

549.

WATERWORKS EXTENSION BONDS—MUNICIPAL—MAY BE OUTSIDE
NET LIMITATIONS OF INDEBTEDNESS AS EXCEPTED IN SECTION
2293-14 (d)—OPINION 295, 1929, MODIFIED.

SYLLABUS:

On account of established administrative practice and until the contrary rule is laid down by a court of competent jurisdiction, bonds to be issued for the extension of a waterworks may be outside the net limitations of indebtedness which may be incurred by a municipality as excepted in paragraph (d) of Section 2293-14, General Code, providing and to the extent that the income from such waterworks is sufficient to cover the cost of all operating expenses and interest charges on all outstanding waterworks bonds and also such extension bonds presently to be issued, and to provide a sufficient amount for the retirement of all such bonds as they become due. Opinion No. 295 modified to the above extent.

COLUMBUS, OHIO, June 21, 1929.

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

GENTLEMEN:—My attention has been directed to the applicability of Opinion No. 295, directed to your bureau under date of April 12, 1929, to certain cases surrounding which there appears to be established a definite administrative practice. Specifically, I am advised that in the event bonds are to be issued for the purpose of extending a waterworks property by the laying of mains and the earnings at the time of such issuance are sufficient to cover the cost of all operating expenses and interest charges on outstanding bonds and also those to be issued for such extension, and to provide a sufficient amount for the retirement of all such bonds, then such extension bonds have been considered as within the provisions of paragraph (d) of Section 2293-14, General Code.

The wording of this paragraph wherein it is said that waterworks bonds are not within the one per cent and five per cent limitations "to the extent that the income from such utility is sufficient" to make them self-supporting, clearly indicates to me that there here appears no authority to estimate such income as heretofore pointed out in Opinion No. 295. If a municipality has no waterworks and proposes to issue bonds to construct a new plant, it could not be said that the income from such utility after completion "is" sufficient to make these bonds self-sustaining. "Is" can only refer to a fact existing at a given time, not to a prophesy of what may exist in the future. Consequently, waterworks bonds outstanding may be disregarded in computing the net indebtedness one year and the following year those same bonds may not be disregarded if the waterworks has had a sufficient decline in its earnings. Such a situation is necessarily unavoidable. Earnings of a utility may be affected for the better or for the worse by many contingencies beyond the control of a municipality, so that it may be said that under the strict construction adhered to in my previous opinion the element of chance or even estimate is nevertheless present in spite of a legislative effort to restrict the net indebtedness of municipalities within certain limitations.

If the waterworks of a municipality at a given time has sufficient earnings whereby the outstanding waterworks bonds are self-supporting and also such earnings are sufficient to meet the principal and interest requirements of bonds presently to be issued for an extension of such waterworks, the question of whether or not such bonds to be issued are outside of the one per cent and five per cent limitation is one which possibly should not be answered in the affirmative or negative as an abstract

question of law applicable to all cases. I am inclined to the view that, the courts would be justified in considering each case upon the particular set of facts surrounding it. Conceivably, if a particular extension involved the extension of water mains whereby new consumers were to be served and the increased operating expense resulting from such extension were negligible, it might accurately be said that under proper circumstances the income "is sufficient." On the other hand, if the extension involved the installation of a filtration plant at considerable expense with no direct prospect of increased revenue, upon completion of such extension by reason of increased operating expenses and larger funded debt, the utility bonds may be entirely within the limitations of net indebtedness provided. The number of failures of businesses which have been profitable until expansion, and, as a result of expansion, have gone into receivership or bankruptcy is too numerous to require further comment on this matter of extension or expansion. I adhere to the view that as an abstract principle, when bonds are issued for the extension of a waterworks insofar as after the completion of such extension the operating costs may be changed, the earnings after such completion may only at the time of issuance of such bonds be estimated. However, on account of established administrative practice and until the contrary rule is laid down by a court of competent jurisdiction, bonds to be issued for the extension of a waterworks may be outside the next limitations of indebtedness which may be incurred by a municipality as excepted in paragraph (d) of Section 2293-14, General Code, providing and to the extent that the income from such waterworks is sufficient to cover the cost of all operating expenses and interest charges on all outstanding waterworks bonds and also such extension bonds presently to be issued, and to provide a sufficient amount for the retirement of all such bonds as they become due.

Respectfully,

GILBERT BETTMAN,
Attorney General.

550.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN
ASHLAND AND SANDUSKY COUNTIES.

COLUMBUS, OHIO, June 21, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

551.

APPROVAL, ABSTRACT OF TITLE TO LAND IN THE VILLAGE OF
BEREA, OHIO, FOR STATE ARMORY.

COLUMBUS, OHIO, June 21, 1929.

HON. A. W. REYNOLDS, *Adjutant General, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of even date