

3066.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS CHIEF, BUREAU OF PLUMBING INSPECTION—ASA A. MANCHESTER.

COLUMBUS, OHIO, March 19, 1931.

HON. H. G. SOUTHARD, *Director of Health, Columbus, Ohio.*

DEAR SIR:—You have submitted a bond in the penal sum of \$5,000.00, with surety as indicated, to cover the faithful performance of the duties of the official named below:

Asa A. Manchester—Chief, Bureau of Plumbing Inspection—The Fidelity and Casualty Company of New York.

Finding said bonds to have been properly executed, I have accordingly approved the same as to form, and return it herewith.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

3067.

PUBLIC UTILITY—OPERATION BY CITY—ISSUANCE OF REVENUE BONDS—EFFECT OF PROPOSED BILL BEFORE LEGISLATURE—CONSTITUTIONALITY DISCUSSED.

SYLLABUS:

*Constitutionality of House Bill No. 439 discussed.*

COLUMBUS, OHIO, March 19, 1931.

HON. LOUIS NIPPERT, *Chairman, Cities Committee, Ohio House of Representatives, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your request for my opinion as to whether or not House Bill No. 439 attached thereto is violative of the Constitution of the State of Ohio. This bill is entitled:

“A BILL to authorize cities to issue revenue bonds in order to construct or acquire and to improve and extend water works, electric heating, lighting and power plants, and works for the disposal of sewage and garbage and to declare an emergency.”

On account of the length of this bill, comprising 421 lines, I shall for the purposes of this opinion paraphrase a considerable portion thereof.

Section 1. “Every city in the state of Ohio is hereby authorized to issue revenue bonds thereof, as hereinafter provided, to pay the cost of

constructing or acquiring by purchase, and the cost of improving and extending as hereinafter provided, either within or without the corporate limits of such cities or both within and without such corporate limits, any one or more of the following: (a) a plant or plants for the treatment, purification and disposal in a sanitary manner, approved by the state department of health, of the liquid and solid waste, sewage, night soil and/or garbage within such city, together with intercepting sewers, connecting trunk lines, and pumping stations, and (b) water works for the supply of water to such city and its inhabitants for public and domestic uses, and (c) an electric heating, lighting and power system to supply such city and its inhabitants with electrical energy for heat, light and power for public and domestic uses, together with any and all property, franchises, rights and easements necessary or convenient for the operation of any plant, works or system so constructed or acquired (herein sometimes called 'works'). The aggregate face amount of revenue bonds issued by any city for any one of the three foregoing purposes shall not exceed five per cent of the assessed valuation of property in the city as last fixed for taxation prior to the issuance of such bonds. No obligation shall be incurred by any city in such construction or acquisition except such as is payable solely from funds provided under the authority of this act. Every such city, by its legislative authority, shall have power to condemn any land, rights, easements, franchises and other property deemed necessary or convenient for the construction of such works, in the manner provided by law for the condemnation of property for the same or other public uses. Title to the property condemned shall be taken in the name of the city. The city shall be under no obligation to accept and pay for any property condemned and shall in no event pay for the same except from the funds provided by this act, and in any proceedings to condemn, such orders may be made by the court having jurisdiction of the suit, action or proceedings as may be just to the city and to the owners of the property to be condemned, and an undertaking or other security may be required by the court securing such owners against any loss or damage to be sustained by reason of the failure of the city to accept and pay for the property, but such undertaking or security shall impose no liability upon the city except such as may be paid from the funds provided under the authority of this act. The purchase of such works may be made upon such terms and conditions and in such manner as the legislative authority of the city may deem proper, and the legislative authority shall, at or before the time of the adoption of the ordinance described in the second section hereof, cause to be determined what repairs, replacements, additions and betterments will be necessary in order that the works so purchased may be effective for their purpose, and an estimate of the cost of such improvements shall be included in the estimate of cost required by section 2 hereof, and such improvements shall be made upon the acquisition of the works and as a part of the cost thereof, and from the proceeds of the revenue bonds herein authorized."

Section 2 provides that before issuing any bonds under this act the legislative authority of the city shall proceed by ordinance in accordance with the requirements of Article XVIII, Section 5 of the Constitution relating to such procedure.

Section 3 provides that the construction, acquisition, improvement, equipment, operation and maintenance of the works shall be under the supervision and con-

trol of the Director of Public Service, or a board of two persons appointed by the chief executive officer of the city with the approval of the legislative authority and a third member who shall be the chief executive officer, the director of public service, the city engineer, or the city manager. The section contains further provisions for the terms of such appointees, the appointment of persons to fill vacancies, the giving of bond, the organization of the board, certain powers of the board and the compensation of certain members and officers thereof:

Section 4. This section relates to the powers of the board or the director of public service, as the case may be, relative to the execution of contracts to effectuate the purposes of the act and expressly provides that all expenditures in carrying out the provisions of the act "shall be paid solely from funds provided under the authority of this act."

Section 5. "The cost of the works shall be deemed to include the cost of all property, rights, easements and franchises deemed necessary or convenient therefor and for the improvements determined upon as provided in the first section of this act, interest upon bonds prior to and during construction or acquisition and for six months after completion of construction or acquisition of the improvements last mentioned, engineering and legal expenses, plans, specifications and surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of the enterprise, administrative expenses and such other expenses as may be necessary or incident to the financing herein authorized and the construction or acquisition of the works and the placing of the works in operation and the performance of the things herein required or permitted in connection with any thereof."

Section 6. "Nothing in this act contained shall be so construed as to authorize or permit any city to make any contract or to incur any obligation of any kind or nature except such as shall be payable solely from the funds provided by this act. Funds for the payment of the cost of the works shall be provided by the issuance of revenue bonds of the city, the principal and interest of which bonds shall be payable solely from the special fund herein provided for such payment. All the details of such bonds shall be determined by said ordinance or by a subsequent resolution or resolutions to be passed by the legislative authority."

Section 7 limits the rate of interest which these bonds shall bear to a maximum of six per cent per annum, and their maturity to a maximum of thirty years from their date. This section further provides:

"The bonds shall contain a statement on their face that the city shall not be obligated to pay the same or the interest thereon except from the net revenues of the works. All such bonds shall be, and shall have and are hereby declared to have all the qualities and incidents of, negotiable instruments under the negotiable instruments law of the state. Such bonds shall be lawful investments of banks, savings banks, trust companies, trustees and of the trustees of the sinking funds of municipalities and counties, and shall be acceptable as security for the deposits of public moneys in the same manner and to the same extent as other bonds of the city issuing such revenue bonds. Said bonds may be issued beyond the general limit of bonded indebtedness prescribed by law, and shall not be considered in ascertaining the limitation of the net indebtedness created or incurred by the city without a vote of the electors. Provision

may be made for the registration of any of the bonds in the name of the owner as to principal alone. The legislative authority may sell the bonds in such manner and for such price as it may determine to be for the best interests of the city, but not at a price so low as to require the city to pay more than six per cent interest on the amount received therefor, computed with relation to the absolute maturity of the bonds in accordance with standard tables of bond values. It shall not be necessary to offer the bonds for sale to the trustees or commissioners or other officers in charge of the sinking funds of the city, and the bonds may in the discretion of the legislative authority be sold at private sale without advertisement. Any surplus of bond proceeds over and above the cost of the works shall be paid into the sinking fund hereinafter provided. If the proceeds of the bonds, by error of calculation or otherwise, shall be less than the cost of the works, additional bonds may in like manner be issued to provide the amount of such deficit and, unless otherwise provided in said ordinance or in a resolution passed prior to the issuance of the bonds first issued or in the trust indenture hereinafter authorized, shall be deemed to be of the same issue and shall be entitled to payment from the same fund, without preference or priority of the bonds first issued. Prior to the preparation of the definitive bonds the legislative authority may under like restrictions issue temporary bonds with or without coupons, exchanging for definitive bonds upon the issuance of the latter."

Section 8 authorizes the issuance of additional bonds from time to time not exceeding in amount one-third of the bonds issued to pay the cost of the works, for extending or improving the works when deemed necessary, and places limitations upon such additional bonds as to maturities and as to the matter of securing the consent of purchasers of bonds first issued as a condition precedent thereto.

Section 9 provides that the proceeds of bonds issued under this act shall be applied solely to the purposes of the issue.

Section 10. "In the discretion of the legislative authority such bonds may be secured by a trust indenture by and between the city and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or outside of the state, but no such trust indenture shall convey or mortgage the works or any part thereof. Either the ordinance authorizing the revenue bonds or a resolution thereafter passed or such trust indenture may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper, not in violation of law, including covenants setting forth the duties of the city and the board or director in control in relation to the construction and acquisition of the works and the improvement, operation, repair, maintenance and insurance thereof, and the custody, safeguarding and application of all moneys, and may provide that the works shall be contracted for, constructed and paid for under the supervision and approval of consulting engineers employed or designated by the board or director in control and satisfactory to the original purchasers of the bonds issued therefor, their successors, assigns or nominees, who may be given the right to require that the security given by contractors and by any depository of the proceeds of bonds or revenues of the works or other moneys pertaining

thereto be satisfactory to such purchasers, successors, assigns or nominees. Such indenture may set forth the rights and remedies of the bondholders and trustee, restricting the individual right of action of bondholders as is customary in trust indentures securing bonds and debentures of corporations. Except as otherwise provided in this act the legislative authority may provide by ordinance, resolution or such indenture, for the payment of the proceeds of the sale of the bonds and the revenues of the works to such officer, board or depository as it may determine for the custody thereof, and for the method of disbursement thereof, with such safeguards and restrictions as it may determine."

Section 11 defines "net revenues of the works" to which holders of these bonds may look for the payments of the interest and principal thereof as "the revenues of the works remaining after the payment of the reasonable expense of operation, repair and maintenance," and further provides for the payment of net revenues into a sinking fund for the payment of the bonds and the interest thereon.

Section 12. "The board or director in control shall establish just and equitable rates or charges, subject to the laws of the state, for the use by each person, firm or corporation of the services, facilities, or product of the works, including facilities of the sewerage or garbage disposal works through use of the sewerage or garbage system of the city or otherwise, and may change and readjust such rates or charges from time to time; provided, however, that such rates or charges shall be sufficient for the payment of the proper and reasonable expenses or operation, repair and maintenance of the works and for the payment of the sums herein required to be paid into the sinking fund and a reasonable amount for depreciation. Revenues collected pursuant to this section shall be deemed the revenues of the works. If the service charge so established shall not be paid within thirty days after due, the amount thereof together with a penalty of ten per cent and a reasonable attorney's fee may be recovered by the board or director in control in a civil action. All such service charges in arrears for thirty days may, together with a penalty of ten per cent, be assessed against the premises served and added to the tax duplicate, in the same manner as taxes of the city against real estate, and shall be collected and returned in the same manner as delinquent city taxes against real estate, and shall be a lien upon such premises at, and from, the time such taxes become a lien and shall be coordinate with the lien of such taxes.

Section 13. "The city shall be subject to the same charges and rates established as hereinabove provided, or to charges and rates established in harmony therewith, for service rendered the city and shall pay such rates or charges when due and the same shall be deemed to be a part of the revenues of the works as herein defined, and be applied as herein provided for the application of such revenues."

Section 14 authorizes any city operating works as defined in this act to contract with one or more other cities, villages or political subdivisions within this state for the use of a portion of the services of the works authorized to be acquired or constructed by the act.

Section 15. "No property shall be acquired under this act upon which

any lien or other encumbrance shall exist, unless at the time such property is acquired a sufficient sum of money be deposited in trust to pay and redeem such lien or encumbrance in full."

Section 16. "Nothing herein contained shall prevent the issuance of additional bonds from time to time, if such bonds shall be authorized by law, provided, however, that all thereof shall be subordinated to bonds issued pursuant to sections 6 and 8 hereof in respect of the application of revenues to such additional bonds."

Section 17 relates to the rights of the holders of any such bonds or coupons as to compelling the protection of their rights granted in the act and enforcing the performance of all duties required by the act to be performed by the city issuing the bonds, or the board or director or any other officer in control of the works. The section further provides that upon default in the payment of the interest or the principal of the bonds, any court of competent jurisdiction may appoint a receiver to administer the works on behalf of the city and the bond holders and trustees with power to charge sufficient rates to meet the interest and principal requirements of the bonds.

Section 18. "The authority hereby given shall be in addition to and not in derogation of any power existing in any city by virtue of the constitution of the state or under the provisions of any other law or of any charter."

Section 19. "This act shall without reference to any other statute or to any charter, be deemed full authority for the construction, acquisition, maintenance, operation, repair, improvement and extension of the works herein provided for and for the issuance and sale of the bonds of this act authorized and shall be construed as an additional and alternative method therefor, and no petition or election or other or further proceeding in respect of the issuance or sale of bonds under this act and no publication of any resolution, ordinance, notice or proceeding relating to the issuance or sale of such bonds shall be required except such as are prescribed by this act, any provisions of other laws of the state to the contrary, notwithstanding; provided, however, that all functions, powers and duties of the state department of health shall remain unaffected by this act."

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Probably the first question as to the constitutionality of this bill would be predicated upon Article II, Section 26 of the Ohio Constitution, reading as follows:

"All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution."

I think it will be conceded that this is a law of a general nature within the constitutional meaning of the term. It is established, however, that the requirement of uniformity of operation does not prevent reasonable classification. *State, ex rel. v. Creamer*, 85 O. S. 349; *Miller v. Korns*, 107 O. S. 287. In the instant

case, the Constitution itself has fixed the classification of municipal corporations in Article XVIII, Section 1, which is as follows:

“Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.”

I am, therefore, of the view that insofar as the act in question applies only to municipal corporations having a population of five thousand or over, it is not thereby unconstitutional.

Article XVIII of the Constitution contains pertinent reference to the powers of municipalities in connection with the acquisition of public utilities. Before considering this matter, however, it is necessary to determine whether or not a works for the disposal of sewage and garbage is a public utility. There is no question as to waterworks and electric, heating, lighting and power plants being public utilities, since they have been so defined by the legislature in Sections 614-2a and 5415, General Code. In neither of these sections is a sewage and garbage disposal plant so defined. I am of the view, however, that such a plant is in fact a public utility. It is contemplated that it shall be devoted to the public use and that its services shall be available to the public generally and without discrimination. In *Power Co. v. Public Utilities Commission*, 110 O. S. 246, the second branch of the syllabus is as follows:

“To constitute a ‘public utility,’ the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state.”

It is not necessary that a public utility be expressly defined as such by the legislature before it may be so constituted. Landing fields for aircraft are not so defined. They are held to be public utilities in *State ex rel. v. Jackson*, 121 O. S. 186.

Before considering the basic question of whether or not the legislature has the power to authorize cities to issue bonds secured only by the revenue of a utility as distinguished from the property and revenue of a utility, there are several provisions in the proposed act which should be commented upon. Section 12 provides that if the established service charge of any one of these utilities is not paid within thirty days after it is due, the amount together with a penalty or ten percent “and a reasonable attorney’s fee” may be recovered in a civil action. I think there is serious doubt as to the construction which may be placed upon this provision with respect to collecting attorneys’ fees under such circumstances. It is well established in this state that such agreements are contrary to public policy and void. *Miller, et al., v. Kyle, et al.*, 85 O. S. 186.

Sections 8 and 16, limiting the amount of revenue bonds which may be issued from time to time, for extending or enlarging a utility and limiting the application of the revenue of such utility to the payment of bonds subsequently issued with respect to bonds which may have been heretofore issued, raise the question of whether or not in these sections the legislature is seeking to limit or curtail the powers conferred upon municipalities by the so-called Home Rule provisions of the Constitution. The case of *State, ex rel., v. Weiler*, 101 O. S. 123, holds that the legislature is not authorized to annul or curtail the powers expressly

granted by the Constitution. To illustrate, an issue of waterworks revenue bonds for the purpose of constructing a small plant in a rapidly growing municipality may be now authorized in the amount of \$50,000 to mature over a period of thirty years. Due to the growth of such a municipality it may be desirable twenty years from now for the purpose of enlarging such works to issue additional revenue bonds in the amount of \$100,000. Under Section 16, such subsequent issuance of bonds, although for the purpose of constructing an addition larger than the original plant and perhaps increasing the revenue three or four-fold, would be subordinate to the original bonds theretofore issued. If the Constitution authorizes the issuance of revenue bonds for such purposes, such a provision may well be construed as a limitation upon this power conferred by the self-executing provisions of the Constitution.

Coming now to the basic constitutional question involved, Article XVIII, Section 12 of the Constitution provides as follows:

"Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchises on foreclosure."

The foregoing section expressly authorizes municipalities to issue mortgage bonds for the purpose of raising money to acquire, construct or extend any public utility and further provides that such bonds "shall be secured only upon the property and revenue of such public utility." A narrow and strict construction of this language would impel the conclusion that in the event a municipality seeks to acquire a public utility by the means of issuing other than general tax bonds, it may only issue bonds secured by the property and revenues of such utility and that in the event the legislatures were to attempt to authorize the issuance of bonds secured only by the property or the revenue of the utility, such authorization would be violative of this constitutional provision—the language of the Constitution being "property and revenues," and not property or revenues, or both. Such a contention might be substantiated by a consideration of Section 10 of Article XVIII of the Constitution which provides as follows:

"A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

Notwithstanding the provisions of this last quoted section, it is my view that



a conclusion to the effect that the legislature may not authorize the issuance of bonds secured only by the revenues of a public utility must be predicated upon a narrow and strict construction of the language as contained in Section 12, Article XVIII, *supra*.

There are several cases decided by the Ohio Supreme Court which are pertinent to this issue. The second branch of the syllabus in the case of *State, ex rel., Bailey v. George*, 92 O. S. 344, is as follows:

“Statutes passed pursuant to such home-rule amendment should be liberally construed so as to effect the plain purpose of such amendment.”

In the case of *Miami County v. Dayton*, 92 O. S. 215, the court said at p. 223:

“In construing a constitution we apply the same general rules that we do in statutes, save and except that the terms of a constitution must of necessity be of a more general and omnibus character, and, therefore, in order that the grants of power under the constitution shall be workable, such grants should be favorably and liberally construed so as to effect the public welfare sought by the constitutional grant.”

Considering, then, the rules of statutory construction of the words “or” and “and,” it is said in Lewis’ *Sutherland Statutory Construction*, Vol II, p. 756:

“While they (the words ‘or’ and ‘and’) are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context.”

The first branch of the syllabus in the case of *Crawford v. Weidemeyer*, 93 O. S. 461, is as follows:

“That meaning should be ascribed to the language of a constitutional amendment which will not thwart or defeat, but which will accomplish, the purpose of its enactment and adoption, and the context will be examined to ascertain such purpose.”

The obvious purpose of the constitutional provisions as contained in Section 12, Article XVIII, *supra*, is to aid municipalities in acquiring or constructing public utilities by a method of financing which does not compel the municipalities to use their corporate credit for such purposes, thereby burdening the taxpayers and limiting themselves in other general municipal activities which may require the use of that credit. I am, accordingly, inclined to the view that the greater power to issue bonds secured by both the property and the revenues of a public utility includes the lesser power to issue bonds secured by either the property or the revenues of the utility.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*