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1. WATER MAIN — MUNICIPALITY BY RESOLUTION GRANTED TO PERSON OR PUBLIC BODY PERMIT TO LAY WATER MAIN TO CONNECT WITH MAINS OF MUNICIPALITY AND EXTEND INTO OUTLYING TERRITORY THROUGH PUBLIC HIGHWAYS—LINE CONSTRUCTED AT EXPENSE OF PERSON OR PUBLIC AUTHORITY — MUNICIPALITY AUTHORIZED AND REQUIRED TO FURNISH WATER FROM MAIN, TO EXTENT OF CAPACITY, TO RESIDENTS AND PROPERTY HOLDERS ON LINE—NO CONSENT NEED BE OBTAINED OF PERSON OR PUBLIC AUTHORITY WHICH LAID THE MAIN—SECTION 3967 G. C.
2. PERSON, NATURAL OR ARTIFICIAL, WHO LAID AT HIS OR ITS OWN EXPENSE A WATER MAIN FROM MAINS OF MUNICIPALITY, EXTENDING INTO TERRITORY OUTSIDE OF MUNICIPAL BOUNDARIES—NO AUTHORITY TO PERMIT TAPS OF LINE OR GIVE AWAY OR SELL WATER FROM EXTENDED MAIN.

## SYLLABUS:

1. When a municipality has by resolution complying fully with the provisions of Section 3967, General Code, granted to any person or to a public body, permission to lay a water main connecting with the mains of the municipality and extending into outlying territory through public highways, and such line has been so constructed, at the expense of such person or public authority, the municipality is authorized and required by the provisions of Section 3967 of the General Code, to furnish water from such main, to the extent of its capacity, to the residents and property holders on the line thereof, and no consent of the person or public authority which has laid the same need be obtained.

2. A person, whether natural or artificial, who, pursuant to Section 3967, General Code, has laid at his or its own expense, a water main from the mains of a municipality and extending into territory outside the municipal boundaries, is without authority to permit taps of such water line by other persons, or to give away or sell water from such extended main.

Columbus, Ohio, April 3, 1951

Hon. S. O. Linzell, Director  
Department of Public Works, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“Sometime ago, the Department of Public Welfare through this department constructed an 8 inch water line, extending from the water mains within the limits of the city of Mansfield to the Ohio State Reformatory. This line provides for stand-by service for the institution whenever extra water is needed or required.

“The city of Mansfield has received many requests from the adjacent property owners for permission to tap into this line and to be supplied with a meter in conformance with city regulations. This department, together with the Department of Public Welfare, has been requested by said city to give consideration to these requests.

“This department had somewhat of a parallel case with a water line built from the water mains of the city of Cleveland to the Hawthornden State Hospital in Cuyahoga county. At that time, representatives of this office conferred with your predecessor in office, and were advised that we are without legal authority to permit the withdrawal of water for private use from a line so constructed. Further, that the water could not be given away, nor could we permit metered taps, or in any way sell the water, since we would then be entering into competition with private business.

“Would you kindly render this department your formal opinion as to what our authority may be in this matter.

“For your reference, we are enclosing herewith correspondence and other papers pertaining to this matter.”

The following sections of the General Code seem to me to be pertinent to the questions you raise:

Section 3966: “On the written request of any number of citizens living outside of the limits of a municipal corporation, the corporation may extend, construct, lay down and maintain aqueduct and water pipes, and electric light and power lines outside the corporate limits, and for such purpose may make use of such of the public streets, roads, alleys and public grounds as may be necessary therefor, provided however aqueduct and water pipes shall not extend more than five miles beyond the corporate limits.”

Section 3967: “When a person or persons at his or their expense have laid down and extended mains and water pipes or electric light and power lines beyond the limits of a municipal corporation, and the corporation by resolution of the council, has authorized the proper officer of the water works to superintend or supervise the laying and extension of such mains and water pipes or electric light and power lines the corporation shall furnish water or electricity to the residents and property holders on the line of such mains and water pipes or electric light and power lines subject to the same rules and regulations that it furnishes water or electricity 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: “All ordinances, except those relative to taxation or assessment, resolutions, rules and regulations relative to the construction, maintenance and operation of water works, mains, hydrants, service pipes and connections, and the protection thereof, shall operate in like manner in the territory outside the municipality when such extensions have been made, and for the enforcement thereof the jurisdiction of the mayor and police shall extend into and over such territory.”

Section 3969: “The corporation shall take full charge and control of such mains and water pipes, keep them in repair at its own expense, and, in case of annexation to the corporation of such territory, the corporation shall pay to such person or persons a just compensation therefor and shall thereupon become the owner of them.”

These statutes have their beginning in Acts of the General Assembly as early as 1869, 66 O. L. 207. The provisions of Section 3967, *supra*, were added in 1893, 90 O. L. 35. These sections originally related only

to water mains. The last amendment, in 109 O. L. 37 added electric and power lines to the provisions of Sections 3966 and 3967. It will thus be seen that these statutes represent a long established policy of the state.

I understand from your letter that the water line therein mentioned, extending from the water mains within the city of Mansfield to the Ohio State Reformatory, was laid by your department in the public highway at the expense of the state; I have before me the resolution of the council of the city of Mansfield granting permission for the laying of such line, which resolution complies fully with the requirements of said Section 3967. The transaction, therefore, appears to fall clearly within the provisions of Section 3967, General Code, which I have above quoted, and the rights and duties of both parties are to be governed by that section and the other related section.

There is no ambiguity in the language of Section 3967 supra. The grant by the municipality of permission to lay such a main and connect the same with its water system appears to carry with it the condition that the municipality shall have the right to use such water main for furnishing water to the residents and property holders on the line thereof. Indeed, the statute goes farther than to give the municipality the right—it really imposes the duty so to do. I assume that we may recognize limitations of necessity on the service to be furnished to the extent that it would be only such as the capacity of the main would make possible. There is also the express limitation in Section 6 of Article XVIII of the Constitution, restricting the portion of the product of any municipally owned utility which may be sold to other than the inhabitants thereof to 50% of the total product.

While the provisions of Section 3967 refer to water mains extending beyond the municipal limits which have been laid by a "person or persons", I see no reason why they should not apply equally to a main which as in this case, was laid by the state.

I do not consider that we need be too greatly concerned whether the word "person" used in the statutes above referred to, include the state. There are a great many decisions holding that the word "person" in certain statutes does include the state, and likewise a great many holding the contrary. An attempt to analyze these many decisions would unnecessarily prolong this opinion and would probably not result in a clearly defined rule. However, it seems to me that in a statute such as the one we have

before us, there is no impropriety in including the state in the word "person". We are not here seeking to impose any obligation on the state or in any way to restrict its rights. Rather, the question is as to the right and duty of a municipality to furnish water from the main outside its limits, the expense of which water main has not been borne by the municipality but has been paid from some other source. The case of *West Coast Manufacturing Company v. West Coast Importing Company*, 25 Wash. 627, 62 L. R. A. 763, seems to be illustrative of the principle upon which we rely. There it was held:

"The state is within the terms of a warranty of the title to real estate against 'all persons whatsoever.'"

There, as here, there was no burden or penalty sought to be placed upon the state.

Your inquiry appears to raise the question of the power of your department to grant permission for the use of this main for supplying water to adjoining property owners along the line. It appears to me that the statutes quoted, particularly Section 3967 supra, confer the powers mentioned upon the municipality, which powers are to be exercised without any reference to the consent of the person or persons who have laid the main. It would appear that in accepting the privilege of so extending the water main, the person or persons doing so have in a sense dedicated it to public use to the extent indicated in the statute quoted, leaving themselves no right in the matter except to be reimbursed in case the territory is afterwards taken into the municipality by annexation.

I do not find in the statutes outlining the powers of your department any express authority to grant a permit for the use of this main, and in my judgment the question of your power and authority is not involved. The authority seems to be vested by law in the municipality, and it would appear that any person or even the state, in securing permission to build a main from the city to outlying territory, would do so subject to the burden which the law imposes and subject to the duty of the municipality to furnish water to the residents and property owners on the line of such main.

Accordingly, it is my conclusion and you are advised that the City of Mansfield is authorized under the terms of Section 3967 of the General Code, to permit property owners adjacent to the water line which your department has constructed for the Department of Public Welfare extend-

ing from the water mains within the limits of the city to the Ohio State Reformatory, to tap such water line, and is authorized to furnish water to such property owners and residents, and that no consent or permission from your department is required for such use.

Your letter raises the further question as to your authority to give away or sell water from the main in question. I am of the opinion that you have no such authority. The terms of Section 3967, General Code, which I have discussed clearly place the right to use surplus water from the main in the city, to the exclusion of any such right in the person who has installed it. The provisions of Section 3969 supra, add weight to that conclusion. The corporation is to take "full charge and control" of such water mains and "keep them in repair at its own expense." "Full control" clearly negatives any idea that the state through any of its agencies could have any right to use or dispose of the water that flows through the main, except for the primary purpose for which it was installed.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General