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1. VILLAGE—BOARD OF TRUSTEES OF PUBLIC AFFAIRS—NOT CREATED— COUNCIL MAY CONTRACT FOR SERVICES OF ENGINEER TO MAKE SURVEY AND PREPARE PLANS FOR UTILITY—WHERE BOARD CREATED, WHEN AUTHORIZED BY COUNCIL, IT HAS A DUTY TO EMPLOY ENGINEER—SECTIONS 3982-2, 4357 G. C.
2. BONDS—MUNICIPAL—SPECIAL ASSESSMENTS—WATER MAINS AND LAYING OF WATER PIPES—GENERAL OBLIGATIONS.
3. NO AUTHORITY FOR MUNICIPALITY TO USE ANY PART OF PROCEEDS FROM SALE OF BONDS, SPECIAL ASSESSMENTS, TO PAY FIRM OR INDIVIDUAL TO PROMOTE SALE OF BONDS.
4. MUNICIPALITY—MORTGAGE REVENUE BONDS—PART OF PROCEEDS, SALE OF BONDS— COMMISSION FOR SALE—LEGAL OPINION OF REPUTABLE FIRM OF BOND ATTORNEYS — PROPER EXPENDITURES — A R T I C L E XVIII, SECTION 12, CONSTITUTION OF OHIO.

## SYLLABUS:

1. In a village which has not created a board of trustees of public affairs as provided by Section 4357, General Code, the council of said village may contract for the services of an engineer to make a survey and prepare plans for a utility, as provided in Section 3982-2, General Code. Where such board has been created, it is the duty of such board, when authorized by the council, to employ such engineer.

2. Bonds issued by a municipality pursuant to Section 2293-24, General Code, in anticipation of the collection of special assessments for paying the cost of water mains and the laying of water pipes, are the full general obligation of the municipality, and for the payment of the principal and interest of the same the full faith, credit and revenues of the municipality are pledged.

3. A municipality is without authority to use any part of the proceeds from the sale of bonds issued in anticipation of the collection of special assessments, in payment of services of a firm or individual in promoting the sale of such bonds.

4. A municipality issuing mortgage revenue bonds pursuant to the authority of Section 12 of Article XVIII of the Ohio Constitution may if it deems it necessary to the most advantageous sale thereof, use a portion of the proceeds of such bonds in payment of a commission for their sale or for procuring and approving legal opinion of a reputable firm of bond attorneys as to the validity of such bonds.

Columbus, Ohio, September 27, 1951

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentleman:

I am in receipt of your request for my opinion, which reads as follows:

"It has come to the attention of the Bureau of Inspection and Supervision of Public Offices, through the examination of village records, that certain engineers and accountants have been employed to perform services for which in part, at least, compensation may not properly be paid from public funds.

"Enclosed herewith is a copy of the memorandum agreement executed between the Village of N. and S., M., M., & W., of Kentucky and Indiana, with the principal offices at Hillsboro, Indiana. Mr. M. is the only engineer member of the above named firm of accountants and engineers who is registered in Ohio.

"Your attention is directed to the following sections and provisions of the aforesaid agreement:

'Sixth: The Village agrees to pay for the approving legal opinion of a reputable firm of bond attorneys which opinion will be required by the purchasers of all of the bonds.'

"(Note: This procedure is in conflict with Opinion No. 701, rendered July 7, 1949.)

'Seventh: \* \* \* In no manner shall this contract create an obligation of the village within the meaning of statutory or constitutional limitations.'

'Eighth: The village agrees to pay \* \* \* (c) two (2) percent of the total of all bonds issued for the preparation of all reports to citizens and the furnishing of the Bond Prospectus to the bond purchasers. The total of this fee to be due when funds are available from bond sale.'

"It will be observed that the aforesaid contract contemplates the issuance and sale of special assessment bonds to partially finance the proposed water works. Also, that two percent of all bonds sold is to be paid the engineer as a fee for assisting in the sale of the bonds for the construction of a water works plant. This last provision is similar to one contained in a contract between said engineers and the Village of M., in which case this office held the payment of a two percent fee for the sale of special assessment bonds to be illegal, and made findings for recovery in the amount so paid.

"Your further attention is directed to the manner in which said contract is executed by the mayor and all members of council, with the village clerk attesting their signatures, which procedure is not in perfect harmony with the provisions of Sections 4221, 4357 and 4361, General Code.

"In view of the fact that the aforesaid engineers have executed contracts similar to the one herewith submitted with several Ohio municipalities, and since there appears to be several items of questionable legality incorporated therein, we respectfully request that you review the contract between the Village of N. and S., M., M., & W., and give us your formal opinion in answer to the following questions:

"1. When council has determined to proceed with the construction of a water works utility, how shall the engineer be employed to prepare plans and supervise such construction work:

"A. Does the village council have the authority to select the engineer and execute a contract for such services?

"B. Or, is it the duty of the board of trustees of public affairs created under Sections 4357 to 4361 of the General Code?

"2. When special assessment bonds are issued to pay for water works improvements, do such bonds become obligations for which the full faith and credit of the village is pledged?

"3a. Is it legal for the Village of N. to pay two per cent (2%) of the proceeds from the sale of special assessment bonds for the services of said engineering and accounting firm to promote the sale of bonds?

"b. Is it legal to use the proceeds from the sale of mortgage revenue bonds to pay a two per cent fee to the engineers for promoting the sale of said revenue bonds?"

"4. Is it legal for the Village of N. to use the proceeds from the sale of mortgage revenue bonds to pay for the approving legal opinion of a reputable firm of bond attorneys?"

1. Your first question relates to the function of the village council and the board of public affairs, respectively, in the employment of an engineer to prepare plans and supervise the construction of a waterworks utility. Section 4357, General Code, provides:

"In each village in which water works, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders water works, an electric light plant, natural or artificial gas plant, or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, or when the council shall have determined to establish a schedule of rates or charges of rents for use of the sewerage system and sewage pumping, treatment and disposal works of the village, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years."

Pending such election, it is provided by Section 4358, General Code, that the mayor with the approval of council, shall appoint such trustees.

Section 4361, General Code, prescribes the general powers and duties of the board of trustees of public affairs, and reads in part, as follows:

"The board of trustees of public affairs shall manage, conduct and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employees and agents. \* \* \* The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service as provided in section 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333 and 4334, of the General Code, and all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

Section 3961, General Code, referred to in the section just quoted, gives the director of public service (board of trustee of public affairs) full authority over the water works. It reads:

“Subject to the provisions of this title, the director of public service may make contracts for the building of machinery, water works buildings, reservoirs and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, and for all other purposes necessary to the full and efficient management and construction of water works.”

Section 4328 et seq. General Code, mentioned in Section 4361, supra, governs the procedure of the director of public service in making contracts for improvements; and these provisions, by adoption, become also the rule for the board of trustees of public affairs. The board thus becomes, in effect, the director of public service for a village, so far as relates to its utilities, and is endowed with the same powers and subjected to the same restrictions which are imposed by law upon such director in the making of contracts relative thereto. However, a village does not have the right to create such board except under the circumstances mentioned in Section 4357, supra.

Section 3982-2, General Code, provides:

“The legislative authorities of municipalities shall be and they are hereby authorized to make surveys of waterworks, sewerage systems or other public works or improvements which they are by law authorized to construct, operate, maintain or repair, the construction, improvement, enlargement or repair of which is contemplated and whether governmental or proprietary, and they shall be authorized to proceed in the manner provided in this act.

“It shall be the duty of the legislative authority of such political subdivisions desiring to make such a survey to adopt a resolution declaring the purpose and necessity therefor. In making such surveys, such legislative authorities shall be authorized to call upon engineering officers or employes regularly employed by such political subdivisions, whether elected or appointed, or they may authorize or enter into, as the case may be, contracts for the services of registered professional engineers to make such surveys.

“The surveys authorized by this act may include drawings, plans, specifications, estimates of cost of labor and materials and

other items of cost, and such other facts, material, data, reports and other information and recommendations as such legislative authority may deem advisable or necessary for the planning and/or construction of the improvement proposed or the enlargement, improvement, replacement or repair of an existing improvement or work.

“Agreements entered into for such surveys shall be deemed contracts for professional services and may provide for preliminary surveys or the making of detailed plans, or both, and may also provide for engineer-supervision of the work, provided (,) however, that no such contract shall be valid unless one or more of the services to be performed thereunder shall be begun within one year after the contract date.

“Such contracts shall be executed in triplicate and shall be signed by the proper officer or officers of such political subdivision as in the case of other contracts of such political subdivision, and the engineer or engineers agreeing to perform such service and one copy thereof shall be filed with the fiscal officer of such political subdivision (,) and the certificate of such fiscal officer as provided in section 5625-33 of the General Code shall not be required. Payment therefor may be from the general fund or any other fund legally available for such use at such times as may be agreed upon and where bonds or notes are theretofore or thereafter sold to pay the cost of work to which such survey related, such funds may be used to pay all or part of the consideration under such contract or to reimburse the fund from which payment was made.”

This section applies to both cities and villages. It will be noted that the only function of the legislative body is to pass a resolution declaring the necessity of making the survey or of having plans prepared, or both, while the contract with an engineer is to be “executed in triplicate and signed by the proper officer or officers of such political subdivision as in the case of other contracts of such political subdivision.”

(Emphasis added.)

In the case of a city, clearly the director of public service should select the engineer and sign the contract, since he is by law entrusted with the management and control of all public utilities. So is the board of trustees of public affairs in a village, if such board has been created. But what happens if a village which has no such board and no utilities, decides, through its council, to have a survey made merely to determine the feasibility of constructing water works or a light plant? How will it contract for the services of an engineer to make such survey?

Plainly the authority to proceed does not depend upon the previous creation of a board of trustees of public affairs. Furthermore, in villages, the law contemplates that the village council is the administrative as well as the legislative body, thereby differing radically from a city council which is expressly forbidden to exercise any administrative powers or to execute contracts. (See Section 4211, General Code.)

The manner in which a village council executes its contracts is set out in Section 4221, General Code, which requires them to be signed in the names and on behalf of the village, by the mayor and clerk.

Referring again to Section 4357, it appears that the village council would be without power to create a board of public affairs unless the village already has public utilities, or the council has ordered one to be constructed or otherwise acquired; or has determined to make charges for sewage treatment. If neither of the above conditions exist, it would clearly be within the power of the village council to select and contract with an engineer to make the survey contemplated by Section 3982-2 supra, which survey might include plans and specifications for the construction of the proposed utility. The village might or might not, after getting such plans, "order water works to be constructed."

If on the other hand a board of public affairs has already been constituted, the selection of such engineer and the execution of such contract would be the duty of such board after authorization by the council. This appears to result from the provision of Section 3982-2, supra, requiring the contract to be signed by the "proper officer or officers." Your question implies that the village council "has determined to proceed with the construction of a water works utility," and accordingly the selection of an engineer to plan and supervise the work would fall upon the board of trustees of public affairs which has been or should be set up as required by Section 4357, supra.

2. Your second question is whether special assessment bonds issued to pay for water works improvements are obligations for which the full faith and credit of the village is pledged.

Section 3812, General Code, authorizes the levy of special assessments on specially benefited property, to pay the cost of a number of improvements, including among others "water mains and the laying of water pipes."

Section 2293-24, General Code, authorizes the issue of bonds "in anticipation of the collection of special assessments." The concluding sentence of that section contains so direct an answer to your question that comment appears unnecessary. It reads:

"Bonds or notes issued in anticipation of the levy of special assessments or the collection thereof shall be the full general obligations of the issuing subdivision, and for the payment of the principal and interest on the same the full faith, credit and revenues of such subdivision shall be pledged."

3(a). Coming to your third question, which relates to the use of a portion of the proceeds of special assessment bonds in payment for the services of an engineering and accounting firm in promoting the sale of such bonds, I note the provisions of Section 3896, General Code, which prescribes what shall be considered as part of the cost of any improvement to be paid for by the levy of special assessments. That section reads as follows:

"The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury, when appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure."

Except for the concluding clause, this section is very explicit in the statement of the elements that may be considered as part of the cost of an improvement which is to be paid for by special assessment. It will be observed that all of the items enumerated are clearly quite necessary to the carrying on and completion of the improvement, except the final words, "and any other necessary expenditure." I do not consider that the quoted words can be construed to authorize the municipality to throw down the bars and include any expenditures that are not clearly necessary. The word "necessary" is not synonymous with "desirable." Rather, according to Webster, its synonym is "indispensable." Certainly no one will argue that a broker or promoter to sell bonds is indispensable to the making of a public improvement.



In the case of *Spangler v. Cleveland*, 35 Ohio St., 469, it appears that the city in estimating the cost of an improvement to be assessed added one percent as an estimate of the cost of collection of the assessments. The court held:

“It is error to add to the cost of an improvement an estimated percentage to pay for collecting an assessment based thereon.”

The court said in the course of the opinion:

“The amount should be ascertained and fixed, on the supposition that the owner will pay without litigation or other expense. These items must be omitted from the several assessments.”

By like reasoning it may be said that it should be assumed that the bonds would be sold as provided by law, and there is no certainty that the services of a promoter would bring the municipality any higher price. Section 2293-28, General Code, provides that bonds may either be sold at private sale for not less than par and accrued interest, or sold to the highest bidder after being duly advertised as stated in the statute. Even the expense of this advertising may be avoided, if the bonds are accepted at par and accrued interest when offered to the officers having charge of the sinking fund, as required by Section 2293-27, General Code. There is certainly no authority expressed in the law for payment of a promotion fee or a commission for the sale of municipal bonds, and I am unable to see any theory upon which such a fee could be considered a “necessary expenditure” entering into the cost of an improvement.

The assessment of the cost of a public improvement upon private property, is predicated and solely justified upon the theory and assumption that the improvement especially benefits the property in at least the amount of the assessment. *Walsh v. Barron*, 61 Ohio St., 15; *Chamberlain v. Cleveland*, 34 Ohio St., 531.

In an opinion of one of my predecessors, being No. 525, Opinions of the Attorney General for 1913, page 358, it was held:

“Legal advertising shall be done according to Section 6254, General Code, which provides that advertising shall be set up in compact form. Display ads. not complying with this section are unlawful. \* \*

“The expense for advertising the sale of bonds should be met from the appropriation for legal advertising for the city generally, which should be paid from the general fund.

“In case of the sale of special assessment bonds, the expenses of advertising may be met out of the proceeds of the sale.”

This expense of legal advertising at the legal rate for the sale of these bonds was justified by the then Attorney General as being part of the necessary cost of the improvement by the express provisions of the statute quoted, but he denied the right to resort to display advertising. It will be noted that there is no suggestion in the law that in addition to the cost of legal advertising the municipality might hire a firm of engineers, brokers or other persons to promote the sale of such bonds.

In an opinion No. 701, Opinions of the Attorney General for 1949, it was held:

“The cost of an approving opinion of a bond attorney may not be included as part of the cost of the improvement upon the issuance of special assessment bonds by a municipality.”

The opinion lays special emphasis upon the language of Section 3896, supra, whereby the other expenditures in addition to those listed must be “necessary expenditures.” It was said, beginning at page 360:

“It is my opinion that the limitation thus placed upon the additional unspecified expenditures was intended to permit the inclusion of the cost of any such improvement only to those items which would be necessarily prerequisite to the full accomplishment of the acquisition or construction of the same, including the issuance of evidences of indebtedness to finance said improvement and the assessment of taxes to pay such indebtedness. \* \* \*

“It is difficult to perceive how an opinion of a bond attorney would confer any benefit upon the property owners adjacent to the improvement or upon the improvement itself. Such an opinion would in no way lend validity to proceedings that might otherwise be invalid. It may be conceded that prospective purchasers of bonds would be more readily available if such opinion accompanied the instruments upon sale thereof, but in the last analysis it would be my opinion that the real benefit of such opinion would inure to the purchaser rather than the municipality issuing the bonds or the property owners whose property was to be benefited from the improvement.”

Statutes which confer power to levy special assessments, like other

taxing statutes, are subject to the rule of strict construction. *Pretzinger v. Sutherland*, 63 Ohio St., 132; *Mallow v. Dover*, 36 Oh. App., 84.

In 36 Ohio Jurisprudence, page 934, it is stated:

“The general rule that statutes conferring power to levy special assessments are to be strictly construed is applicable with respect to the items which may be included in the assessment. It is also established, as a general rule, in view of the fact that assessments are based upon benefits, that the cost of particular items of construction, in connection with the making of the improvement, which confer no benefit on the property to be assessed for the cost of the improvement, cannot be included in the assessment.”

I concur in the reasoning and conclusion of the 1949 opinion from which I have just quoted. While the particular expenditure there under consideration was the payment for the opinion of an expert bond attorney, the principle applies with equal force to the expenditure of a fee to an agent or firm who would undertake to promote the sale of the bonds.

3(b). The second part of your question No. 3, leads us into quite a different field. Revenue bonds, so-called, are issued under favor of Article XVIII, Section 12, of the Ohio Constitution. It reads:

“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 franchise on foreclosure.”

When acting under the authority of this constitutional provision, a municipality is freed from all restrictions that may be contained in the uniform bond act or the statutes. *Middletown v. City Commissioners*, 138 Ohio St., 596; *Zangerle v. Cleveland*, 145 Ohio St., 347; *Vollmer v. Amherst*, 65 Oh. App., 26.

It has also been held that in owning and operating its utilities, whether under authority of the statutes or under the powers conferred by Section

4 of Article XVIII, of the Constitution, a municipality acts in a proprietary capacity and in so doing, may exercise its powers as an individual owner would. *Butler v. Karb*, 96 Ohio St., 472; *Insurance Co. v. Wadsworth*, 109 Ohio St., 440; *State ex rel. White v. Cleveland*, 125 Ohio St., 230; *Akron v. P. U. C.*, 149 Ohio St., 347.

In *Insurance Co. v. Wadsworth*, *supra*, it was held :

“The power to establish, maintain and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may exercise its powers as would an individual or private corporation.”

The particular question involved in that case was the right of the municipality to purchase insurance against liability for damages caused by the operation of its light plant. The court in the course of the opinion said :

“Would a private business man take out liability insurance upon such a business as this Wadsworth utility? Such insurance is often written upon business operated by individuals and by private corporations, and making contracts therefor is generally considered to be the act of a prudent business man.”

It appears to me that the doctrine expressed in those cases which relate to utilities owned and operated under the general statutes, as well as to those operated under the special provisions of Article XVIII, Section 4 of the Constitution, are particularly applicable in considering the extraordinary method of financing a public utility provided by Section 12, of Article XVIII. Here we may ask what would a private person do if he were the owner of, or was about to acquire a plant, and intended to raise the funds for the purchase or enlargement of the same by giving a mortgage on such plant? Might he not use some of the proceeds of his loan to pay the expenses incident to securing it, including, if necessary a broker's commission? The answer appears to be obvious.

It is my opinion that a municipal corporation may exercise like powers in the sale of revenue bonds issued under Section 12 of Article XVIII of the Constitution, and may therefore, if it deems it necessary to the most advantageous sale of such bonds, pay out of the proceeds of the sale thereof a commission for the sale of such bonds.

4. Your fourth question, relative to the payment from the proceeds

of sale of mortgage revenue bonds for the approving legal opinion of a reputable firm of bond attorneys, would call for the same reasoning and conclusion as that above expressed in reference to a fee or commission for the sale of the bonds.

In specific answer to the questions submitted, it is my opinion :

1. In a village which has not created a board of trustees of public affairs as provided by Section 4357, General Code, the council of said village may contract for the services of an engineer to make a survey and prepare plans for such utility, as provided in Section 3982-2, General Code. Where such board has been created, it is the duty of such board, when authorized by the council, to employ such engineer.

2. Bonds issued by a municipality pursuant to Section 2293-24, General Code, in anticipation of the collection of special assessments for paying the cost of water mains and the laying of water pipes, are the full general obligation of the municipality, and for the payment of the principal and interest of the same the full faith, credit and revenues of the municipality are pledged.

3. A municipality is without authority to use any part of the proceeds from the sale of bonds issued in anticipation of the collection of special assessments, in payment of services of a firm or individual in promoting the sale of such bonds.

4. A municipality issuing mortgage revenue bonds pursuant to the authority of Section 12 of Article XVIII of the Ohio Constitution may if it deems it necessary to the most advantageous sale thereof, use a portion of the proceeds of such bonds in payment of a commission for their sale or for procuring an approving legal opinion of a reputable firm of bond attorneys as to the validity of such bonds.

Respectfully,

C. WILLIAM O'NEILL

Attorney General