

each probate court of the several counties of the state appoint a commissioner of insolvents. By the terms of Section 11180, General Code, when the office of commissioner of insolvents is vacant, the duties of commissioner temporarily shall be discharged by a master commissioner.

Respectfully,
 EDWARD C. TURNER,
Attorney General.

2381.

MUNICIPALITY—WATER REVENUE—SURPLUS FUNDS MAY BE APPLIED TO CONSTRUCTION OF PORTION OF MUNICIPAL OFFICE BUILDING OCCUPIED BY WATERWORKS.

SYLLABUS:

A municipality may, by proper legislation, use surplus water revenues for the purpose of constructing that portion of a city office building to be dedicated and used for water works office purposes.

COLUMBUS, OHIO, July 23, 1928.

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

GENTLEMEN:—I am in receipt of your inquiry, as follows:

"In the case of *Cincinnati vs. Foettinger*, 105 O. S. 145, it was decided that the use of water works funds was limited to the purposes specified in Section 3959, General Code.

The syllabus of Opinion No. 3866, to be found at page 1109 of Opinions for 1922, reads:

'Under the provisions of Sections 3958 and 3713, G. C., the water works department of a municipality may enter into an agreement with the city, to pay rental for office space occupied by said department in a public building under the control of the city.'

Question: May water works funds be used to pay a portion of the cost of constructing a city office building to house all departments, including the water works office?"

Sections 3958 and 3959, General Code, read as follows:

Section 3958. "For the purpose of paying the expenses of conducting and managing the water works, 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. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessments therefor are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes."

Section 3959. "After paying the expenses of conducting and managing the water works, any surplus therefrom may be applied to the repairs,

enlargement or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. The amount authorized to be levied and assessed for water works purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction and extension of water works and for no other purpose whatever."

In the case of *Cincinnati vs. Roettinger*, 105 O. S. 145, the Supreme Court held that Section 3959, General Code, is constitutional, the first branch of the syllabus of that case reading:

"Section 3959, General Code, is constitutional and operates as a valid limitation upon the uses and purposes for which revenues derived from municipally owned water works may be applied. By virtue of the provisions of that section, surplus revenues derived from water rents may be applied only to repairs, enlargement or extension of the works, or of the reservoirs, and to the payment of the interest of any loan made for their construction, or for the creation of a sinking fund for the liquidation of the debt."

The limitations contained in Section 3959, *supra*, do not preclude the payment of a rental for necessary office space in a municipal office building, for use of the water works department, from the amount authorized to be levied and assessed for water works purposes. Such rental may be considered a part of "the expenses of conducting and managing the water works", and not a part of the "surplus revenues", as the term is used in the statute.

In accord with the Attorney General's opinion of 1922, referred to in your inquiry, I am of the opinion that such rental may be charged against the water works funds of the municipality and credited to the general fund of the municipality, if the water works department occupies office space in the city hall, or in a municipal office building owned and maintained by the municipality.

The authority to pay rent for office space, either to another municipal department or to third parties, or the authority to build quarters for office space, in the first instance, as a part of the necessary "expenses of conducting and managing the water works" would, in my opinion, extend to joining with either another municipal department or with third parties in the construction of a building for office purposes.

Although the management and control of both a municipal office building and the water works department of the municipality are vested, in non-charter cities, in the Director of Public Service, yet the upkeep, repair and running expenses of the city building are paid from general revenues, while that of the water works are paid from water works funds.

It becomes pertinent to inquire whether or not the building of office quarters or the joining with the municipality, as such, in the erection of a city hall, to the extent of necessary office space for the water works department, would be such an use as would come within the clause "repairs, enlargement or extension of the works, or of the reservoirs", as the same is used in Section 3959, *supra*. If the providing of office space for the use of the water works department can be said to be a "repair, enlargement or extension of the works, or of the reservoirs", then clearly surplus revenues derived from water rents may be used for that purpose.

Office space is without a doubt a necessary and proper part of a municipal water department. Rents must be collected and records kept and suitable quarters usually spoken of as an office should be provided for that purpose. Such an office could not, of course, be classed as a repair and could hardly be said to be an enlargement, but, it does, in my opinion, come within the expression "extension of the works". I attach

no particular significance to the fact that the word "works" is used in the statute in the place of plant or department. The entire department is commonly spoken of as the water works. The term "water works" is used as descriptive of the system of water distribution including all things necessary for such distribution, and has been so used in all the legislation on the subject from the earliest times. Reservoirs from which the supply of water is obtained, on the other hand, are not generally considered or spoken of as a part of the water works and this distinction is made in Section 3959, General Code, wherein is used the expression "extension of the works or of the reservoirs".

Necessary office space is, in my opinion, as much a part of the "works" as the engines, pumps, water-mains and other equipment necessary for the maintenance of the distribution system, and it seems fairly clear, for that reason, that office space required for water works purposes may be constructed as "extension of the works" from the proceeds of surplus revenues derived from municipally owned water works. That is to say, I have no difficulty in reaching the conclusion that office work is a necessary incident of the operation of a water works and, hence, these surplus funds may be used for the construction of a separate building and likewise, as stated before, suitable space may be rented for office purposes, in which case such expenditure would constitute a proper operating charge and the provisions of Section 3959, *supra*, would have no application.

The only difficulty presented by your inquiry is the fact that, in the present instance, instead of the construction of separate buildings, the municipality contemplates the erection of one municipal building only, a part of which is to be used for water works purposes and for the construction of this part it is sought to use surplus water revenues. The contract will, of course, be let as a whole and the amount of the water funds to be used for this purpose will, I take it, be appropriated for the purpose of the contract. Upon completion the building will, of course, be operated as a municipal structure and the question resolves itself into whether or not this comingling of funds would be violative of the provisions of the Code, heretofore quoted.

It must be borne in mind that we are not here confronted with the constitutional objection often raised as to the right of municipalities to go into partnership with private individuals or corporations. That was the question before the court in the case of *Alter vs. Cincinnati*, 56 O. S. 47, of which the first and second branches of the syllabus are as follows:

"1. Under section six of article eight of the constitution, a city is prohibited from raising money for, or loaning its credit to, or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constitutes but one property.

2. A city must be the sole proprietor of property in which it invests its public funds, and it cannot unite its property with the property of individuals or corporations, so that when united, both together form one property."

In this instance no private interests are involved. The municipality is dealing purely with municipal funds and the difficulty arises solely from the fact that the Legislature has, in the enactment of Section 3959, *supra*, impressed a trust upon the surplus revenues of the water works by limiting their use to certain purposes. Consequently our question is whether or not the use of the funds for the purpose herein questioned constitutes a violation of such trust.

I am assuming that the proposed use of surplus revenues will be strictly limited to so much as is necessary to construct that portion of the building to be used for water works purposes. Clearly the municipality could not under any circumstances devote these surplus revenues to the construction of necessary facilities for other departments of the municipal government. This rule is settled by the case of *Cincinnati vs. Roettinger*,

supra. With this in mind is it possible in any way to carry out lawfully the proposed plan? From what I have heretofore stated, it seems clear that this office space might be provided either by lease or by construction of a separate building. If it may be created by lease, it may, of course, be created by a ninety-nine year lease or, perhaps, the purchase of a portion of a building. We have many instances in modern practice of the ownership in fee of different portions of the same building. Likewise it is common practice for ninety-nine year leases to be executed upon certain floors of a building so that a permanent interest is vested, although the fee to the land itself may be elsewhere. I see no reason to conclude that office space for water works purposes cannot be similarly acquired. Accordingly, if a municipality may properly expend surplus water works revenues for the acquisition of a ninety-nine year lease for office space or the purchase of the fee of a portion of a building when properly safeguarded in the instruments pertaining thereto, I see no reason why, prior to the construction of a building a similar arrangement cannot be made whereby the same result is accomplished.

If, for example, a private individual were contemplating the erection of a building and the city should agree to pay a certain sum toward the construction of that building, coupled with the annual rental, and thereby acquire suitable office space for water works purposes, I think it would be legal. If this may be done with a private individual, it follows that the municipality itself may, by proper legislation, accomplish the same result. Of course, in this instance there can scarcely be any relationship of lessor and lessee or seller and purchaser, since the city is the only party involved. It is, however, a well recognized rule of the law of trusts that an individual may, by proper action, make and declare himself a trustee with respect to certain property and so bind himself with respect to the use of that property that the courts will enforce the trust for the benefit of the *cestui que trust*. A municipality may similarly become a trustee by definite formal action. In this instance the Legislature has already made the municipality a quasi trustee with respect to the surplus water revenues. The provision of adequate office space for water works purposes is, in my opinion, no violation of the duties of the municipality as such trustee. If, in order to make such provision, the municipality, in the exercise of a reasonable discretion, determines that the most advantageous course to pursue is to include such office space in the municipal building, in my opinion it may be done. In the appropriation of the moneys of the surplus water revenues for this purpose appropriate language should be used indicating that a certain definite portion of the proposed structure is set aside and dedicated for use for water works purposes and such dedication, by formal action of council, would constitute a declaration of trust so that the municipality would hold such office space in trust for water works purposes, which trust would be enforceable by the courts if violated.

I shall not attempt to go into detail in outlining the proposed legislation, but deem it sufficient to say that any definite formal action on the part of council devoting that portion of the building to be constructed from water works funds for water works purposes would be sufficient. Of course, in the event of the subsequent disposition of the building an equitable distribution of the proceeds would have to be made and the water works fund reimbursed to the extent of its fair proportion.

In conclusion, and by way of specific answer to your inquiry, I am of the opinion that a municipality may, by proper legislation, use surplus water revenues for the purpose of constructing that portion of a city office building to be dedicated to and used for water works office purposes.

Respectfully,
EDWARD C. TURNER,
Attorney General.