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1. WATER FURNISHED TO STATE INSTITUTION LOCATED OUTSIDE OF CORPORATE LIMITS OF CITY—AGREEMENT BETWEEN CITY AND STATE—TWENTY YEARS—RATE SPECIFIED—MUNICIPALITY CONSTRUCTED AT OWN EXPENSE WATER MAIN—AFTER CONTRACT EXPIRED, SECTION 3967 G. C. HAS NO APPLICATION TO RATE TO BE CHARGED.

2. MUNICIPALITY MAY CHARGE AND COLLECT REASONABLE RATES BASED UPON CONSTRUCTING AND MAINTAINING WATER SERVICE OUTSIDE CORPORATE LIMITS— MAY CONSIDER COST OF ENTIRE WATER WORKS SYSTEM—SECTION 3967 G. C.

3. MUNICIPALITY AUTHORIZED TO FURNISH AND DELIVER WATER TO PERSONS OR INSTITUTIONS OUTSIDE CORPORATE LIMITS—MAY ISSUE MORTGAGED REVENUE BONDS—SECURED UPON PROPERTY AND REVENUE OF WATER WORKS—PAY COST TO INSTALL MAINS AND OTHER FACILITIES—ARTICLE XVIII, SECTIONS 4, 6, 12, CONSTITUTION OF OHIO.

SYLLABUS:

1. Where a city has entered into an agreement with the State of Ohio to furnish water from its municipal water works to a state institution located outside the corporate limits of the city, for a period of twenty years, at a rate specified in the agreement, and pursuant to its agreement the municipality has constructed at its own expense, a water main to said institution, Section 3967 of the General Code, has no application to the rate to be charged for water so furnished after the expiration of the term of such contract.

2. The provisions of Section 3967, General Code, do not apply to rates to be charged for water service from a line extended by a municipality at its own expense, beyond its corporate limits; but such municipality may charge and collect reasonable rates based upon the cost of constructing and maintaining such line and of furnishing such service, including a proper consideration of the cost of the entire water works system.

3. A municipality is authorized by Sections 4 and 6 of Article XVIII of the Constitution of Ohio to furnish and deliver water to persons or institutions outside of its corporate limits; and is further authorized by Section 12 of said Article XVIII to issue mortgage revenue bonds, secured only upon the property and revenue of its water works, to pay the cost of installing its mains and other facilities for supplying such service.

Columbus, Ohio, July 9, 1951

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your request for my opinion, reading as follows:

"We are enclosing herewith a letter and other data received from the Solicitor of the city of Sandusky, setting forth certain facts and questions arising out of an old agreement between the city of Sandusky and the Ohio Soldiers' and Sailors' Home, a State institution, located approximately one mile south of the corporation limits of said city.

"Your attention is directed to copies of Ordinance No. 362 and Informal Opinion rendered by former Attorney General Herbert S. Duffy, and a schedule of water rates effective July 1, 1950, established pursuant to Ordinance No. 4643-C, passed May 29, 1950, all of which are attached hereto.

"The questions raised by the Solicitor of the city of Sandusky involve the correct interpretation of Section 3967, of the General Code, and a determination as to whether or not said statute applies to water mains extended beyond the corporate limits of a municipality, when such mains have been constructed by and at the expense of the municipal corporation.

"Since the answer to the problem presented by the Solicitor of the city of Sandusky will be of interest to all municipal corporations in the State of Ohio owning and operating a water works utility, may we request your consideration of and formal Opinion in answer to the following questions:

"1. Where a city has entered into an agreement with the State of Ohio to furnish water from its municipal waterworks to a state institution located outside the corporate limits of the city for a period of twenty years at a fixed rate specified in the agreement, and thereafter said city continues to furnish water to the state institution, is the municipality limited in fixing the rates to be charged for such water service to an amount not in excess of ten percent more than the rates charged for water service to the citizens of said city pursuant to the provisions of Section 3967 of the General Code?

"2. Do the provisions of Section 3967, General Code, apply to water line extensions beyond the corporate limits of a municipality when such water lines were installed and paid for by the municipal corporation furnishing such water service?

"3. Is it legal for a municipal corporation to issue First Mortgage Water Revenue Bonds for the purpose of providing the facilities to furnish water service to consumers residing outside the corporation limits, including the cost of water mains, pumps, and elevated storage tanks, and charge a rate for such water service to outside consumers commensurate with the cost of furnishing such outside consumers with water and sufficient to amortize that portion of the capital expenditure necessary to provide such water service, to consumers outside the corporation limits?"

Attached to your letter is a copy of an Ordinance passed by the Council of the City of Sandusky on September 20, 1886, entitled:

"An ordinance to contract with the Board of Trustees of the Ohio Soldiers' and Sailors' Home, for supplying the Home with pure water."

The provisions of this ordinance are to the effect that the city should lay and extend a water main, not less than eight inches in diameter, from the corporation line to said Home, and furnish such quantity of pure water as shall be sufficient for all purposes of the Home, upon the grounds thereof. The ordinance further provides that said service should cover a period of twenty years, and that for the first thirteen years of said term

the said Home should pay to the city $25.00 per annum, payable annually, for the water so furnished, and during the remaining seven years of said term said water should be paid for at the same rate as paid by the citizens of Sandusky for water used for manufacturing purposes. It was further provided that the city should at its own expense, maintain and keep said water main in good order and repair during the term of the contract. The ordinance authorized the trustees of the waterworks of said city to execute a contract with the Board of Trustees of the said Ohio Soldiers' and Sailors' Home in accordance with the provisions of the ordinance.

It does not definitely appear from the correspondence that the contract was executed pursuant to said ordinance but it is stated that the city furnished water during the term thereof in accordance with its provisions, and that the water was paid for at the rate therein stipulated.

It is stated in the letter of the Solicitor of Sandusky, attached to your communication, that sometime after the said twenty year period, water rates were increased to the users outside the city limits, to an amount which was 10% higher than city rates and the rates so charged were paid by all county users, including the Ohio Soldiers' and Sailors' Home. Further, the city has always maintained the line, permitted others to tap in on request, and the State has never asserted any claim of ownership.

It further appears from the Solicitor's letter that by an ordinance of the city of Sandusky, effective July 1, 1950, said city established a new schedule of rates for water used by consumers outside the city, such rates being in excess of 10% above the rates charged for water service within the corporate limits. The board of trustees of the Ohio Soldiers' and Sailors' Home has refused to certify for payment any bills rendered under that rate schedule, claiming immunity under Section 3967 of the General Code; to-wit, that the city must furnish water to said Home at a rate not exceeding 10% more than the rate charged for water service within the corporate limits.

This brings us to a consideration of the terms of Section 3967 and several closely related sections of the General Sode. Section 3966 reads as follows:

> "On the written request of any number of citizens living outside of the limits of a municipal corporation, the corporation may extend, construct, lay down and maintain aqeduct and water pipes, and electric light and power lines outside the corporate

limits, and for such purpose may make use of such of the public streets, roads, alleys and public grounds as may be necessary therefor, provided however aqueduct and water pipes shall not extend more than five miles beyond the corporate limits."

Section 3967 reads as follows:

"When a person or persons at his or their expense have laid down and extended mains and water pipes or electric light and power lines beyond the limits of a municipal corporation, and the corporation by resolution of the council, has authorized the proper officer of the water works to superintend or supervise the laying and extension of such mains and water pipes or electric light and power lines the corporation shall furnish water or electricity to the residents and property holders on the line of such mains and water pipes or electric light and power lines subject to the same rules and regulations that it furnishes water or electricity to its own citizens, except that the rates charged therefor shall not exceed those within the corporation by more than one-tenth thereof."

Section 3967, General Code, together with Sections 3966, 3968 and 3969 of the General Code, formerly were embraced in one section of the law, to wit, Revised Statutes Section 2421. All of these statutes, with the exception of Section 3967, were originally enacted in substantially their present form in an Act found in 66 Ohio Laws, page 267. In 90 Ohio Laws, page 35, Section 2421 of the Revised Statutes was so amended as to introduce and incorporate what is now Section 3967.

Section 3968, General Code, provides as follows:

"All ordinances, except those relative to taxation or assessment, resolutions, rules and regulations relative to the construction, maintenance and operation of water works, mains, hydrants, service pipes and connections, and the protection thereof, shall operate in like manner in the territory outside the municipality when such extensions have been made, and for the enforcement thereof the jurisdiction of the mayor and police shall extend into and over such territory."

Section 3969, General Code, reads as follows:

"The corporation shall take full charge and control of such mains and water pipes, keep them in repair at its own expense, and, in case of annexation to the corporation of such territory, the corporation shall pay to such person or persons a just compensation therefor and shall thereupon become the owner of them."

It will be noted that Section 3966, supra, provides for the extension of water lines beyond the city limits on request of any number of citizens living outside the corporate limits, and clearly such extension was contemplated to be made at the expense of the municipality. It is also to be noted that as to lines so extended, there is no limitation placed upon a municipality as to the rate it may charge for service. Section 3967, supra, which as I have stated, was brought into the Act at a later time, introduces a new element, to wit, the extension of a line into outside territory by a "person or persons at his or their expense," in which case the city is to furnish water to the residents and property holders on such line, at a rate not exceeding that within the corporation by more than one-tenth thereof. There appears to be a sound reason for this distinction. In the first case, where the lines are built at municipal expense, the municipality acting as it does, in a purely proprietary capacity, should have the right to charge such rates to outsiders as would fairly compensate it for the extra expense incurred in construction, and a rate that would yield a fair profit on the investment. Niles v. Union Ice Company, 133 Ohio St., 169, 181, where the court, speaking of the contention that a municipality could not make a profit on the sale of its utility service, said:

> "This contention proceeds on the theory that a municipality has no right to charge for its utility service or product a rate in excess of cost, i. e., that it has no right to make a profit. Nevertheless, we are not referred to any statute or constitutional provision denying this right. In the absence of such prohibition, a municipality, no less than a private corporation engaged in the operation of a public utility, is entitled to a fair profit."

In the second case, where a line is built without any initial expense to the municipality, but it is given the right to furnish water to property owners along the line, there would seem to be reason for placing a limitation on its charges. Finally, when the line is taken into the city by annexation, then the corporation is required to pay to the person who built the line a just compensation therefor, and thereafter the people living along said line would receive water at the same rate other citizens of the municipality would pay.

I cannot understand how it can possibly be argued that because the city at one time made a contract for a limited number of years with an institution of the state, located without the city, whereby that institution was to be furnished water at a nominal rate or at a very conservative rate, there-

fore the city should be bound forever to extend a special favor to such institution. It is not claimed that the institution has ever paid any part of the cost of installing said water main or has given any other consideration for a claim to a favored rate.

There is attached to your communication a copy of a letter from my immediate predecessor to the Trustees of the Ohio Soldiers' and Sailors' Home in which he states that the line in question was originally laid by the city and the water furnished therein as provided in said contract, because of the feeling on the part of the citizens and the city council of Sandusky that it would be a great advantage to the city to have the said institution located in the immediate vicinity of said city, and he concluded, therefore, that in view of the history of the establishment of said institution, the water line in question became in effect a private line and therefore fell within the purview of Section 3967, and his conclusion was as follows:

> "Therefore, it would appear that water rates for the institution should be determined in accordance with Section 3967 of the General Code."

It was on the basis of this opinion that the Trustees of the Ohio Soldiers' and Sailors' Home have refused to pay water bills rendered in accordance with the rates provided by the ordinance of July 1, 1950, to which I have referred.

I am unable to agree with the advice thus given. Even if we assume that the advantages of having the Home located close to the city of Sandusky afforded a consideration for the very generous contract which was made in 1886, yet that contract was only for a period of twenty years and that period has long since elapsed. It could not by any stretch of reasoning afford the basis for tying the hands of the city after its expiration. Furthermore, that conclusion disregards the plain language of Section 3967, supra, which is predicated entirely on the premise that the line has been laid by a person or persons "at his or their expense."

When the water line in question was laid, it was presumably done under the authority of Section 3966, supra, whether it was or was not installed pursuant "to the written request of any number of citizens," as stipulated in that section, appears to me to be a matter of no consequence. At present the city need not rely on a power given by the legislature.

The city of Sandusky has since 1912 been enjoying the powers

granted to it by the adoption of the Eighteenth Amendment to the Constitution, Section 4 of which gives it the authority to own and operate a public utility "within or without its corporate limits." Section 6 of the same Article reads as follows:

> "Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality."

It is well settled that a municipality while operating a public utility such as a water system, is engaged in a private or proprietary function, and while so engaged may exercise its powers as would an individual or a private corporation. The Supreme Court of Ohio in the case of Travelers Insurance Co. v. Village of Wadsworth, 109 Ohio St., 440, considering the powers of a city under the sections of the Constitution just referred to, held:

> "The power to establish, maintain, and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may exercise its powers as would an individual or private corporation."

To the same effect see: State ex rel. White v. Cleveland, 125 Ohio St. 233; Zangerle v. Cleveland, 145 Ohio St. 347; Akron v. Public Utilities Commission, 149 Ohio St. 354. In the case of Miller v. Orville, 48 Ohio App. 87, it was held:

> "Under the Constitution and laws of Ohio, a municipally-owned public utility is authorized to extend, maintain and operate its distribution system and service beyond the limits of the municipality, subject to the limitations prescribed by Section 6 of Article XVIII of the Constitution of Ohio."

This was a case in which a taxpayer sought to enjoin the Village of Orville from furnishing current from its light plant through lines which it had extended into outlying territory, it being claimed, among other things, that lines had been extended without having the written request of any person living outside municipal limits as provided for by Section 3966. The court referred to Section 4 of Article XVIII, which expressly

authorizes a municipality to own and operate a utility outside the municipality if the product or service thereof is to be supplied to the inhabitants of such municipality; and Section 6 which provides that the municipality may supply "to others" its surplus product. The court said in the course of its opinion:

> "The 'others' referred to are necessarily not inhabitants of the municipality, and to sell and deliver its product or transportation service to one outside the municipality necessarily requires the extension of its facilities outside of the municipality."

The court, discussing the powers conferred by Sections 3966 and 3967, General Code, says further:

> "* * * the mere fact, if it be a fact, that such power was exercised without 'the written request' of those living outside the village, as specified in Section 3966, General Code, would not invalidate the exercise of such power; * * *"

I quote further from said opinion the language appearing on page 92:

> "The foregoing construction of said provisions of the Constitution is in accordance with the settled legislative policy of the state in reference to the powers of municipalities owning and operating water works utilities over a long period of time, as is shown by the history of legislation on that subject, beginning with an act passed May 7, 1869 (66 Ohio Laws, 207-8), and later amended so as to apply to publicly-owned electrical utilities, and extending to 1912, when that policy was made a part of the Constitution by the adoption of Sections 4 and 6 of Article XVIII of the state Constitution. * * *"

In view of the foregoing, it is my opinion that the City of Sandusky is entitled to fix a reasonable rate for all consumers of water outside of the city limits, and that the Ohio Soldiers' and Sailors' Home is subject to the rate so fixed.

Coming to your question as to the issuance of water revenue bonds for the purpose of providing facilities to furnish water service to consumers residing outside the corporate limits, I note the provisions of Section 12 of Article XVIII of the Constitution, which read as follows:

> "Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded in-

> debtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

Having in mind the provisions of Section 6 of this Article, which I have quoted, expressly authorizing a municipality to sell *and deliver* to persons outside of the corporate limits the product of any utility, it appears to me beyond question that for the purpose of extending its lines through outlying territory, the municipality has the right to issue its bonds, secured as stated in Section 12, "only upon the property and revenues of such public utility."

It might be noted also, that a municipality is not limited to this method of financing such construction, to wit, to the issuance of mortgage revenue bonds, but has also the authority to issue general bonds under the Uniform Bond Act pledging the entire credit of the municipality. State ex rel. Toledo v. Weiler, 101 Ohio St., 123. If so issued, they would be the general obligation of the municipality. Obviously if this latter course were chosen, the question of the adequacy or inadequacy of the revenues from the utility to take care of the interest on and redemption of the bonds would not affect the right to issue the same. Likewise, so far as I can discover, the question of the sufficiency of the revenue of a utility to meet the charges on mortgage revenue bonds does not enter as a legal proposition into the issuances of such bonds. It is manifest that it would be a very important element from a practical standpoint, in marketing the bonds, since a buyer would naturally inquire carefully into the sufficiency of the revenue arising from the utility in question to make the bonds a desirable investment. Hence, it is customary to write into the mortgage securing such bonds, provisions as to the rates to be charged for the product or service to be furnished.

Accordingly, in specific answer to the questions which you have submitted, it is my opinion:

1. Where a city has entered into an agreement with the State of Ohio to furnish water from its municipal water works to a state institution located outside the corporate limits of the city, for a period of twenty years, at a rate specified in the agreement, and pursuant to its agreement

the municipality has constructed at its own expense, a water main to said institution, Section 3967 of the General Code, has no application to the rate to be charged for water so furnished after the expiration of the term of such contract.

2. The provisions of Section 3967, General Code, do not apply to rates to be charged for water service from a line extended by a municipality at its own expense, beyond its corporate limits; but such municipality may charge and collect reasonable rates based upon the cost of constructing and maintaining such line and of furnishing such service, including a proper consideration of the cost of the entire water works system.

3. A municipality is authorized by Sections 4 and 6 of Article XVIII of the Constitution of Ohio, to furnish and deliver water to persons or institutions outside of its corporate limits; and is further authorized by Section 12 of said Article XVIII to issue mortgage revenue bonds, secured only upon the property and revenue of its water works, to pay the cost of installing its mains and other facilities for supplying such service.

Respectfully,

C. WILLIAM O'NEILL
Attorney General