

It was then pointed out in Opinion No. 2669 that in support of the conclusions reached in the 1919 opinion the cases of *State vs. Mayor of Jersey City*, 42 Atl. 782; *Kerr vs. Jones*, 19 Ind. 351, and *State vs. De Gross*, 53 Tex. 387, were cited, and it was said that:

"To these authorities might be added the case of *Chisholm vs. Coleman*, 43 Ala. 204 wherein it was held, under a similar constitutional provision, that a judge of the Circuit Court forfeited his office by accepting a commission as colonel in the Confederate Army."

There is no constitutional provision affecting the question presented in your communication; nor are there any statutory provisions to be considered other than Sections 11 and 2910, *supra*, above noted.

With respect to the question of compatibility in the functions of the two offices, it is quite apparent that there is no question here presented with respect to your physical ability to perform the duties of each of said offices. Of course, while you are in active performance of your duties as commanding officer of a company in the Ohio National Guard, you may to that extent be prevented from performing some of the duties devolving upon you as prosecuting attorney of the county. As to this, however, it is quite clear that in the absence of facts showing an abandonment by an elected officer of the office to which he has been elected, the mere fact that he fails to perform some or all of the duties of the office does not in any way affect his right to said office or to the emoluments of the same. *Bryan vs. Cattell*, 15 Iowa, 538; *Fekete vs. City of East St. Louis*, 315 Ill. 58.

Inasmuch as it further appears that neither of the offices here in question are in any way subordinate to the other, and neither is a check upon the other, it follows that said offices are not incompatible; and you are accordingly advised, by way of specific answer to your question, that the fact that you are commanding officer of a company in the Ohio National Guard would in no wise affect your right to qualify for the office of prosecuting attorney to which you have been elected, by taking the oath of office and giving the bond required by law.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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2935.

TAX AND TAXATION—VILLAGE WATER WORKS—AUTHORITY OF  
COUNCIL TO LEVY A TAX FOR OPERATION OF SAME—REQUIRES  
VOTE OF PEOPLE.

**SYLLABUS:**

*Under the provisions of Section 4362, General Code, the council of a village is unauthorized to levy a tax not to exceed five mills on each dollar valuation of the taxable property listed for taxation in such village for the purpose of paying the expenses made in operating the waterworks plant in the village and to place said tax outside the fifteen mill limitation without a vote of the people of such village.*

COLUMBUS, OHIO, November 28, 1928.

HON. LESLIE S. WARD, *Prosecuting Attorney, Wauseon, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

“Under Section 4362 of the General Code a council of a village may levy a tax not exceeding five mills on a dollar valuation of the taxable property listed for such taxation in such village, real and personal, to pay the running expenses and expenses made in operating their water works plant in the village, which tax shall be in addition to all other taxes authorized by law. The question involved in this case is whether or not a council by its resolution can exceed the fifteen mill limitation without a vote of the people by operating under this section.

Will you kindly give me an opinion at your earliest convenience?”

Section 4362 of the General Code reads as follows:

“When waterworks and electric light plants or either of them are owned and operated by a village which receives its street lighting and fire protection therefrom and the proceeds from the operation of such plant or plants is insufficient to pay the expenses of operating such plants or either of them, the council may levy a tax not to exceed five mills on each dollar valuation of the taxable property listed for taxation in such village, real and personal, to pay the running expenses and extensions made thereto after applying the proceeds therefrom, which tax shall be in addition to all other taxes authorized by law.”

This section remains in its original form as enacted in 98 Ohio Laws at page 46. It provides that when the proceeds derived from the operation of a municipal waterworks or electric light plant are insufficient to pay the expenses of running and operating said plant, the council of such village may levy a tax not to exceed five mills on each dollar valuation of all the taxable property listed for taxation, said village to pay the running expenses after applying the proceeds of such plant. It is also provided that said tax is to be in addition to all other tax authorized by law. It is noted that the levying of said tax is optional with the village council and while it is provided that said tax is to be in addition to all other tax authorized by law, it does not provide that said tax shall be beyond all limitations provided by law.

Section 5625-2, General Code, provides for the “fifteen mill limitation,” and reads as follows:

“The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit of the state shall not in any one year exceed fifteen mills on each dollar of tax valuation of such subdivision or other taxing unit, except taxes specifically authorized to be levied in excess thereof. The limitation provided by this section shall be known as the ‘fifteen mill limitation.’”

Section 5625-3, General Code, provides in part as follows:

"The taxing authority of each subdivision is hereby authorized to levy taxes annually, subject to the limitations and restrictions of this act, on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvements. \* \* \*"

Section 5625-6, General Code, provides what special levies may be made without a vote of the people outside the fifteen mill limitation, and reads in part as follows:

"The following special levies are hereby authorized without vote of the people:

a. For any specific permanent improvement which the subdivision is authorized by law to acquire, construct or improve, or any class of such improvements which could be included in a single bond issue.

b. For the library purposes of the subdivision, in accordance with the provisions of the General Code authorizing a levy or levies for such purposes, but only to the extent so authorized.

c. In the case of a municipality for a municipal university under G. C., Section 7908, but only to the extent authorized therein.

\* \* \*

Excepting the special levies authorized in this section any authority granted by provision of the General Code to levy a special tax within the fifteen mill limitation for a current expense shall be construed as authority to provide for such expense by the general levy for current expenses."

Section 5625-7, General Code, provides what levies may be made outside of the fifteen mill limitation and irrespective of all limitations on the tax rate. Said section reads as follows:

"The taxing authority of any subdivision may make the following levies outside of the fifteen mill limitation and irrespective of all limitations on the tax rate:

(a) Tax levies for debt charges when such levies have, prior to the taking effect of this act, been excluded by the law of the state or by vote of the people from the limitation imposed by Section 5649-5b, and taxes authorized by the laws of the state, prior to the taking effect of this act, to be levied outside of the limitations imposed by G. C., Section 5649-5b, in anticipation of which indebtedness has been incurred; but in either instance only until said indebtedness has been paid.

(b) Tax levies which, prior to the taking effect of this act, were excluded by vote of the people from the limitation imposed by Section 5649-5b, not exceeding the rate and the number of years authorized by such vote.

(c) Tax levies excluded by law from the fifteen mill limitation or hereafter authorized outside of said limitation by a vote of the people under the provisions of law applicable thereto.

(d) Tax levies under the provisions of Section 7639, but not to exceed one mill of said tax shall be outside the fifteen mill limitation."

In an opinion of this department, Opinions of the Attorney General for 1927, Vol. I, page 448, it was held as stated in the syllabus:

"A village council is unauthorized to enact an ordinance, during the current year, levying an additional tax for current expenses and the county auditor is without authority to place such additional levy upon the tax duplicate of said village for collection."

It is therefore my opinion that under the provisions of Section 4362, General Code, the council of a village is unauthorized to levy a tax not to exceed five mills on each dollar valuation of the taxable property listed for taxation in such village for the purpose of paying the expenses made in operating the waterworks plant in the village and to place said tax outside the fifteen mill limitation without a vote of the people of such village.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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2936.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE  
CITY OF DELAWARE AND DELAWARE COUNTY FOR THE ELIM-  
INATION OF GRADE CROSSING IN THE CITY OF DELAWARE.

COLUMBUS, OHIO, November 28, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication submitting for my approval contract in triplicate between the State of Ohio, the County of Delaware and the City of Delaware, relating to the construction of a railroad grade crossing elimination project and improvement on State Highway No. 116, and on a street in the City of Delaware, Ohio, locally known as West Central Avenue.

I have carefully examined said contract and assuming that a resolution has been properly passed by the Council of the City of Delaware, assuming and agreeing to pay the proportion of the cost and expense of the improvement to be contributed by the City of Delaware as set out in said contract, and authorizing the execution of said contract in manner and form as the same has been executed on behalf of the City of Delaware, Ohio, said contract is hereby approved.

There has not been submitted to me with said contract or otherwise a copy of the legislation of the Council of the City of Delaware above referred to and no opinion is expressed with respect to the same.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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2937.

APPROVAL, DEED TO MIAMI AND ERIE CANAL LANDS IN THE CITY  
OF CINCINNATI—ALBERT HAFERTEPEN.

COLUMBUS, OHIO, November 28, 1928.