

1183.

MUNICIPALITY—CONSTRUCTING SEWER AND WATER CONNECTIONS  
—NOTE ISSUE FOR THEIR COST—PENALTIES AGAINST PROP-  
ERTY OWNERS NOT INCLUDED IN SUCH NOTES—WHERE COL-  
LECTED PENALTIES PLACED.

*SYLLABUS:*

1. *In the event a municipality constructs sewer and water connections under the provisions of Section 3812-1, General Code, and issues notes in anticipation of the levy of assessments to pay the cost of such connections, the penalty authorized by this section may not be included in the amount of notes so issued.*

2. *Such penalty, when collected, should be paid into the general fund.*

COLUMBUS, OHIO, November 13, 1929.

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

GENTLEMEN:—Your letter of recent date is as follows:

“Section 3812-1 G. C. reads:

“The director of public service in cities and council in villages shall have authority to compel the making of sewer and water connections as hereinafter provided. Whenever said director in cities or council in villages deems it necessary in view of contemplated street paving or as a sanitary regulation that sewer or water connections or both be constructed, said director in cities or council in villages shall cause written notice thereof to be given to the owner of each lot or parcel of land to which such connections are to be made, which notice shall state the number and character of connections required.

The director of public service in cities and council in villages shall appoint some competent person to serve said notice in the manner provided for the service of summons in civil actions and the report of the person serving said notice or a certified copy thereof shall be prima facie evidence of the service of the notice as therein stated; provided that if any of said owners be non-residents of the corporation or cannot be found, such notice may be given publication twice in one or more newspapers of general circulation in the municipality.

If said connections are not constructed within twenty days of such service of notice or day of first publication thereof, as the case may be, the same may be done by the city and the cost thereof, together with a penalty of five per cent (5%), assessed against the lots and lands for which such connections are made and said assessments shall be certified and collected as other assessments for street improvements. No property owner shall be required to construct such connections further from the street main or sewer than the inner line of the curb. Assessments for such connections, whether levied under authority of this act or section thirty-eight hundred and twelve of the General Code shall not be subject to the limitations prescribed in Sections thirty-eight hundred and nineteen, thirty-eight hundred and twenty, thirty-eight hundred and twenty-one and thirty-eight hundred and twenty-two.’

In Opinion No. 592, p. 1805, year 1912, at page 1806, it was decided that a municipality could legally borrow money and issue notes in anticipation of the collection of charges for sewer and water connections authorized by Sec. 3812-1, G. C., for the reason that such charges are special assessments.

The city of ----- finances the cost of installing water connections

which are not installed by property owners, as authorized by Sec. 3812-1 G. C., by issuing and selling notes in anticipation of the collection of such charges by the county treasurer. A special water connection fund has been established, and the proceeds of the sale of such notes, together with accrued interest received, is paid into such fund, and the cost of installing connections is paid from such fund. A five per cent penalty is added to the cost together with interest payable on the notes. Such five per cent penalty is included in the principal of the notes and the amount of such penalty is transferred to the municipality's general fund immediately following the receipt of the proceeds of the sale of such notes. Items collected by the county treasurer are paid over to the municipality, deposited in the water connection fund and used to pay the notes and interest.

House Bill No. 80, 112 O. L., 391, and House Bill No. 426, 113 O. L., govern the disposal of moneys collected by taxing districts, the funds to be established, transfers, etc.

Question 1. May the five per cent penalty referred to be included in the principal of the notes issued?

Question 2. May the amount of such five per cent penalty be transferred to the general fund when collected?"

Opinion No. 592, rendered in the year 1912, holds, as you state, that a municipality may issue notes for the payment of the cost of work done by the city in making sewer and water connections upon failure of the property owners to make such connections after having been notified pursuant to the provisions of Section 3812-1, *supra*. I concur in the conclusions of the then Attorney General as set forth in this opinion. There is no reference made therein to the matter of including the five per cent penalty as a portion of the cost of the work done by the city for which notes may be issued.

Section 2293-24, General Code, being part of the Uniform Bond Act, as amended by the 88th General Assembly, is the section authorizing the issuance of notes in anticipation of the levy of special assessments. It is therein provided that notes issued in anticipation of the levy of special assessments "shall not exceed in amount that portion of the estimated cost of the improvement or service for which the assessment is levied." This limitation, confining the amount of notes that may be issued to the estimated cost of an improvement or the portion thereof for which the assessment is levied, is pertinent to a determination of your first question. In order that the five per cent penalty authorized by Section 3812-1, *supra*, may be included in the principal of notes issued in anticipation of the levy of assessments for sewer and water connections, it becomes necessary to say that this penalty is a part of the estimated cost of the improvement. Such a contention is, in my opinion, clearly untenable.

Section 3812-1, *supra*, provides that the city may assess the cost of such connections, together with a penalty of five per cent and further that "said assessments shall be certified and collected as other assessments for street improvements." The mere fact that this five per cent penalty shall be assessed, certified and collected as assessments for street improvements is not sufficient to constitute this penalty an assessment for a street improvement. It is clearly not such an assessment, but is solely a penalty notwithstanding the manner in which it may be collected. It is well established that the basic right to levy a special assessment against property must rest upon the fact that such property has derived a special benefit from the improvement different from the general benefit accruing to all other citizens. It must be further borne in mind that Section 3812, General Code, specifically limits the right to assess benefited property to the cost and expense connected with the improvement. A penalty is not a part of the cost of the improvement nor is it an expense connected with it. It follows that, although Section 3812-1 provides that this penalty, together with the cost

of the connections, shall be assessed, the penalty itself is not a part of the assessment levied to pay the cost of the connections, and although collected as the assessment is collected, it is not an assessment as the term is used in Sections 3812, et seq., General Code. This penalty may not, therefore, be included in the principal of notes so issued.

Coming now to your second question, Section 5625-10, General Code, provides in part as follows:

"All revenue derived from the general levy for current expense within the fifteen mill limitation; from any general levy for current expense authorized by vote outside of the fifteen mill limitation; and from sources other than the general property tax, unless the law prescribes its use for a particular purpose, shall be paid into the general fund.

\* \* \* ."

This penalty, being revenue derived from a source other than the general property tax, should, under this section, be paid into the general fund unless the law prescribes its use for a particular purpose. Section 3812-1, supra, contains no provision as to the purpose for which this penalty should be used. Section 5625-10 provides that proceeds from the sale of a note issue shall be paid into a special fund for the purpose of such issue. The penalty under consideration not being included in the amount of notes issued to pay the cost of sewer and water connections, should not, of course, be paid into the note fund. Section 5625-11, General Code, as amended by the 88th General Assembly, 113 O. L., 673, provides as follows:

"In addition to the funds provided for by Sections 5625-9 and 5625-12 of the General Code, the taxing authority of a subdivision may establish, with the approval of the bureau, such other funds as may be necessary and desirable, and may provide by ordinance or resolution that moneys derived from specified sources other than the general property tax shall be paid directly into such funds."

In the event a municipality should find it necessary and desirable to establish a special fund into which shall be paid these penalties, under this section, this could probably be done with your approval. You do not, however, make any reference to this having been done, so I assume that this section has no bearing upon the facts submitted. It follows, therefore, that this money should be paid into the general fund, the law not having prescribed its use for a particular purpose.

Specifically answering your questions, I am of the opinion that:

1. In the event a municipality constructs sewer and water connections under the provisions of Section 3812-1, General Code, and issues notes in anticipation of the levy of assessments to pay the cost of such connections, the penalty authorized by this section may not be included in the amount of notes so issued.

2. Such penalty, when collected, should be paid into the general fund.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*