2864.

MUNICIPALITY—EXPENSE OF RELOCATION OF EQUIPMENT OF MUNICIPALLY OWNED PUBLIC UTILITY MAY BE INCLUDED IN COST OF STREET IMPROVEMENT WHICH IS ASSESSED AGAINST ABUTTING PROPERTY OWNERS WHEN.

SYLLABUS:

1. *The legislative authority of a municipal corporation may, in the absence of a charter provision to the contrary, include in the cost of a street improvement, all or a part of which is assessed against abutting property, the expense of the relocation of the equipment of a municipally owned public utility located in such street, which relocation is made necessary by such improvement.*

2. *The expense of making core tests on street improvements may be made part of the cost of such street improvement, all or a part of which is assessed against abutting property owners.*

COLUMBUS, OHIO, June 28, 1934.

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

GENTLEMEN:—I acknowledge receipt of your communication, which reads as follows:

> "We have been requested to submit the following question to you for an opinion, and we are quoting from the communication received in this office as follows:
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> 'We are desirous of determining the legality of certain expenses charged against street improvements in the City of Cleveland. These improvements are provided by ordinance of council and payment of a portion of the cost is procured by the levy of special assessments against abutting property.
>
> For some years it has been the practice of the Department of Public Utilities to charge against said street improvements the following expenses:
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> 1. Actual cost of removing or changing poles, wires, and other incidental equipment of the municipal light plant.
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> 2. Actual cost of removing or changing mains, hydrants, and other incidental equipment of the municipal water works.
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> Private utilities have always made these changes at their own expense.
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> Section 190 of the charter of the City of Cleveland provides the following regulations for public utilities:
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> > "The council shall at all times control the distribution of space in, over, under or across all streets or public grounds and occupied by public utility fixtures. All rights granted for the construction and operation of public utilities shall be subject to the continuing right of the council to require such reconstruction, relocation, change or discontinuance of the appliances used by the utility in the streets, alleys, avenues, and highways, of the city, as shall in the opinion of the council be necessary in the public interest."

Question. Is there such a distinction regarding the regulation of municipally owned and privately owned utilities that permits a municipally owned utility to charge the expense of changing or relocating equipment against the improvement which makes such changes necessary, and assess the cost thereof against the property owners?

Core tests are made on all street improvements in the City of Cleveland. We are interested here only in street improvements provided by ordinance of council of which a portion of the cost is procured by the levy of special assessments against abutting property.

These core tests are made prior to the release of the final estimate and again just prior to the release of the contractor's guarantee, which may be from three to five years from date of construction, depending on the type of construction. The cost of said tests is included in the engineer's estimate.

Question. Can the cost of making these core tests on street improvements, be legally charged against the improvement and assessed as part of the total cost?' "

It is apparent that the charter provision quoted in your letter refers only to privately owned public utilities and does not apply to the city itself.

Section 3812, General Code, empowering municipal corporations to levy and collect special assessments, provides that "The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, * * * which the council may declare conducive to the public health, convenience or welfare, * * *."

Section 3896, General Code, reads as follows:

"The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury, when appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

It is the duty of the legislative authority of a municipal corporation to determine what are necessary expenditures, and that determination, while not conclusive, will not be set aside if the action of such authority is not unlawful or does not constitute an abuse of discretion. In the case of *Longworth* vs. *Cincinnati,* 34 O. S. 101, which held that the cost of a retaining wall may be assessed upon abutting property, the court said:

"The 18th clause of section 199 of the municipal code confers power upon the city, in general terms, to make the improvement. Section 544 provides that the cost of the improvement shall include

the expense of construction, enumerating many items specially, 'and any other necessary expenditure.' Under this latter clause, the determination of what constitutes the 'necessary expenditure' of a given improvement, is devolved upon the city council.

In determining whether items of non-enumerated expenditure are or are not necessary, the council is clothed with discretionary power, and where action has been had it will not be presumed that this discretion has been abused. But in addition to this, on the trial, the court found, among other things, the fact to be 'that it was impossible to improve said avenue between Central avenue and Center street unless this wall, so assessed for, was first built, and that the improvement of said avenue made it necessary to build said wall,' etc. There being no question as to the power of the city to make the improvement, this finding of fact, in connection with the other findings of fact on this point, clearly shows that this wall was an item of necessary expenditure in making the improvement, and, hence, that the cost of it was properly included in the assessment."

In the case of *Acklin* vs. *Parker, Treasurer, et al.*, 10 G. C. (N. S.) 243, affirmed without opinion, 78 O. S. 413, the following was held:

"A charge against an abutting owner in a paving assessment for removing the water boxes on the street, which were put in by the city, and not by a private person or corporation, is a legitimate item of expense."

To the same effect is the case of *People* vs. *Buffalo,* 137 N. Y. Supp. 464, which held:

"A street paving assessment properly includes items of cost for removing lamp posts and hydrants."

In the opinion Pound, J., said:

"The work of moving lamp posts and hydrants is necessary in connection with widening the pavement. If it were not done, the lamp posts and hydrants would obstruct the new pavements."

It is often necessary in the improvement of a street to relocate public utility equipment which is located in the street, and while council might provide that the cost of such relocation be paid out of the general fund or other appropriate fund of the city, or out of the fund of the municipally owned public utility owning such equipment, I am of the view that council has the authority to include such expense in the cost of the improvement, all or a part of which is assessed against abutting property.

Likewise, it is customary in street improvements to make core tests to determine whether the quality of the paving material is in accordance with the plans and specifications. This is as important to the abutting property owners as it is to the city, and is, in my opinion, a proper item of expense which council could determine to be a part of the necessary costs of the improvement.

Consequently, I am of the opinion that,

1. The legislative authority of a municipal corporation may, in the absence of a charter provision to the contrary, include in the cost of a street improvement, all or a part of which is assessed against abutting property, the expense of the relocation of equipment of a municipally owned public utility located in such street, which relocation is made necessary by such improvement.

2. The expense of making core tests on street improvements may be made part of the cost of such street improvement, all or a part of which is assessed against abutting property owners.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2865.

COUNTY COMMISSIONERS — UNAUTHORIZED TO EXPEND COUNTY FUNDS FOR BOARDING PSYCHOPATHIC CHILD OUTSIDE TERRITORIAL LIMITS OF OHIO.

SYLLABUS:

County Commissioners have no authority to contribute to the expense of boarding a psychopathic child outside the territorial limits of Ohio even though such child is in indigent circumstances.

COLUMBUS, OHIO, June 28, 1934.

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

GENTLEMEN:—I am in receipt of your communication which reads as follows:

> "You are respectfully requested to furnish this department your written opinion upon the following:
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> In a county where, in the judgment of the county commissioners, the best interests of dependent wards of the county would be served by the appointment of a County Child Welfare Board, and such Board, with the approval of the Board of State Charities, is appointed as provided in Section 3092 of the General Code, may such county welfare board legally commit children under its care to an industrial farm located outside the state, and may the county commissioners pay the cost of maintaining a child so appointed?
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> We are enclosing herewith certain data with reference to the industrial farm where a child was committed, and a statement from Mr. C. H. Calhoun, executive psychologist of the State Bureau of Juvenile Research; also correspondence between the acting agent of the Lake County Child Welfare Board and Mr. Calhoun."