

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*

---

993.

APPROVAL—BONDS OF HAMILTON COUNTY, OHIO, \$3,000.00.

COLUMBUS, OHIO, August 9, 1937.

*The Industrial Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:

RE: Bonds of Hamilton County, Ohio, \$3,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of tuberculosis sanatorium, Series F, bonds in the aggregate amount of \$160,000, of an authorization of \$2,000,000, dated December 15, 1931, bearing interest at the rate of 4½% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said county.

Respectfully,

HERBERT S. DUFFY,

*Attorney General.*

---

994.

PUBLIC UTILITIES AND APPURTENANCES, DEFINED—  
MUNICIPALITIES MAY OWN, WHEN—MAY SUBMIT TO  
ELECTORS A LEVY FOR GAS PLANT, ETC.

SYLLABUS:

1. *Under Sections 4 and 5 of Article XVIII of the Ohio Constitution, a municipality may properly acquire, construct, own, lease and*

*operate any public utility, and a gas plant and its incidental appurtenances is to be considered a public utility within the meaning of Section 4, Article XVIII of the Ohio Constitution.*

*2. A municipality may, under Section 5625-15, General Code, properly submit to the electors at a November election the question of a levy outside the ten mill limitation for the construction or acquisition of a gas plant and its incidental appurtenances.*

COLUMBUS, OHIO, August 9, 1937.

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

GENTLEMEN :

I am in receipt of your letter requesting my opinion, which reads as follows :

“We are inclosing herewith letter from a Councilman of the City of Cleveland, filed with our Cleveland Examiner, in which we are requested to obtain your opinion on the following :

Question. Can a municipality such as the City of Cleveland submit a two mill levy to voters at the regular November election, the proceeds of which are to be used for the purpose of acquiring and constructing a municipal gas distribution plant and the transmission lines incidental thereto and for the further purpose of engaging in the distribution service and sale of gas to its citizens?

Section 4 of Article XVIII of the Constitution of the State of Ohio provides that :

“Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.”

Section 5 of said Article XVIII of the Ohio Constitution provides as follows :

“Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission.”

In addition to the afore cited constitutional authorizations, Section 3990 of the General Code provides that the council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas or electric works already erected therein.

It must be clearly understood, however, that any municipality desiring to exercise such rights in the acquisition of such public utility must do so by ordinance passed by its council and not by initiative petition. See *Power vs. Davidson*, 49 O.App. 184.

The Supreme Court of Ohio, in the case of *State, ex rel. vs. Weiler*, 101 O.S. 123, in construing the rights of municipalities to acquire any public utility, held as disclosed by the first branch of the syllabus:

“Municipalities of the state are empowered by constitutional provision to acquire any public utility, the product or service of which is to be supplied to the municipality or its inhabitants, and they may issue bonds to raise money for such purpose, pledging the general credit of the municipality to their payment.”

It will be noted, therefore, from the language used in the above cited case that municipalities have full power and authority not only to purchase public utilities, but to finance the same by the issuance of bonds, pledging the general credit of the municipality to their payment.

The question propounded in your letter relates to the acquisition of a gas plant. Various authorities have held that a gas plant and its necessary appurtenances are properly considered public utilities within the meaning of Section 4 of Article XVIII of the Ohio Constitution. In the case of *Pierce vs. City of Hamilton*, 40 O.App. 338, in the fifth and sixth branches of the syllabus, it was held as follows:

“5. Municipal gas plant is ‘public utility,’ which municipality under Constitution may construct and operate. (Section 4, Article XVIII, Constitution).

6. Municipality may issue bonds to acquire, construct, own, lease and operate municipal gas plant and to provide funds for those purposes (Section 4, Article XVIII, Constitution).”

The court, further elaborating upon this principle, said at page 342:

“A municipal gas plant is a public utility. The Supreme Court in the case of *State, ex rel., vs. Weiler, supra*, held that this provision of the Constitution was self-executing, and that the issued bonds for the purposes named under Section 4 of Article XVIII are essential to the enjoyment of the power granted, and are necessarily incident thereto, and that the power was included in the power expressly conferred. So that the municipality may issue bonds for the purpose of acquiring, constructing, owning, leasing, and operating its municipal gas plant, and as decided in the case of *State, ex rel., vs. Weiler, supra*, could issue bonds to provide funds for any of these purposes.”

It is, therefore, my opinion that in addition to acquiring, constructing, erecting or leasing a gas plant and the necessary appurtenances thereto, a municipal corporation has full power to issue bonds and pledge the general credit of the subdivision in payment thereof. If these bonds could not be issued within limitations, then the question of their issuance could be propounded and submitted to the electors placing the same outside limitations, provided the procedure and the issuance were in conformity and full compliance with the provisions of the Uniform Bond Act.

Section 5625-15 of the General Code provides for a tax levy in excess of limitations, and inasmuch as the section is of great length, I shall merely set forth the pertinent parts relative to your inquiry:

“The taxing authority of any subdivision at any time prior to September 15, in any year, by vote of two-thirds of all the members of said body, may declare by resolution that the amount of taxes which may be raised within the ten mill limitation will be insufficient to provide an adequate amount for the necessary requirements of the subdivision, and that it is necessary to levy

a tax in excess of such limitation for any of the following purposes:

\* \* \* \* \*

6. For the construction of acquisition of any specific permanent improvement or class of improvements which the taxing authority of said subdivision may include in a single bond issue.

\* \* \* \* \*

Such resolution shall be confined to a single purpose, and shall specify the amount of increase in rate which it is necessary to levy, the purpose thereof and the number of years during which such increase shall be in effect which may or may not include a levy upon the duplicate of the current year. The number of years shall be any number not exceeding five, except that when the additional rate is for the payment of debt charges the increased rate shall be for the life of the indebtedness."

For the reason that a gas plant and its incidental appurtenances is considered a public utility which may be acquired, purchased, operated or leased by a municipality and bonds issued therefor, I am of the opinion that the above mentioned item 6 is ample authority for a tax levy to be submitted to the electors at a November election. However, it is to be noted that such excessive levy may not exceed five years unless such excessive levy is for debt charges. Debt charges must be interpreted to mean a levy for bonds already issued and outstanding for the retirement of which the excessive levy is desired.

In specific answer to your question, I am therefore of the opinion that:

1. Under Sections 4 and 5 of Article XVIII of the Ohio Constitution, a municipality may properly acquire, construct, own, lease and operate any public utility, and a gas plant and its incidental appurtenances is to be considered a public utility within the meaning of Section 4, Article XVIII of the Ohio Constitution.

2. A municipality may, under Section 5625-15, General Code, properly submit to the electors at a November election the question of a levy outside the ten mill limitation for the construction or acquisition of a gas plant and its incidental appurtenances.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*