

3839.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES
AS FIRST ASSISTANT DIRECTOR OF HIGHWAYS—CARL G. WAHL.

COLUMBUS, OHIO, January 19, 1935.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted a bond in the penal sum of \$10,000.00, with surety as indicated to cover the faithful performance of the duties of the official as herein-after listed:

Carl G. Wahl, First Assistant Director of Highways—The United States Fidelity and Guaranty Company.

The above bond is undoubtedly executed pursuant to the provisions of sections 1180-1 and 1182-3, General Code, which read, in so far as pertinent, as follows:

“Sec. 1180-1. The director (of highways) shall appoint a first assistant director who shall * * * serve during the pleasure of the director * * *. The first assistant director shall give bond in the sum of ten thousand dollars, conditioned for the faithful performance of his duties with sureties to the approval of the state highway director.”

“Sec. 1182-3. * * * All bonds hereinbefore provided for shall be conditioned upon the faithful discharge of the duties of their respective positions, and such bonds, except the bond of the director, * * * shall be approved as to the sufficiency of the sureties by the director, and as to legality and form by the attorney general, and be deposited with the secretary of state. * * * ”

Finding said bond to have been properly executed in accordance with the above statutory provisions, I have accordingly approved the same as to form, and return it herewith.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3840.

MUNICIPALITY—MAY ASSESS COST OF LIGHTING STREET UPON BENE-
FITED PROPERTY WHERE LIGHTING EQUIPMENT OWNED BY PRI-
VATE UTILITY UNDER CONTRACT TO FURNISH SERVICE.

SYLLABUS:

A municipality may, in accordance with the provisions of Sections 3212, et seq., General Code, assess upon benefited property the cost of lighting a street when the lighting equipment is owned by a private utility which is furnishing the service under contract with the municipality.

COLUMBUS, OHIO, January 19, 1935.

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

GENTLEMEN:—You have requested my opinion on a question presented to your office in the following letter:

“The Village of B on December 9th, 1931, entered into a contract with the C. Electric Illuminating Company for the lighting of its streets for a period of five calendar years to wit: 1932 to 1936, inclusive. The Illuminating Company prior to the execution of the contract owned and still owns all poles, wires and other equipment through which the illumination is supplied, and the contract provides for the payment for such illumination at a fixed price per light per year for a minimum number of lights. The fiscal officer's certificate of available funds to meet the obligations accruing under this contract for the year 1932 was duly issued at the time of the execution of the contract, and the illumination supplied during that year has been paid for in full.

The fiscal officer's certificate has been not issued for any of the subsequent years and no money has been appropriated for the purpose for the year 1935. The Village finds itself unable to pay for these lights during the year 1935 out of its general funds and, in all probability, will find itself similarly embarrassed during the year 1936.

Will you kindly if possible obtain for me an opinion by the Attorney General on the following questions:

(1) May the Village under the circumstances outlined legally levy special assessments to pay for the cost of street lighting under said contract for the calendar year 1935?

(2) May the Village under the circumstances outlined legally levy special assessments to pay for the cost of street lighting under said contract for the calendar year 1936?

(3) May the Village under the circumstances legally levy special assessments to pay for the cost of street lighting for the years following 1936, that is after the contract by its terms expires but under a new contract with the Illuminating Company to be entered into after such assessment has been levied?

I am familiar with the opinion rendered by the Attorney General identified as Opinion No. 177 of 1933, but I conceive that questions 1 and 2 above do not present the same issues as there presented in that in that instance authority was sought to pay for light already delivered the year previous for which money was already owing and probably had been appropriated out of the general fund. It further appears to me that the issues raised by questions 1 and 2 above were not there raised in view of the solicitor's comment quoted therein to the effect that no doubt exists in his mind that ‘assessments may be made for the current year’ anent which observation the Attorney General makes no direct comment in his opinion.

The third question above is submitted for the reason that the Attorney General in said Opinion No. 177 lays some stress upon the fact that assessments are authorized only for the purpose of paying for a future improvement, whereas in this case the physical improvement will have been in existence and will be in existence prior to the time of the proposed legislation, and the improvement contemplated will consist simply of continued service through such physical equipment already extant.”

Opinion No. 177 referred to in the foregoing inquiry, Opinions of the Attorney General for 1933, Vol. I, page 208, held as set forth in the syllabus:

“A municipality may not legally levy special assessments for the purpose of paying an obligation incurred for the lighting of streets at a time prior to the completion of the proceedings provided in Sections 3812, et seq., General Code.”

The foregoing opinion did not expressly pass upon the question of the power to assess the cost of street lighting where a permanent improvement is not to be constructed and such cost consists of the payment to a private utility for such service supplied with their own equipment. The opinion, however, indirectly recognized the fact that the cost of street lighting might be assessed under such circumstances. After quoting Section 3816, General Code, relating to there being on file in the office of the director of public service in cities and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, it is said at page 210:

“The foregoing section, of course, contemplates an improvement which is to be constructed. It is obviously not entirely applicable to the improvement of a street by lighting the same in the event the lighting equipment is already installed. Under these circumstances, there may be no plans, specifications or profiles which may be filed as therein provided but certainly estimates as to cost are required to be filed under such a situation. The obvious purpose of the section is to afford opportunity to all persons who are interested in the improvement to file remonstrances with respect thereto.”

Section 3812, General Code, provides in part as follows:

“Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. 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, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, watercourses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, * *.”

It is observed that after authorizing the assessment of the cost of a permanent improvement of a street, alley, dock, wharf, etc., authority is granted to assess the cost of lighting, sprinkling, sweeping or cleaning. Obviously, the power to assess the cost of sweeping or cleaning a street extends the power to levy special assessments to cases where no permanent improvement is being constructed by the municipality.

Section 3812-4, General Code, specifically relating to the levy and collection of special assessments for street lighting, contains no express reference to the construction of a permanent improvement. This section provides in part as follows:

“The council of a city upon the recommendation of the director of public service, or the council of a village, may provide for lighting any street, alley, dock, wharf, pier, public road or place, or parts thereof, and levying and collecting special assessments therefor, by any of the methods mentioned in section 3812, General Code of Ohio. * * *”

Had the legislature seen fit to limit the power to assess only in cases where a permanent improvement is to be constructed for the purpose of lighting streets, it could easily have done so, but the language used is much broader and evidently discloses a legislative intent to authorize the assessment of the cost of lighting, regardless of whether or not the municipality may desire to purchase such service from an illuminating company or supply it itself. The legislative intent must be sought from the language employed. *State, ex rel. vs. Pharmacy Board*, 127 O. S. 513.

It is my opinion that a municipality may, in accordance with the provisions of Sections 3812, et seq., General Code, assess upon benefited property the cost of lighting a street when the lighting equipment is owned by a private utility which is furnishing the service under contract with the municipality.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

3841.

EXCISE TAX—EFFECTIVE DATE OF H. B. No. 43, SECOND SPECIAL SESSION
 90TH GENERAL ASSEMBLY—DEDUCTION PROVIDED IN SECTION 5483,
 G. C. DISCUSSED.

SYLLABUS:

1. *House Bill No. 43 of the second special session of the 90th General Assembly is an act providing for tax levies as defined in Article II, section 1d of the Constitution, and went into immediate effect when approved by the Governor.*

2. *The \$25,000 deduction provided for by section 5483, General Code (House Bill No. 43 of the second special session of the 90th General Assembly) is applicable to the gross receipts from the effective date of said act to the end of the reporting period provided for in said act. However, the \$10.00 minimum tax provided in said act is not applicable to that portion of the reporting period subsequent to the effective date of said act but will apply to the entire year.*

3. *The special excise tax levied on certain public utility companies for the purpose of providing funds for poor relief under the provisions of Amended Senate Bill No. 4, passed by the 89th General Assembly, at its special session March 21, 1932, is to be computed upon the basis prescribed by sections 5483 and 5485 of the General Code as they read March 21, 1932.*

COLUMBUS, OHIO, January 19, 1935.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads as follows:

“The Commission respectfully submits the following questions relative to the administration of House Bill No. 43 of the Second Special Session of 1934 which increases the rates of excise taxation imposed upon the gross receipts and gross earnings of certain public utilities. The questions relative to the administration of this act on which your opinion is desired are as follows:

· What is the actual effective date of this Act?

The original Act provides that the tax shall be collected on that portion