

Appropriations of sufficient funds to provide for the expenses incurred for the services rendered by a legal adviser contingent upon special improvements and court trials must be made by the council. The law is mandatory. If a council should make a contract with its legal adviser contingent on per diem services for work required for special improvements and court trials, it must provide reasonable appropriations each half year to meet such obligations and it is able to provide such reasonable sum by estimate since it can know what improvements are in immediate contemplation and what court work the village is likely to have based upon the expense that it has had during a term of years.

From the foregoing reasons and the law this department is of the opinion that a village council can pay no part of any fine or forfeiture as compensation to any officer, but it may allow the mayor or the marshal to retain all or any stipulated part of their legal fees as a part of such compensation. The legal adviser may be paid a salary or a salary and per diem for services rendered, but the same must be within the amount of the balances and the sum appropriated by council for that purpose in the appropriation made in any six months period.

Your first and second questions therefore, except as to license fees, must be answered in the negative, and the third in the affirmative.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1506.

MUNICIPAL CORPORATION—STREETS AND ALLEYS—CHANGE OF STREET GRADE PETITIONED FOR BY MAJORITY OF PROPERTY OWNERS—PREVIOUSLY LAID WATER MAINS LOWERED—COST ASSESSABLE AGAINST LOTS AND LANDS AFFECTED.

Where a change of a street grade is petitioned for by a majority of the property owners affected and such change necessitates the lowering of previously laid waterworks service pipes for house connections, the cost of lowering such pipes is a part of the cost of such street improvement and as such is assessable against the lands and lots affected.

COLUMBUS, OHIO, August 19, 1920.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your recent letter requesting the opinion of this department, as follows:

“We are today in receipt of the following communication from the village clerk of Kenmore, Ohio:

“In the process of improving a certain street in our city, we found it necessary to lower the water mains to accommodate a change of grade petitioned for by the property owners concerned. Now, the question of paying the cost of this additional work confronts us. Can we charge the cost of lowering the service lines from the main line to the building or any part of it, to the property owner? Would it be possible to pay the cost of lowering the main line out of that street improvement fund? The service lines were originally paid for by the property owners.

Our waterworks is owned by the city and as we understand it, occupies the same legal position as a private corporation such as a gas or light company. Naturally our waterworks department is very anxious to avoid payment of the cost of the above mentioned work out of their operating fund.

Could we legally embody in our contracts for street improvement work, a clause compelling the contractor to assume responsibility for damage done to water and sewer lines?"

Under the conditions described herein:

Question: Can the expense of lowering the main pipes or the service pipes be assessed against the property owners? If not must such expenses be borne by the waterworks department or can such expense be paid in any other manner?"

Sections 3955 et seq. and sections 3629, 3714 et seq. are pertinent to your inquiry.

It is noted that your question is whether the cost of lowering the service lines from the main line to the property line may be assessed against the property owner, and that the alternative question is also asked whether expenses may be borne by the waterworks department or be paid in some other manner.

It is noted that the question arose, as stated in your correspondent's letter, from "improving a certain street in our city" occasioned by a change of grade "petitioned for by the property owners concerned."

In your letter it is not stated specifically whether the improvement is one initiated by the director of public service as a part of the waterworks service as an improvement of a street, but the clear inference is that the improvement is of the latter character as it appears to have been started on the petition of the property owners to change a grade. And this opinion proceeds on the inference that but for such change there existed no necessity for or any desire by such owners to lower such water service pipes.

If this improvement may be regarded as within the sphere of operations of the waterworks department, then general authority for it appears in section 3916 G. C. and special powers are granted in section 3955 with assessing power given in section 3812. On the other hand, if it be regarded as a street improvement, then section 3629 confers general power as to streets with specific powers in section 3714. Provision for assessments under these sections is in 3812 G. C.

The charges assessable against the consumer, either for service pipes or for water are chargeable as stated in section 3958 "for the purpose of paying the expenses of conducting and managing the waterworks." This is further indicated by the language of section 3959 "after paying the expenses of conducting and managing the waterworks, any surplus therefrom may be applied to the repairs, enlargement or extension of the works * * * the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt." As to funds raised by levies for waterworks purposes the rest of this section provides:

"The amount authorized to be levied and assessed for waterworks purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction and extension of waterworks *and for no other purpose whatever.*"

Section 3960 provides for placing money collected for waterworks purposes into a separate and distinct fund. These sections indicate a policy to limit the

charges against the consumers to cost of furnishing the water service and negative the idea of paying for street improvements out of waterworks funds.

Section 3980 provides that council may prescribe by ordinance for laying down water pipes in all highways about to be permanently improved, and for the assessment of the cost and expense thereof upon adjoining or abutting lands. It further provides that council shall not "require any house connections to be built further from the main pipe than the outer line of the curbstone."

In passing it is noted: (1) that this prescription is by act of council. (2) The section is in the waterworks chapter. (3) The assessment is made not merely against lands of the users of the service, but against all adjoining or abutting lands. (4) That it apparently relates to permanent improvements about to be made on streets wherein such pipes have not previously been laid.

The general powers of the city as to streets are stated in section 3629. In 3714 the grant of powers in this regard is more special where it is said "The council shall have the care, supervision and control of public highways."

In *Henry vs. Cincinnati*, 1 O. C. C. n. s. 289, it is said that a street in this connection includes not only the surface of the land but also the land beneath the surface for pipes, sewers, etc.

Section 3812 provides in part for the assessment of the cost of street improvements, as follows:

"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 of an expense connected with the improvement of any street, * * * water mains or laying of water pipes * * *.*"

Section 3812-1 provides that water service connections may be required by the service director in cities or by council in villages "in view of contemplated street paving" and the assessment of the cost in case the owner neglects to put in such connections. The object of this section is to make it unnecessary to afterwards tear up the pavement to put in such water pipes. In the succeeding sections the procedure of such improvements is outlined.

In section 3838 it is provided that:

"When a street * * * is graded or pavements are constructed in conformity to grades established by the authorities of the corporation, and the expense is assessed on the lots or lands benefited, the owners shall not be subject to any special assessment occasioned by any subsequent change of grade in such * * * street * * *, *unless a petition for such change is subscribed by a majority of the owners of such lots or lands.*"

When not so petitioned for, such expense shall be borne by the general revenue of the corporation.

Consideration of the facts as presented in connection with these sections results in these conclusions:

1. That this is a street improvement initiated upon the petition of property owners and not as a waterworks enterprise initiated by the director of public service or by council under section 3980 supra.

2. That the lowering of the service pipes is an incident of and referable to a street improvement rather than to the waterworks service.

3. It is immaterial to the land owners as in either event the cost is assessable against their lands.

From these premises it is further concluded that the cost of lowering such service pipes is a part of the expense of such street improvement and is payable from the specific street improvement fund and that after deducting the city's portion of such expense it is assessable against the adjoining, abutting and otherwise specially benefited lots or lands.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

1507.

APPROVAL, AGREEMENT BETWEEN OHIO BOARD OF ADMINISTRATION AND BALTIMORE & OHIO RAILROAD COMPANY, SIDETRACKS AT OHIO STATE BRICK PLANT, GOBLES, OHIO.

COLUMBUS, OHIO, August 20, 1920.

The Ohio Board of Administration, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your letter dated August 18, 1920, transmitting for the approval of this department the proposed agreement between your board and the Baltimore & Ohio Railroad Company relative to changes in sidetracks at the Ohio state brick plant, Gobles, Ohio.

Section 2183, 103 O. L., 65, gives the warden of the penitentiary, under the direction of your board, authority to employ convicts in the manufacture of articles used by the state "in carrying on the penitentiary." He is also authorized to employ them "in the preparation and manufacture of any and all forms of road-making material for use in the construction, improvement, maintenance and repair of the main market roads and highways within the state of Ohio."

To carry out this purpose the State Board of Administration is authorized, with the approval of the Governor, to purchase land, quarries, buildings, and machinery. Under this section the approval of the Governor, it is to be noted, is necessary to consummate the initial purchase of land and equipment and construction of buildings.

Section 1838 G. C., relative to the powers of your board, provides that the board "in addition to the powers expressly conferred, shall have all the power and authority necessary for the full and efficient exercise of the executive administration and fiscal supervision over all of said institutions." By reference to section 1835 and to other sections, notably section 1866, as amended in 103 O. L., 551, it is quite clear that the penitentiary and such other plants or places acquired for the purposes of section 2183, supra, are among the institutions referred to in section 1838.

By personal conference, it is learned that a large part of the road material made at the Gobles plant is used by the state highway commissioner for the purposes mentioned in that section. So it would appear that the purpose of this agreement is within the power of your board. The appropriation certificate of the state auditor, it must be noted, is limited to the express amount of the cost, \$1,120.00.

This certificate, considering the uncertainty of it costing possibly less or more, is, however, deemed sufficient, and I am therefore returning the agreement with my approval as to form endorsed thereon.

Respectfully,
 JOHN G. PRICE,
Attorney-General.