

Works, and Continental Chimney Co., a corporation under the laws of State of Illinois. This contract is for the construction and completion of a smoke stack, Ohio State Reformatory, Mansfield, Ohio, and calls for an expenditure of Seven Thousand, Eight Hundred Dollars (\$7,800.00).

Accompanying said contract is a bond to insure faithful performance, executed by Maryland Casualty Company.

I have before me the certificate of the Director of Finance that there is an unencumbered balance legally appropriated sufficient to cover the obligations of this contract.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return same to you herewith, together with all other data submitted to me in this connection.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

3695.

MUNICIPAL CORPORATIONS—WHERE AUTHORIZED TO PURCHASE OR ACQUIRE WATER MAINS NECESSARY FOR OPERATION OF MUNICIPAL WATER WORKS—SECTION 3806 G. C. MUST BE COMPLIED WITH BEFORE VALID CONTRACT FOR PURCHASE OR ACQUISITION OF SUCH WATER MAINS.

1. *Under the provisions of section 4, Article XVIII of the constitution of Ohio as adopted September 3, 1912, municipalities are authorized to purchase or acquire the water mains necessary for the operation of its municipal water works, and such property may be acquired or purchased from individuals or private corporations.*

2. *A valid contract for the purchase or acquisition of such water mains, may not be entered into by the city, until the requirements of section 3806 G. C. are fully complied with.*

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

GENTLEMEN:—Receipt is acknowledged of your recent communication which reads as follows:

“We respectfully request your written opinion upon the following matter:

*Statement of Facts.*

During the year 1920 the City of Warren, Ohio, purchased from the Trumbull Public Service Company the water works and all equipment owned by said company for the sum of \$687,500. The city was to have possession of such property from and after the 1st day of January, 1921; however, the said company operated the plant and made the collections to July 1st, 1921, and from the said date the city has operated and maintained this utility.

It appears that the water mains during the past several years have been laid by real estate development companies within the corporate limits of

the city at their own expense, they asserting that the public utility company had refused to make any water line extensions of any kind, claiming that it was unable financially to do so. There was a verbal understanding that when such public utility company was able to furnish moneys therefor and when there was a house for every one hundred feet that the said public utility company would take over and pay for the lines constructed by said development companies, paying the price it would cost to construct same at the time.

Such lines were not included in the purchase made from the public utility company by the City of Warren and the city did not agree to assume any liability of said company. Council of said city of Warren on the 30th day of November, 1921, passed ordinance No. 1292 declaring it necessary and expedient to purchase the water mains heretofore laid by the Warren Building and Investment Company upon the streets set forth in said ordinance. Copy of such ordinance is enclosed herewith. The question now arises as to the power of the city to make such purchase from the said development company.

Section 4 of Article XVIII of the Constitution provides that any municipality may acquire any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants.

*Question:* Under said constitutional provision would a municipal corporation have power to purchase water mains located within the corporate limits of such municipality, which were laid by a private company not a public utility?

We are enclosing herewith letter of Mr. Lea, Solicitor of the City of Warren, Ohio, and letter from Mr. Geo. D. Braden, representing the Warren Building and Investment Company, which bear upon this subject."

Before proceeding to consider the legal phase of your question, attention is directed to the form thereof.

It is asked whether or not a municipality under the provisions of Section 4, Article XVIII of the constitution of Ohio as adopted September 13, 1912, has power to purchase water mains which were laid by a private company not a *public utility*.

Apparently confusion is encountered as to the meaning of the term "public utility" as it occurs in said section, since it is gathered from the form of your question that the term "public utility" as used therein includes only such utilities as may be owned or controlled by public authority. If such a limited meaning is concluded as applicable to this term, it would seem obvious that the force and effect of this section could only be treated as a nullity, since there seemingly could be no more reasonable object accomplished in the purchase or acquisition by a municipality of a utility already owned by a corporation. It is not believed, however, that such a limited meaning may be applied to the term "public utility" as it occurs in this section, but rather that section 4 contemplates the acquisition by a municipality of any utility the products or service of which are of public concern, regardless of the question of their ownership. Such a conclusion obviously disposes of this angle of your question, and which may now be resolved as follows:

"Under section 4 of Article XVIII of the constitution, would a municipality have power to purchase water mains privately owned and located within the corporate limits of said municipality?"

Relative to this question, it may be noted that section 4 of Article XVIII of the constitution of 1912 provides as follows:

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product 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."

It would seem clear from a consideration of this section that municipalities are authorized to acquire, construct, own, lease and operate, within or without its corporate limits *any public utility*, the products or service of which are to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. Your question, however, under the facts stated, would now seem to be as to the authority of the municipality in view of section 4 quoted supra, to purchase privately owned water mains which may be deemed to be a part or portion of a public utility as defined by this section. It is believed that an affirmative answer may be given to this question, since it is thought that authority to acquire the whole, necessarily carries with it the authority to acquire a part of the whole or any necessary or vital portion thereof. Since water mains can only be concluded as being a necessary part of a water works system, it is believed that the power and authority to acquire the same when necessary is included within the greater grant as expressed in section 4 of Article XVIII of the Constitution.

It is believed that the rule of construction applicable to the case considered is aptly stated in Black on Interpretation of Laws, page 23, wherein the following language is used.

"A constitution cannot, from its very nature, enter into a minute specification of all the minor powers naturally and obviously included in it and flowing from the great and important ones which are expressly granted. It is therefore established as a general rule that when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the performance of the other."

This view as concluded from a consideration of the powers granted municipalities in the first paragraph of section 4 as quoted supra, is thought to be augmented upon consideration of the similar powers granted under the last sentence of the same section which reads:

"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."

Thus it will seem that section 4 of Article XVIII of the Constitution of Ohio as adopted September 13, 1912, clearly authorizes municipalities to acquire the property of persons or corporations when required for the purpose of its public utilities. Under the very broad authority granted municipalities by the provisions of this section, I am inclined therefore to the opinion that water mains when necessary for the operation for the municipal water works system, may lawfully be purchased or acquired by such corporation, either from private persons or corporations when required for the purposes of the public utility provided by this section.

Relative to certain other questions pertaining to the ownership of the water mains, pertinent to your local situation and as embodied in the communication of the city solicitor of Warren, Ohio, to Mr. Foster of the Bureau of Inspection and Supervision of Public Offices, opinion may not be passed, since it is thought that the ownership of the property mentioned is a question of fact which this department is unable to determine.

Relative to ordinance No. 1292, passed by the council of the city of Warren December 30, 1921 which provides for the purchase of the water mains previously laid by the Warren Building and Investment Company, it would seem conclusive that the legal effect of such legislation must be delayed until such a time as the city has funds in its treasury for the accomplishment of the purpose of said ordinance, and this fact as part of the necessary legislation in the instance, must be certified by the city auditor to council under the provisions of section 3806 G. C., before a valid or binding contract may be entered into by the municipality.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*

3696.

PARTITION FENCES—TOWNSHIP TRUSTEES—NOT AUTHORIZED  
TO PROCURE MAKING OF SURVEY TO SETTLE DISPUTED  
BOUNDARY LINE AS PRELIMINARY TO AN ORDER RESPECTING  
APPORTIONMENT OF PARTITION FENCE.

*When proceeding under sections 5908 et seq. G. C. (partition fence statutes), township trustees are not authorized to procure the making of survey with the view of settling a disputed boundary line as a preliminary to an order respecting the apportionment of a partition fence.*

COLUMBUS, OHIO, November 1, 1922.

HON. HAVETH E. MAU, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—You have recently addressed this office as follows:

“The Board of Trustees of German Township, Montgomery County, Ohio, have taken up with us the question of establishing a partition fence in accordance with Sec. 5908, etc.

The query put to us is whether or not where there is a dispute between the property owners as to what is the line; as to whether or not under Section 5910, G. C., providing in part: ‘shall view the fence or prem-