Act, so-called, 114 O. L., 546. And, assuming as I do, that no part of the above described parcel of abandoned Miami and Erie Canal lands has been designated by the Director of Highways as lands needed for highway purposes, under Sections 6 to 9, inclusive, of said act, and, further, that no application has been made by any municipal corporation or other political subdivision for the lease of said parcel of land or of any part thereof for public park purposes as provided for in Section 13 of said act, I find that you are authorized to execute this lease under the authority of Section 19 of the act above referred to.

Upon examination of this lease, I find that the same has been executed by you as Superintendent of Public Works for and in the name of the State of Ohio and by The Pure Oil Company, the lessee therein named, by the hand of L. S. Wescoat, Vice President, acting pursuant to the authority of a resolution of the Board of Directors of said company, all in the manner provided by law. I further find that the provisions of this lease and the conditions and restrictions therein contained are in conformity with the provisions of the act of the legislature above noted and with other statutory enactments relating to leases of this kind. I am accordingly approving this lease as to legality and form as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith enclosed.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

3411.

MUNICIPALLY OWNED PUBLIC UTILILTY—MUNICIPAL CORPORATION—COUNCIL — ORDINANCE—FURNISHING FREE OF CHARGE SERVICES OF UTILITY PLANTS —PAYMENT OF SERVICE FROM GENERAL REVENUE FUND—PRIVATE PROPERTY FOR PUBLIC USE—COMPENSATION — GENERAL FUND—COST — FINDINGS—SURPLUS.

SYLLABUS:

1. *The council of a municipal corporation may not provide by ordinance for furnishing free of charge, the services of its municipally owned public utility plants when used for a municipal or public purpose, without providing also, for the payment to the utility funds for such service from its general revenue fund. To do otherwise would be to fly in the face*

of the case of The Board of Education, Etc., vs. The Village of Willard, 130 *O. S., p.* 311, *as the cost of furnishing the product of such utilities to such institutions would, if not provided for by general taxation, have to be charged against the consumers and thereby amount to taking private property for public use without compensation.*

2. *The Bureau of Inspection and Supervision of Public Offices of the State of Ohio under the grant of authority contained in Section* 13 *of Article XXIII of the Constitution of Ohio, has plenary power to examine the financial transactions of municipalities, charter as well as non-charter and it is the duty of such Department to render findings for adjustment and for recovery against the general fund in favor of the particular public utility fund for the value of the service furnished institutions under virtue of Section* 3982-1, *General Code, notwithstanding, under the law as announced in the case of the City of Niles, et al. vs. The Union Ice Corporation et al.,* 133 *O. S., p.* 169, *the municipality might neutralize your finding by having transfer made from any accumulated surplus in the particular utility fund other than a waterworks fund, if there be such a surplus to the general revenue fund, and amount equal to the cost of furnishing the product of such utilities to such institutions.*

COLUMBUS, OHIO, December 16, 1938.

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

GENTLEMEN: I am in receipt of your communication of recent date in which you submit the following questions:

"The provisions of Section 3982-1, G. C., permitting the council of a municipality to furnish free of charge the services of a municipally owned public utility plant, when used for a municipal or public purpose, were interpreted by two of your predecessors, in opinions from which we quote the syllabi as follows:

Opinion No. 1959, page 886, Opinion for 1928:

> Syllabus: 'By virtue of the provisions of Section 3982-1, General Code, the council of a municipal corporation owning and operating a waterworks may provide for free water for the use of a county children's home located outside the city limits.'

Opinion No. 242 page 349, Opinions for 1929:

> Syllabus: 'A municipality which owns its own waterworks, gas or electric plant may lawfully provide by ordinance of its council or other legislative authority to furnish free of charge the product of such plant for municipal or

public purposes, if the cost of furnishing the same is met from the general revenue fund of the corporation and not prorated among the other patrons of the waterworks, gas or electric plant who are charged service rates based on the cost of the management and operation of the plant.'

There are also later opinions and court decisions that may bear upon the general subject of free service, particularly Opinion No. 6000, rendered by the Attorney General, August 26, 1936; also the case of *Board of Education* vs. *Willard,* 130 O. S., 311, and the case of *City of Niles* vs. *Ice Corp.,* 133 O. S., 169. We are also enclosing herewith copy of a decision of the common pleas court of Cuyahoga County, viz., case No. 341775, styled *City of Cleveland* vs. *W. P. Walsh, et al.,* bearing upon the same subject.

By reason of the two opinions first referred to above, and the later court decisions, we are somewhat confused as to just what the council must do, if anything, in addition to adopting an ordinance providing for the furnishing free of charge the service of the utility plants when used for a municipal or public purpose.

In view of the fact that a large number of municipalities are furnishing more or less free utility service, by ordinances adopted in accordance with the provisions of Section 3982-1 G. C., but without any provision being made to pay for such free service by general revenue funds, we are seeking your advice in answer to the following questions:

Question 1: May the council of a municipal corporation provide by ordinance for furnishing free of charge, the services of its municipally owned public utility plants when used for a municipal or public purpose, without providing also, for the payment to the utility funds for such service from its general revenue funds?

Question 2: If the answer to question number one is in the negative, is this Department required to render findings for adjustment or for recovery against the general fund in favor of the public utility fund, for the value of such free service, at the time of making examinations of the accounts of such municipal corporations?"

You likewise state that there is some confusion in your mind as to the right of municipalities to furnish free of charge the product of municipally owned public utilities when used for a municipal or public purpose. Permit me to say that your minds are not the only minds that entertain confusion along this line. The confusion arises out of the provisions of Sections 3982, 3982-1 and 3963, General Code.

So much of Section 3963, supra, as precluded municipalities from making a charge for water furnished for the use of any public

building belonging to the corporation, or any hospital, asylum or charitable institutions devoted to the relief of the poor, aged, infirm or destitute persons, or orphans or delinquent children or for the use of public school buildings in such city or village, was held unconstitutional in the case of *Board of Education of Willard School District* vs. *Village of Willard,* 130 O. S. 311. This was a short per curiam in which it was stated that the judgment of the Court of Appeals was affirmed on authority of the Board of Education of the *City School District of Columbus* vs. *City of Columbus,* 118 O. S., p. 295. It will be seen from a reading of the syllabus of this case that the section was held to be violative of the rights of municipalities as conferred upon them by Section 4 of Article XVIII of the Constitution of Ohio; that its effect was to take private property for public use without compensation therefor as provided by Section 19 of Article I, of the Constitution.

This judgment of the Supreme Court of Ohio must be read into the per curiam of the Willard case, supra, to make it understandable. Let it be remembered that the Willard case, supra, was decided December 4, 1935.

The opinions of the Attorney General of 1928 and 1929, referred to in your communication, can be forgotten, to a certain extent, as the Supreme Court of Ohio had not spoken at that time.

Opinion No. 6000 (1936), of my predecessor, and in which I concur, may be taken as dispositive of the question of the right of municipalities to collect water rentals from boards of education. This opinion is not found in printed volume as no appropriation has as yet been made by the General Assembly for the printing of same.

It will be noted that the opinion and the Willard case above referred to, deal with water rents only, but wherein lies the difference between water, gas and electricity.

Water is metered and the rent is fixed at so much per gallon. Electricity is metered and paid for at so much per kilowatt hour. Gas, natural and artificial, is metered and paid for at so much per M. C. F. (one thousand cubic feet.)

In furnishing these commodities to consumers, the municipality is exercising a purely proprietary function—in short, selling a product at a fixed price—and it does not necessarily sell to all of its citizens or all of its taxpayers. It sells to subscribers only and just how a municipality could provide by general taxation for the payment for the product of public utilities for consumption by its public institutions by general taxation, without upsetting a volume of the statutory law of Ohio, to say nothing of the Constitution, is somewhat beyond my ken.

The annual consumption by the public institutions could not be determined until a year had elapsed and then the charge would have to be spread on the duplicate and property owners would pay this year by taxation for what the municipality consumed last year, thereby utterly destroying the "pay-as-you-go" doctrine that our legislative branch of government has so consistently endeavored to establish.

We now arrive at a point where we are compelled to deal with living statutes.

Section 3982, General Code, provides amongst other things that the council of a municipal corporation may regulate the price of electric light, gas and water and the price of meters as well.

Section 3982-1, General Code, reads as follows:

> "The council of any municipality owning and operating municipal water, gas or electric light plants, may provide by ordinance to furnish free of charge the products of such plants when used for municipal or public purposes."

The constitutionality of this section has not been passed on as yet by any court of Ohio, so far as I am advised and I must take it as I find it and accept it as the law. This section was construed by one of by predecessors in Opinion No. 1959 (1928) Volume 2, Opinions of the Attorney General, page 886. This opinion refers back to Opinion 798 (1923) and follows it. I quote the syllabus of this opinion:

> "By virtue of the provisions of Section 3982-1, General Code, the council of a municipal corporation owning and operating a waterworks may provide for free water for the use of a county's children's home located outside the city limits."

The writer of this opinion cites the cause celebre, The Perrysburg case, wherein the Supreme Court held that the grant of power in Section 3 of Article XVIII of the Constitution of Ohio is equally applicable to municipalities that do adopt a charter as well as those who do not adopt a charter.

The law announced in the dictum of this opinion was to the effect that a municipality, charter or non-charter, could do as it pleased with the product of its public utilities and if it saw fit to furnish free water to the county children's home located beyond the city limits, it could do so, as the children's home was supported by general taxation, which of course includes the property in the municipality and was for a public purpose, the statute using the terms, municipal and public purposes.

A later opinion of this office, namely, Opinion No. 242 (1929), gets closer to the vital question involved, according to my view. It was held in effect, in that opinion, that a municipality that owns its waterworks, gas or electric plant may lawfully provide by ordinance of council to furnish free of charge the product of such plant for municipal or public purposes, if the cost of furnishing same is met from the general revenue fund of the corporation and not prorated among the patrons of the public utilities who are charged service rates based on the management and operation of the plants.

This is the vital question, to my mind.

The municipal corporation may furnish the product of its public utilities for municipal or public purposes free of charge, if it can be and is done by a general levy on all the property in the corporate limits.

"Free of charge" of course means "free of cost" to the institutions.

These products furnished such institutions cost someone something. If such cost is made to fall equally on all the taxpayers of the municipality, then no one is hurt, but if it is added to the water, gas or electric rentals of consumers, it goes right back to the Willard case, supra, and amounts to taking private property for a public use without compensation and the process becomes confiscatory.

If water rentals are charged by the municipalities against the institutions above referred to, they must pay them. See Opinion No. 6000 (1936) of this office.

The rights of your Bureau in charter cities is fully dealt with in Opinion No. 1465 (1937), to which you are referred. Your Bureau has the constitutional authority to examine the financial transactions of all municipalities, charter and non-charter alike, and make such findings as the facts warrant.

If these institutions were furnished free water without a general tax levy for that purpose, then the cost thereof must have been charged against the rental-payers, and belongs to the utility funds as a matter of municipal bookkeeping, but there is a query in my mind as to whether or not such moneys when returned to the public utility fund, do not belong to the rental-payers in proportion to their individual payments. While this is a question for the rental-payers, it is likewise a matter of concern to your Bureau. But suppose you do make findings and it is developed that free gas or free electricity had been furnished by the municipality to the institutions out of a surplus in these particular utility funds?

Under the law as announced in the case of *City of Niles* vs. *Union Ice Corporation, et al.,* 133 *Ohio State,* p. 169, the municipality

would just transfer a sufficient amount from the gas and electric funds to the general revenue fund to cover the deficit. While the syllabi in this case does not mention "surplus," I am reading it in the light of the statement of the case, the reasoning adopted in the opinion and in accordance with the dictates of sound business principles.

Reference to pages 178 and 179 of the opinion, and page 170 of the statement of the case will establish the theory that "surplus funds" were being considered as measuring the scope of authority of municipalities to make such transfers. I say this regardless of the fact that the second syllabus which recognizes and establishes the right to transfer, does not mention "surplus."

It is rather difficult to conceive that the people of Ohio, when they adopted the Constitution of 1912, and thereby delegated to municipalities the power to acquire, own and conduct their public utilities, and sell their products, intended that the municipalities should make a profit off of their citizens.

Is not the converse true? The product of public utilities was being furnished citizens of municipalities at prices regarded by the constitutional delegates as exhorbitant and it was for the purpose of carrying these products to the consumers at a reasonable price, that municipalities were granted such power.

What is meant by the word "surplus," as applied to these utility funds? In common parlance, "surplus" means that which remains when use is satisfied; excess beyond what is prescribed or wanted. The law definition of "surplus," I find in Ballentine's Law Dictionary, at page 1256, viz:

> "The undistributed profits of a business or a corporation."

I find another term which I think is more nearly applicable to the funds involved in your inquiry, namely, "accumulated surplus" defined by Ballentine at page 16 as "the property or fund which a corporation has in excess of its capital stock and above all its debts and liabilities." That definition fits this situation "like a glove." The municipality is exercising a proprietary function, it is a corporation, its capital stock is its plant when paid for and when in addition thereto, it has cash in excess of all debts and liabilities, such cash constitutes "accumulated surplus." The query in my mind is just how many municipal corporations in Ohio have an accumulated surplus derived from their municipally owned gas or electric plants. If they have such a surplus, it can in accordance with the Niles case, supra, be transferred to the municipality's general revenue fund.

I come now to answer your questions in their order—

Question No. 1: "May the council of a municipal corporation provide by ordinance for furnishing free of charge, the service of its municipally owned public utility plants when used for a municipal or public purpose, without providing also, for the payment to the utility funds for such service from its general revenue funds?"

My answer to this question is "no." Unless such service is paid for out of the general revenue fund, it must be paid for by the consumers of the product of the utility, which amounts to taking private property for a public use without compensation, thereby running afoul of the Willard case, supra; however, if the particular utility fund has a surplus, under the Niles case, supra, so much money could be transferred from the surplus in the utility fund to the general revenue fund as would take care of the situation and a finding thereby rendered nugatory.

Question No. 2: "If the answer to question number one is in the negative, is this Department required to render findings for adjustment or for recovery against the general fund and in favor of the public utility fund, for the value of such free service, at the time of making examinations of the accounts of such municipal corporations?"

My answer to this question is "yes." The people intended that the financial transactions of municipalities, charter as well as non-charter, should be inspected by your Department, else they would not have delegated to you the constitutional authority so to do.

The fact that the municipality might neutralize your finding as above indicated, in no wise excuses you from the performance of your duty.

It will be noted in the reasoning in this opinion I have carried water and water rentals along with gas and gas rentals and electricity and electric rentals. The purpose of dealing with all of them is that they in fact constitute a trio of public utilities that are most commonly the subject of municipal ownership and the reasoning that would apply to the one would apply to the others in the absence of statutory provision to the contrary.

The surplus derived from municipally owned waterworks has been dealt with specifically in Section 3959, General Code, wherein it is provided in substance that *all moneys* received by the municipality from the operation of its waterworks plant shall be applied by council to the creation of a sinking fund for the payment of the in-

debtedness incurred for the construction and extension of waterworks and for no other purpose whatever.

It must be concluded that funds received by the municipality from the operation of its waterworks plant are impressed with superlative sanctify and can not be used for any other than the specific purpose set out in the statute.

Section 3959, General Code, was held constitutional in the case of *Cincinnati* vs. *Roettinger*, 105 O. S., 145, and funds derived from municipally owned waterworks were specifically excluded from consideration in the Niles case, supra, as appears from the first paragraph of the syllabus.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

3412.

APPROVAL—BOND, $5,000.00, H. A. KELLER, ACTING RESIDENT DIVISION DEPUTY DIRECTOR IN DIVISION NO. 3, DEPARTMENT OF HIGHWAYS.

COLUMBUS, OHIO, December 16, 1938.

HON. IVAN R. AULT, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval the bond of H. A. Keller, in the amount of $5,000.00, with the Ohio Casualty Insurance Company as surety, covering Mr. Keller as Acting Resident Division Deputy Director in Division No. 3, Department of Highways.

Finding said bond in proper legal form, with the authority of the signers of the bond properly attached, I am returning the same herewith to you with my approval thereon.

Respectfully,
HERBERT S. DUFFY,
Attorney General.