general assembly shall appropriate annually the amount authorized by section 5247 G. C. is not binding upon the present or subsequent general assemblies.

Respectfully,
JOHN G. PRICE,
Attorney-General.

920.

MUNICIPAL CORPORATION—WATERWORKS EXTENSIONS OUTSIDE OF MUNICIPALITY—COST WHEN UNREASONABLE PASSED UPON —BONDS MAY NOT BE LEGALLY ISSUED UNDER SECTION 3939 G. C. FOR SAID PURPOSE.

1. *Waterworks extensions outside the municipality may not legally be made at its expense where it is known, or by the exercise of ordinary prudence should be known, to the director of service that the income from water rates for such outside service would be so disproportionately less than the cost of such extension as to constitute a substantial gratuitious service to such users.*

2. *Municipal bonds for extension of waterworks beyond the corporate limits for supplying water to persons outside such limits may not be legally issued under section 3939 G. C.*

COLUMBUS, OHIO, January 12, 1920.

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

GENTLEMEN:—Acknowledgment is made of your recent request for the opinion of this department as follows:

> "We desire to call your attention to sections 3966 to 3970, inclusive, of the General Code, and would say that in cases of this nature the general custom has been that the water mains are laid beyond the corporation while under the supervision of the municipal force in charge, payment therefor is made by the individuals desiring the water until such time as the extension nets the municipality in water rentals a certain percentage of the cost of the extension, whereupon the municipality reimburses the person who made the payment therefor.
>
> However, in a few instances it has been abused, where a municipality has assumed the original expense for one or two water consumers and thereby sustained a heavy loss.
>
> 1. May extensions outside of a municipal corporation under these laws be done at the expense of municipality when it is known that the users therefrom will not justify the cost of the extension?
>
> 2. If a municipality may legally extend water mains beyond the corporate limits and bear the expense thereof, is there any authority of law for the issuance of bonds to cover or include such extensions, whereas, paragraph 11 of section 3939 G. C. authorizes bond issues for waterworks purposes for the 'inhabitants thereof?'"

Sections 3955 to 3988 G. C., section 6 of Article 18 of the constitution, adopted in 1912, and section 3939 G. C., all relating to municipal waterworks, are pertinent to your inquiry.

It may be observed that statutory and constitutional authority (since 1912) now clearly exist for municipalities acquiring, constructing and extending waterworks, as will appear from these sections.

The control and management of such waterworks is entrusted to the director of service.

Section 3956 G. C. is:

> "The director of public service shall manage, conduct and control the waterworks, furnish supplies of water, collect water rents, and appoint necessary officers and agents."

Section 3957 G. C. provides:

> "Such director may make such by-laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the waterworks. Such by-laws and regulations shall have the same validity as ordinances when not repugnant thereto or to the constitution or laws of the state."

Section 3958 G. C. in part provides:

> "For the purpose of paying the expenses of conducting and managing the waterworks, such director may assess and collect from time to time a water rent of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water."

In passing, attention is directed to the first line of this section, as indicating the purpose for which the rates are charged and collected, viz., "paying the expenses of conducting and managing the waterworks."

Section 3959 limits the application of funds raised by levy and taxation for waterworks purposes " 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 3963 definitely specifies what water service shall be furnished gratuitously.

Sections 3966 to 3970 G. C. relate to service to persons outside the corporate limits.

Section 3966 contains the statutory authority to extend the waterworks service outside the city and in part is:

> "On the written request of any number of citizens living outside of the limits of a municipal corporation, the corporation may extend * * * aqueduct and water pipes to any distance outside the corporate limits, not to exceed four miles."

Section 3967 seems to follow in logical sequence in legislating on at least one method of extending such service. Pertinent parts of this section are:

> "When a person or persons *at his or their expense* have laid down and extended mains and water pipes beyond the limits of a municipal corporation * * * the corporation shall furnish water to the residents * * * on the line of such mains and water pipes, subject to the same rules and regulations that it furnishes water to its own citizens, except that the rates charged therefor, shall not exceed those within the corporation by more than one-tenth thereof."

Section 3968 confers jurisdiction on the mayor and police over the territory in which such outside service is given, to enforce the ordinances and regulations relating to such waterworks, which are made binding on such persons, and section 3969 provides the rule of action where the territory is later annexed to the city.

Since 1912, however, the municipality's power to extend its waterworks service beyond its corporate limits can no longer be said to depend upon section 3966 (supra), as in that year section 6, Article XVIII, was adopted as a constitutional amendment. This section provides that:

> "Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality."

As the supreme court stated in Fitzgerald vs. Cleveland, 88 O. S., 360:

> "There has been a new dispensation of governmental power. The dispensation has been made by the people."

So that, so far as the constitutional grant extends, it is placed beyond the control of the legislature.

The reference to these sections and the observations, so far made, are more or less pertinent to both of your questions and bring us now to their separate consideration.

Your first question is:

> 1. "May extensions outside of a municipal corporation under these laws be done at the expense of municipality when it is known that the users therefrom will not justify the cost of the extension?"

Enough has been said to show the very large discretion placed in the director of service. It has been noted that sections 3956, 3957 and 3958 clothe him with almost plenary powers as to rate fixing. Its abuse is, however, subject to judicial review. As held in Ramsey vs. Columbus, 12 O. D., 729:

> "The law, under the limitations imposed, has left it to the discretion of the director of public improvements to assess and collect water rents of sufficient amount and in such manner as he may deem most equitable, and with the exericse of this discretion this court will not interfere unless it has been made to appear that he has abused the discretion or transgressed the limits of his power."

This is also the holding in the case of city (Mansfield) vs. Manufacturing Company, 82 O. S., 216. It is to be noted that there is no express authority for or prohibition against so extending the waterworks service on a non-self sustaining basis, if such authority or prohibition exists it must be found by implication clearly and necessarily arising from these sections.

Consideration of them indicates the following policies:

> 1. That the rate must be proportionate to the cost of the service.

This must be so because of the nature of the enterprise; it is a municipal activ-

ity not for profit in the ordinary sense of that phrase, but for the benefit of its inhabitants who are the equitable owners of the plant, the legal title and management of which is in the municipality in trust for them.

Section 3958 is expressive of such policy. In the Ramsey case (supra), on page 729, the court said:

> "The power to assess and collect water rents is limited by the terms of the legislation conferring it, but the exact line of such limitation can be ascertained only by a proper construction of the legislation on the subject.
>
> The power may be exercised *for the purpose of paying the expenses of conducting and managing the waterworks, sufficient in amount,* and in such manner as they may deem most equitable on all *premises and tenements* supplied with water."

2. The rates for outside service shall be practically the same as that inside the city.

This policy may be said to be shown by section 3967, which provides that the outside service rate shall not exceed the inside rate more than ten per cent, apparently an allowance for an increase on account of the increased cost of service and supervision in the ontlying territory. This is in accord with the opinion of the attorney-general in 1914, Vol. 1, page 895, where it is said:

> "Under these statutes (3966 to 3969) council and the director of public service of a municipal corporation is given substantially the same control and jurisdiction over matters pertaining to waterworks, with reference to those persons lying outside of a municipal corporation who lay down pipes themselves and receive water from the municipal corporation, as is had by council and the director of public service over persons being supplied with water within the municipal corporation."

3. That the expense of operating and maintaining the waterworks is to be borne equally by all those who receive its service.

This is based on the principle that the service being installed for the benefit of all who receive it, each should bear a proportionate part of its cost. Here again much is left to implication. However, in the Mansfield case this policy is stated on page 231 as follows:

> "It seems to us that in this last case the proper practice was followed. In the territory the city undertakes to furnish a supply of water. It is its duty to supply all of its inhabitants without discrimination, at the same price, subject to the same rules and regulations and under the same or similar conditions. It is not a matter of bargain and sale, or of express contract."

And in the Columbus case (supra) we find this:

> "True the rates must be equal and uniform to all consumers without any discrimination whatever, either in measurement, price or terms of payment, except the director may at his discretion fix and establish a minimum meter rate for the services rendered by such waterworks department."

4. That except as permitted by statute, no waterworks service shall be furnished gratuitously.

This policy is evidenced by consideration of the fact that the waterworks service stands in the same relation to the public as public trust funds and cannot be given away.

Section 3963 indicates the state policy in this regard.

It was construed in opinions of the attorney-general for 1912, Vol. 2, page 1977, as indicative of a result that no other water service can legally be furnished gratuitously. In that opinion, after quoting this section and applying the general rule of law *"expressio unius est exclusio alterius,"* it was held that as to all other such waterworks "the board of trustees of public affairs have the right to charge for water used * * *; not only that they have the right, but for the reason above stated, it is the duty of such trustees so to do."

It might be added that public policy forbids discrimination in such matters and law and right reasoning would condemn the taking of private property for pretended public use and giving it or the use of it to other private persons.

These considerations have been stated somewhat at length because it seems that this precise question has not been decided by the courts and no precedent is thus afforded for its solution.

While the matter involved is not entirely free from uncertainty, it is thought that the legislative intent is reasonably clear. Your letter questions the legality of such outside extension, when, as stated therein, it is "known that the income will not justify the cost of such extension."

It must be borne in mind that the discretion to determine the justification of such extension lies in the director of service, which discretion the courts will not attempt to control or review except in case of its abuse. Your question cannot be intelligently answered in a categorical manner but may be answered in this way.

Waterworks extensions outside the municipality may not legally be made at its expense where it is known, or by the exercise of ordinary prudence should be known, to the director of service that the income from water rates for such outside service would be so disproportionately less than the cost of such extension as to constitute a substantial gratuitous service to such outside users.

Your second question is:

> "If a municipality may legally extend water mains beyond the corporate limits and bear the expense thereof, is there any authority of law for the issuance of bonds to cover or include such extensions, whereas, paragraph 11 of section 3939 G. C. authorizes bond issues for waterworks purposes for the 'inhabitants thereof'?"

This is understood by its terms and from personal conference to relate exclusively to the issuance of bonds under section 3939 G. C., and this opinion is limited to that section, pertinent parts of which are:

> "* * * The council * * * may issue and sell bonds * * * for any of the following specific purposes: * * * *.
>
> 11. For erecting or purchasing waterworks for supplying water to the corporation and the inhabitants thereof."

Here the authority is granted to issue bonds for a certain purpose clearly defined, viz., erecting and purchasing waterworks for supplying water to the corporation and its inhabitants. It may be pointed out that the purchase and erection

of a waterworks does not include the extension of such a waterworks already erected or purchased and that supplying water to persons outside of a municipal corporation is not "supplying water to the corporation and the inhabitants thereof." This section is not ambiguous and, as said in Hough vs. Dayton Co., 66 O. S., 435, "in such case there is no room for construction."

Therefore you are advised that municipal bonds for extension of waterworks beyond the corporate limits for supplying water to persons outside such limits may not be legally issued under section 3939 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

930.

AGRICULTURE—FLAVORING EXTRACTS—"ADULTERATED" IN SECTION 5779 G. C. CONSTRUED AS APPLICABLE TO ARTIFICIAL OR IMITATION EXTRACTS—WHEN FORMULA NOT REQUIRED TO BE PRINTED ON LABEL—ALCOHOLIC CONTENT IN TERMS OF PERCENTAGE BY VOLUME SATISFIES REQUIREMENT CONTAINED IN SUBSECTION 4 OF SECTION 5785 G. C.

1. *An artificial or imitation flavoring extract is not "adulterated" within the meaning of section* 5779 *and related sections of the General Code of Ohio, merely because it is an artificial or imitation flavoring extract.*

2. *The statutes of Ohio do not now require the formula for flavoring extracts or compounds for which no standard exists, to be printed upon the label of the bottle, package or other container of same; nor has the secretary of agriculture the authority at the present time to make and enforce a departmental rule to that effect.*

3. *A statement of alcoholic content in terms of percentage by volume satisfies the requirement contained in subsection* 4 *of section* 5785 *G. C. as amended by H. B. No.* 225 (108 *O. L.* 460).

COLUMBUS, OHIO, January 12, 1920.

HON. THOMAS C. GAULT, *Chief, Bureau of Dairy and Foods, Department of Agriculture of Ohio, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter reading as follows:

> "Will you please advise me as to the proper labeling of flavoring extract or compound for which no standard exists, since the amendment of section 5785, giving consideration also to section 5779 and section 1177-12, General Code, and to ruling No. 3 in the enclosed department rulings?"

In personal conference it is learned that the specific points upon which you desire the opinion of this department are:

First: Whether an artificial or imitation flavoring extract is "adulterated" within the meaning of section 5779 and related sections of the General Code of Ohio, merely because it *is* an artificial or imitation flavoring extract.

Second: Whether the formula for flavoring extracts or compounds, for which no standard exists, must be printed upon the label of the bottle, package or other container of same.