

prove to be not sufficient so to do, obviously the limitations of debt prescribed in this section would be exceeded to such extent as actual earnings fall short of estimated earnings.

It is noted that the statute makes no provision whatsoever for estimated earnings of a utility in determining whether or not such bonds may be disregarded in computing the net indebtedness, but, on the contrary, provides that such bonds need not be considered only to the extent that the income of such utility is sufficient to cover all operating expenses and provide a fund sufficient to cover interest and sinking fund requirements on such bonds. It is further noted that this paragraph (d) of Section 2293-14, *supra*, only refers to "bonds issued". There is no reference to bonds hereafter issued as is found elsewhere in this section; nor is there any reference to bonds *to be issued* for the purpose of purchasing, constructing, improving or extending a waterworks. Manifestly, if bonds proposed to be issued for improving or extending a waterworks are to be disregarded in computing the limitations of a debt of a municipality under this section, they must, in every instance, be disregarded on the grounds of estimated earnings, or, in other words, upon grounds for which no provisions are made in this section.

I am, therefore, of the opinion that:

(1) Waterworks improvement bonds proposed to be issued by a municipality may be issued only within the limitations of debt of a municipality as provided in Section 2293-14, General Code.

(2) Paragraph (d) of Section 2293-14, General Code, providing that waterworks improvement bonds need not be considered in ascertaining the limitations of debt of a municipality, to the extent that the income from such waterworks is sufficient to cover the cost of all operating expenses, and interest charges on such bonds, and to provide a sufficient amount for their retirement as they become due, refers only to waterworks bonds issued and outstanding at the time a computation is being made for the purpose of ascertaining the debt limitations of a municipality, and has no reference to waterworks improvement bonds proposed to be issued, and for which such computation is being made.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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296.

COUNTY COMMISSIONERS—DUTY TO PAY CITY SOLICITORS PROSECUTING STATE CASES IN POLICE AND MAYOR'S COURTS MANDATORY—WHEN ALLOWANCES CAN BE LEGALLY MADE.

*SYLLABUS:*

1. *It is the mandatory duty of the county commissioners to make allowances to city solicitors or their assistants for services performed in the prosecution of State cases in police and mayor's courts, in accordance with the provisions of Section 4307, General Code.*

2. *If the county commissioners fail to make allowances to city solicitors or their assistants for the prosecution of State cases in mayor's and police courts for any year,*

*the said allowances may lawfully be made in the succeeding year or years and paid from the then current appropriation.*

COLUMBUS, OHIO, April 12, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

“Section 4307 of the General Code provides that a city solicitor when acting as prosecutor of a police or mayor’s court shall receive for this service such compensation as council may provide and such additional compensation as the county commissioners shall allow. In a certain county in this state, having two cities, no appropriation or payment was made to the solicitor of either of such cities for services as prosecutor in the mayor’s court for the years 1926, 1927 and 1928. At the beginning of the year 1929, the county commissioners made an appropriation in the sum of \$1,600.00, with the understanding that each solicitor is to receive \$200.00 a year for the present year and for the three preceding years.

Question: May the county auditor pay out of such appropriation to the two solicitors \$800.00 each covering services for the years 1926, 1927, 1928 and 1929?”

Sections 4306 and 4307, General Code, read as follows:

Sec. 4306. “The solicitor shall also be prosecuting attorney of the police or mayor’s court. When council allows an assistant or assistants to the solicitor, he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor’s court. The person thus designated shall be subject to the approval of the city council.”

Sec. 4307. “The prosecuting attorney of the police or mayor’s court shall prosecute all cases brought before such court, and perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county. The city solicitor or the assistant or assistants whom he may designate to act as prosecuting attorney or attorneys of the police or mayor’s court shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow.”

In 1913 the then Attorney General in construing the above sections said in an opinion which is reported in the Annual Report of the Attorney General for that year at page 1454:

“Section 4307, General Code, provides that the city solicitor shall receive for services as prosecuting attorney in the mayor’s court such compensation as council may prescribe and such additional compensation as the county commissioners shall allow.

While it is true that there is a seeming difference in the language between ‘may’ and ‘shall’ yet I am of the opinion that it is optional with the county commissioners as to whether or not they allow any additional compensation to a city solicitor for the prosecuting of state cases in the mayor’s court. Or, in other words, that the words ‘shall allow’ are simply directory in their application or construction. \* \* \*

As I view it, the compensation provided for in Section 4307, General

Code, may be either fixed at a lump sum in advance, or as I view it, the more proper way by fixing the compensation after the services are performed."

In the case of *Board of County Commissioners of Butler County et al. vs. The State, ex rel. Primmer, City Solicitor, Etc.*, 93 O. S., page 42, the court held it to be the mandatory duty of the county commissioners to make an allowance to city solicitors and their assistants for the prosecution of State cases in police or mayor's courts. In the course of the opinion, after referring to Section 4307, General Code, the court said:

"The first sentence of the section imposes a duty upon the prosecuting attorney of such court.

The second sentence designates, first, who that prosecuting attorney shall be, to-wit, the city solicitor or assistants. The latter part of the second sentence provides for the compensation of such prosecuting attorney, the evident purpose being that the city shall compensate him for the prosecution of city cases, upon allowance of council, and the county, as a subdivision of the state, shall compensate him for services rendered in state cases, upon the allowance of the county commissioners.

The amount allowed by the council and the amount allowed by the county commissioners is wholly in their judgment, but the statute makes it mandatory upon them to allow something.

In the case about which you inquire it appears that the county commissioners made no allowance to the city solicitors in question for prosecuting State cases during the years 1926, 1927 and 1928 nor did they make an appropriation therefor as they were required to do, according to the Supreme Court. It would seem, therefore, that the present board of county commissioners may now perform the duty which should have been performed during the previous three years, and it is very probable that they might be required to do so.

The board having now determined what is a proper allowance for the services of the solicitor during the years 1926, 1927 and 1928 and having made an appropriation therefor, it is my opinion that these allowances may now lawfully be paid from the current appropriation.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

297.

TOWNSHIP TRUSTEES—COMPENSATION GIVEN TO PROSECUTING ATTORNEY TO PREPARE LEGISLATION FOR ROAD CONSTRUCTION, ILLEGAL—BUREAU CAN MAKE FINDING FOR RECOVERY.

**SYLLABUS:**

1. *The trustees of a township may not legally pay additional compensation to the prosecuting attorney of the county to prepare legislation for the construction of a township road.*
2. *In the event the trustees of a township pay extra compensation for legal ad-*