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1. BONDS—ISSUED AND SOLD BY MUNICIPALITY FOR WATERWORKS EXTENSION—OPTIONS FOR PURCHASE OF LANDS—CITY AUDITOR WITHOUT AUTHORITY TO MAKE EXPENDITURE FROM FUNDS REALIZED FROM SALE OF BONDS UNTIL AUTHORIZED BY ORDINANCE OR RESOLUTION OF COUNCIL—SECTION 5625-33 G. C.
2. SINKING FUND TRUSTEES OF CITY—MEMBER WHO PROCURES OPTIONS FROM OWNERS OF LAND TO BE SOLD TO CITY—RECEIVED COMMISSION ON SALE PRICE OF LANDS—INTEREST IN EXPENDITURE OF MONEY—SECTIONS 3808, 12910 G. C.

SYLLABUS:

1. Where bonds have been issued and sold by a municipality for the purpose of waterworks extension, and options have been received for the purchase of lands needed therefor, the auditor is without authority to make any expenditure from the fund realized from the sale of such bonds for the purchase of such lands, until first authorized by ordinance or resolution of council, as provided by Section 5625-33, General Code.

2. A member of the board of sinking fund trustees of a city who procures options from the owners of lands proposed to be sold to such city, by the terms of which he is to receive and does receive a commission on the sale price of such lands, is amenable to the provisions of Sections 3808 and 12910 of the General Code.

Columbus, Ohio, April 27, 1948

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your communication, reading in part as follows:

"We are enclosing herewith a letter received from our state examiner in charge of the current examination of the city of 'X' accounts, together with photostat copies of certain options to purchase real estate for waterworks purposes, and sworn statements of city officials pertaining to the manner in which such purchases were authorized.

"It will be noted from the accompanying data that the records of council are silent with reference to any specific action to acquire such real estate either by purchase, appropriation or otherwise. The records show council passed Ordinance No. 1—1946, authorizing the employment of A. L., Consulting Engineer, to make a preliminary survey and report on waterworks improvements under consideration. A contract was executed in writing between the city of 'X' and said A. L., Engineer, under date of February 11, 1946.

"As a result of said engineering survey, the purchase of certain tracts of land was recommended as the site for a new well field. Council authorized the issuance and sale of Waterworks Mortgage Bonds pursuant to provisions of Section 12, Article XVIII, of the Ohio Constitution, for the purpose of paying the cost of such waterworks improvements."

There follows a summary of the options taken by said city on certain parcels of real estate with the privilege to drill test wells thereon and purchase same within a six months period of time. These options are for several separate tracts owned by different owners. The total purchase price called for by these options amounted to something over \$197,000. Your letter further proceeds as follows:

"It will be noted that said options were negotiated by the J. M. Company, a realty firm owned and operated by Mr. J. M., who was at the time said options were prepared and real estate purchased a member of the Board of Sinking Fund Trustees, of the city of 'X', and said Mr. J. M. received commissions from the sellers of such real estate in the amount of \$11,929.94.

"A careful scrutiny of the records of council failed to disclose any evidence that council has taken official action in author-

izing either the acceptance of the aforesaid options, or the purchase and acquisition of the parcels of real estate listed therein.

“In connection therewith, attention is directed to the provisions of Section 5625-33, G. C., which reads in part:

‘No subdivision or taxing unit shall: (a) Make any appropriation of money except as provided in this act; provided that the authorization of a bond issue shall be deemed to be an appropriation of the proceeds of the same for the purpose for which such bonds were issued, but no expenditure shall be made from any bond fund until first authorized by the taxing authority.’

“Warrants were issued by the city auditor against the waterworks Bond Improvement fund, for the purchase of the several parcels of real estate described in the attached option agreements, without formal action of council authorizing their issuance, or determining the amount to be paid in each case respectively for the various parcels of land.

“Will you kindly examine the enclosures, and give us your opinion in answer to the following questions:

“1. In the absence of any legislation of council fixing the price to be paid and authorizing the execution of a contract or option to purchase real estate to be used as a site for a new well field for the municipal waterworks, was the action of the city auditor in issuing his warrants on the waterworks Bond Improvement Fund in payment of the purchase price, purported to have been agreed upon between the city and sellers of the real estate, a legal expenditure of public funds?

“2. Is it lawful for a member of the Board of Sinking Fund Trustees of a city to represent the sellers of such real estate, by means of an exclusive option, in the sale of such real estate to the city with which he is connected, and thereby receive a commission from the sellers, and, indirectly, from the city for such services, in the amount of 6% of the purchase price?

“3. Does the action of such member of the Board of Sinking Fund Trustees contravene the provisions of Sections 3808 and 12910 of the General Code?”

Your statement of facts raises two distinct questions, one as to the conduct of the auditor in issuing warrants for the purchase of the several tracts described in the option agreements, and the other as to the action of Mr. J. M. in procuring such options and in receiving the commission on the sales of said property to the city.

(1) In reference to the action of the auditor in issuing the warrants, I note the provisions of Section 5625-33, General Code, which you have quoted in part. This section is a part of the uniform tax law contained in Section 5625 et seq. of the General Code, which governs the levying and expenditure of taxes by all political subdivisions, including counties, school districts (except county school districts), municipal corporations and townships. The pertinent portion of Section 5625-33 reads as follows:

“No subdivision or taxing unit shall:

“(a) Make any appropriation of money except as provided in this act; provided that the authorization of a bond issue shall be deemed to be an appropriation of the proceeds of the same for the purpose for which such bonds were issued, but *no expenditure* shall be made from any bond fund *until first authorized* by the taxing authority.” (Emphasis added.)

It is provided in paragraph (b) of that same section that it is unlawful for any subdivision or taxing unit to make any expenditure of money unless it has been appropriated as provided in this act. This provision would appear to relate directly to the appropriations for the ordinary running expenses of a municipality or other subdivision and to the appropriation of special funds levied and collected for special purposes. The provision in paragraph (a) is that the authorization of a bond issue shall be deemed an appropriation of the proceeds of the same for the purposes for which said bonds are issued. That, I take it, merely means that the authorization of such bond issue operates in itself to set aside the proceeds of the bonds when received for the general purposes for which they were issued. The appropriation here referred to, does not carry with it any blanket authority to any officer to spend such money at such times and in such amounts as he chooses without specific authorization from the council. The next sentence makes it very clear that no expenditure from this fund so appropriated shall be made until first authorized by the taxing authority. The taxing authority under the definition contained in Section 5625, General Code, is, in the case of a municipal corporation, the council. The use of the word “but” adds strength to the conclusion that the authorization of the bond issue, in so far as it amounted to an appropriation could have no effect to authorize the actual expenditure of the money unless and until the council should see fit to authorize specific expenditures.

When these options were taken, they amounted to nothing except an offer by the owner to sell his land for a stipulated price. That price might and might not in the judgment of the council be a reasonable price. Council might consider it wholly unreasonable. Until accepted by council, it did not amount to a contract. If the period of the option expired without acceptance by the council it ceased to exist as an offer. It appears from your letter and from the sworn statements of the clerk of council, the auditor and the city solicitor that no action whatever was taken by the council accepting any of these options or authorizing any payment out of the bond fund in question. However, the auditor drew his warrants to the several landowners in the amount of their respective options, and they were issued and paid. The auditor also states that the city solicitor was present when he made out the warrants and approved his action in issuing them.

In the light of these facts, it appears to me that there was a complete disregard of the plain provisions of the statute, which provides that "no expenditure shall be made from any bond fund until first authorized by the taxing authority." The manifest purpose and effect of this provision was to leave the control of the city's purse strings in the hands of the city council.

The statement of the city solicitor is in full accord with that of the auditor. He states that he was and still is of the opinion that the bond ordinance was sufficient authority for the purchase of the land for the well fields and that no other legislation was necessary. He further states that council was well aware of the purchase, that much discussion on the subject had been had, and that council was in agreement as to price, but he admits that no legislation authorizing these expenditures was passed.

The fact that the members of council may have been in agreement on this subject, would not supply the want of action on their part. A municipal council or other public body can act only by a formal proceeding by way of resolution or ordinance duly passed and entered on its minutes; Section 4224, General Code. This section expressly provides that in the purchase of property the ordinance or resolution must be read on three different days, unless such rule be dispensed with by a three-fourths vote of all the members elected to the council.

(2) As to the action of the member of the sinking fund commission in procuring these options and accepting a commission on the sale of the

property to the city, I call attention to Section 3808 of the General Code, which reads as follows:

“No member of the council or of any board and no officer or commissioner of the municipal corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation.”

Inasmuch as your inquiry also suggests the application of Section 12910, General Code, I quote its provisions, as follows:

“Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.”

There can be no question but that a member of the board of trustees of the sinking fund is an officer within the contemplation of both of the sections above quoted. He is appointed pursuant to Section 4507, General Code. This section provides in part, as follows:

“In cities, such board shall consist of four citizens of such city, who shall be electors thereof, well known for their intelligence and integrity, to be appointed by the mayor, for one, two, three and four years respectively, and their successors shall be appointed for four years from the expiration of their respective terms.”

The statutes which follow impose upon this board important duties involving great responsibility and while the office is one that carries no compensation, it is nevertheless an office of trust of very high degree. It appears from the sworn statements attached to your letter that this officer was the active agent for the landowners in procuring the options and that when the warrants were made out, he requested the city auditor to pay him direct for his commissions but on the advice of the city solicitor the auditor made the warrants to the sellers, leaving Mr. J. M. to collect his commissions from them. The warrants, however, were delivered to him for the sellers.

I can hardly imagine a course of procedure that would be more flagrantly in disregard of the provisions of Sections 3808 and 12910 supra,

than that above set forth. It does not seem necessary to discuss at length the adjudicated cases and numerous opinions of this office in which acts much less objectionable were held to be in violation of the statutes prohibiting public officers from having a personal financial interest in public contracts and transactions. Among others may be noticed, *Doll v. State*, 45 O. S., 445; *In Re Leach*, 19 O. O., 263; 1927 Opinions of the Attorney General, p. 1326; 1939 Opinions of the Attorney General, p. 438. The *Doll* case was a criminal prosecution wherein a member of the board of public works of Cincinnati was interested in the sale of property to that city. It was held:

“To become so interested in the contract, it is not necessary that he make profits on the same. But it is sufficient, if *while acting as such officer, he sell the property* to the city for its use, *or is personally interested in the proceeds* of the contract of sale, *and receives* the same or part thereof, *or has some pecuniary interest* or share in the contract.” (Emphasis added.)

The court in its opinion laid down the principle on which such statutes rest, in the following language:

“To permit those holding offices of trust or profit to become interested in contracts for the purchase of property for the use of the state, county, or municipality of which they are officers, might encourage favoritism, and fraudulent combinations and practices, not easily detected, and thus make such officers, charged with the duty of protecting those whose interests are confided to them, instruments of harm. The surest means of preventing this, was to prohibit all such contracts; and the legislature having employed language sufficiently clear and comprehensive for this purpose, there is no authority in the courts under the pretext of construction to render nugatory the positive provisions of the statute.”

Accordingly, in specific answer to your questions, it is my opinion:

1. Where bonds have been issued and sold by a municipality for the purpose of waterworks extension, and options have been received for the purchase of lands needed therefor, the auditor is without authority to make any expenditure from the fund realized from the sale of such bonds for the purchase of such lands, until first authorized by ordinance or resolution of council, as provided by Section 5625-33, General Code.

2. A member of the board of sinking fund trustees of a city who procures options from the owners of lands proposed to be sold to such city,

by the terms of which he is to receive and does receive a commission on the sale price of such lands, is amenable to the provisions of Sections 3808 and 12910 of the General Code.

Respectfully,

HUGH S. JENKINS,
Attorney General.