

Specifically answering your inquiry, I am of the opinion that assessments for highway purposes duly levied against school lands, and which are not in excess of the benefits conferred by such improvement, should be paid out of the net rentals of such lands so assessed, and if there is no money in fund from such rentals, to pay said assessments, notes for the required sum should be executed and sold payable in the number of years that will be required for such rentals to meet said assessments as are not already obligated for the payment of prior assessments.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

4073.

VILLAGE—LEGISLATIVE AUTHORITY THEREOF MAY DETERMINE PERCENTAGE OF SURPLUS OF VILLAGE WATERWORKS FUNDS PAYABLE ON WATERWORKS BONDS WHEN.

SYLLABUS:

The legislative authority of a village has discretion to determine how much of the surplus of the fund of a village owned waterworks after the payment of the operating expenses thereof is to be used for the purpose of paying water works bonds, and the board of public affairs has no control over the portion of such surplus which has been appropriated for such purpose.

COLUMBUS, OHIO, March 19, 1935.

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

GENTLEMEN:—I acknowledge receipt of your communication which reads as follows:

“Relative to the disposition of earnings of a publicly owned water works system in cities, section 3959 G. C., reads as follows:

‘After paying the expenses of conducting and managing the waterworks, any surplus therefrom may be applied to the repairs, enlargement or extension of the works or of the reservoirs, the payment of the interest or 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.’

Section 4361 G. C., provides that in villages a board of public affairs shall manage and control publicly owned waterworks and electric light plants and reads in part as follows:

‘ * * * 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 sections 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 board shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith.'

In many villages, the earnings of the water works and electric light plants are sufficient not only to pay operating expenses but to pay all or part of the debt charges on bonds issued for the construction and extension of such utilities, and the village councils, in accordance with the provisions of section 5625-29 G. C., appropriate from the water and light funds, an amount to cover the debt charges, but the board of public affairs refuses to approve vouchers transferring from the funds under their control to the sinking or bond retirement funds, the amounts appropriated.

This situation has prompted a solicitor of certain villages in Cuyahoga County, to request that we submit two questions relating thereto to you for an opinion. We are quoting the questions from his letter:

'Please submit the questions involved (1) as to the power of the village clerk and treasurer to arbitrarily transfer from council appropriations for B.P.A. debt purposes to the sinking fund trustees or bond retirement fund to meet maturing bond and interest obligations of said board. (2) If the reply to the above query is negative, will mandamus proceedings, brought by council, be in order?' "

The portion of section 4361, General Code, not quoted in your letter reads 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 may make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of such works, plants and public utilities. Such by-laws and regulations when not repugnant to the ordinances, to the constitution or to the laws of the state, shall have the same validity as ordinances. For the purpose of paying the expenses of conducting and managing such water works, plants and public utilities, of making necessary additions thereon and extensions thereof, and of making necessary repairs thereon, such trustees may assess a water, light, power, gas or utility rent, of sufficient amount, in such manner as they deem most equitable, upon all tenements and premises supplied with water, light, power, or gas, and, when such rents are not paid, such trustees may certify the same over to the auditor of the county in which such village is located to be placed on the duplicate and collected as other village taxes or may collect the same by actions at law in the name of the village. * * * "

While it is the intention of this statute to place the management and control of a village owned waterworks in the Board of Trustees of Public Affairs, such board is limited so far as the expenditure of funds is concerned, that is, no money can be expended by it until the money has been appropriated for the use of such board.

Section 3960, General Code, reads as follows:

"Money collected for water works purposes shall be deposited weekly

with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council, it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund."

The phrase "when appropriated by council" means, of course, in the case of a village when appropriated by council for the use of the board of public affairs.

In Opinions of the Attorney General for 1917, Volume I, page 308, the following is stated:

"The effect of section 3960, supra, taken in connection with section 4361 is to require all moneys collected by the board of trustees of public affairs as electric light rentals to be deposited weekly in the public treasury, to the credit of the electric light plant fund. When placed therein said money cannot be used until council has appropriated it specifically for the use of said board, as is further provided by said sections.

Section 4240, General Code, reads as follows:

"The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law."

A consideration of the three last mentioned sections of the General Code makes it apparent that the general supervision of a village electric light plant, as far as the finances of the same are concerned, is placed in the village council. The control of same in this respect by said body consists in the right to exercise discretion, and it would be for the council to determine whether the amount of money appropriated for the use of said plant would be large or small."

This is especially true since the enactment of the budget act.

Section 5625-33 prohibits the expenditures of money unless it has been appropriated as provided in the act. In the case of a municipality, the authority to make appropriations is vested only in the council or other legislative authority. Section 5625-29; Section 5625-1, General Code.

In Opinions of the Attorney General for 1917, Volume 1, page 898, the following was held:

"Where bonds have been issued and a fund created for the improvement or extension of a public utility of a village and only a certain portion thereof has been expended, and there are no contracts outstanding or entered into against said bond fund, the village council may, in the exercise of its discretion, legally determine to discontinue any further improvement or extension of said public utility and transfer the unexpended balance to the trustees of the sinking fund under the authority of section 3804 G. C., although the board of trustees of public affairs of said village considers the further extension of said public utility necessary and expedient."

Section 3804, General Code, was repealed when the budget act was enacted, but substantially the same provision is now contained in section 5625-13, General Code.

While the earnings of the waterworks are paid into a separate fund, they go into the city treasury and become the property of the village. Such money is no more under the control of the board of public affairs until it has been appropriated for its use than are any other unappropriated funds of the village. Until such money is appropriated for the use of the board, the board would have no authority to approve vouchers for any portion of said fund. The surplus of this fund after the payment of the operating expenses of the waterworks is expressly authorized to be used for the purpose of paying the debt charges of such waterworks. How much of this surplus is to be used for that purpose and how much for repairs and improvement is left to the discretion of the legislative authority and not of the board of public affairs, and when the legislative authority appropriates a certain amount of such surplus for debt charges the board of public affairs has no control over it and it becomes the duty of the village clerk, without any action of the board of public affairs, to transfer it to the sinking fund or bond retirement fund to be used for the payment of such debt charges by the sinking fund trustees, if there is a sinking fund, or to the treasurer if there is no sinking fund.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

4074.

BOARD OF ELECTIONS—MAY EMPLOY GUARDS TO PROTECT BALLOTS
 UNTIL RECOUNTED WHEN—COST HOW PAID.

SYLLABUS:

1. *Where there is a recount of votes cast at an election in pursuance of section 4785-162, General Code, the board of elections may, if it deems it advisable, employ guards necessary to protect the ballots until said ballots are recounted when it finds there is no other method of adequate protection, and pay the cost thereof from the county treasury out of its appropriation. If the recount is of votes cast at an election in an odd numbered year, such cost should then be charged to the subdivision for which the election is held.*

2. *The cost of such guards is properly a part of the cost of such recount and should be taken out of the deposit made by the person demanding the recount, except where the deposit is refunded.*

COLUMBUS, OHIO, MARCH 20, 1935.

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

GENTLEMEN:—I acknowledge receipt of your communication which reads as follows:

“You are respectfully requested to furnish this department your written opinion upon the following:

Sections 4785-162 et seq. of the General Code, relate to a recount of votes cast at an election, and provide for certain deposits to be made by the person requesting such recount.