

In your first question you inquire as to the authority to pay for the cost of posts and wire mesh for the repair of safety fences along streets and highways from the revenues herein under discussion. Quite obviously these expenditures are maintenance and repair for they consist simply in returning the fences to their original condition. The only question is as to whether the fences may be regarded legitimately as a part of the highway.

Had this question been propounded in earlier times I have no doubt the answer would have been in the negative. It is necessary, however, to take into consideration changed conditions and the modern development of street and highway construction and traffic conditions before a proper answer can be reached. For example, the use of curbing in rural highway construction was practically unheard of until comparatively recent times. Similarly, the use of safety fences which, in the past, was a rarity, is now not only common practice but a virtual necessity by reason of the danger incident to the congestion and speed of modern traffic. For these reasons I am of the opinion that safety fences must now be regarded as a legitimate part of street and highway construction and accordingly the use of the funds in question for the maintenance and repair of such fences is proper.

The foregoing discussion is equally applicable to the repair of so-called loading platforms constructed in streets for the use of street car passengers. Here again is a direct and necessary result of changing traffic conditions. The safety of pedestrians in legitimate uses of the highways must be conceded to be a proper consideration in highway construction. Construction of these platforms is, in my opinion, the construction of a portion of the streets and constitutes an improvement thereof so as to authorize the expenditure of the funds in question in the maintenance and repair of such structures.

In view of the foregoing it is my opinion that the cost of repairing safety fences and loading platforms may be paid from funds derived from the motor vehicle license tax and the gasoline tax.

Respectfully,

GILBERT BETTMAN,
Attorney General.

295.

WATERWORKS IMPROVEMENT BONDS—MAY BE ISSUED ONLY WITHIN MUNICIPAL DEBT LIMITATIONS—WHAT BONDS ARE INCLUDED WITHIN TERMS OF SECTION 2293-14(d), GENERAL CODE.

SYLLABUS:

1. *Waterworks improvement bonds proposed to be issued by a municipality may be issued only within the limitations of debt of a municipality as provided in Section 2293-14, General Code.*

2. *Paragraph (d) of Section 2293-14, General Code, providing that waterworks improvement bonds need not be considered in ascertaining the limitations of debt of a municipality, to the extent that the income from such waterworks is sufficient to cover the cost of all operating expenses, and interest charges on such bonds, and to provide a sufficient amount for their retirement as they become due, refers only to waterworks bonds issued and outstanding at the time a computation is being made for the purpose of ascertaining the debt limitations of a municipality, and has no reference to water-*

works improvement bonds proposed to be issued, and for which such computation is being made.

COLUMBUS, OHIO, April 12, 1929.

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

GENTLEMEN:—This is to acknowledge receipt of your letter of recent date which is as follows:

“Referring to paragraph (d), Section 2293-14, General Code, 112 O. L., 370, the following question is respectfully submitted:

If provision is made in an ordinance to issue water works improvement bonds, for an annual appropriation out of waterworks funds to pay such bonds and interest, and the estimated water works earnings are sufficient for this and all other waterworks purposes, may such bonds be issued without regard to the net indebtedness limitations of one per cent and five per cent?”

The section to which you refer, insofar as is pertinent is as follows:

“The net indebtedness created or incurred by a municipal corporation without a vote of the electors, shall never exceed one per cent of the total value of all property in such municipal corporation as listed and assessed for taxation.

The net indebtedness created or incurred by a municipal corporation shall never exceed five per cent of the total value of all property in such municipal corporation as listed and assessed for taxation.

In ascertaining the limitations prescribed by this section the bonds excepted in Section 2293-13 and the following bonds, and the amounts held in any sinking fund, and other indebtedness retirement fund for their retirement shall not be considered:

* * * * *

(d) Bonds issued for the purpose of purchasing, constructing, improving or extending waterworks or municipally owned steam railroads and rapid transit systems to the extent that the income from such utility or railroad is sufficient to cover the cost of all operating expenses, and interest charges on such bonds, and to provide a sufficient amount for retirement or sinking fund to retire such bonds as they become due.

* * * .”

The language of the statute is clear in that outstanding waterworks improvement bonds to the extent that the income from such waterworks is actually sufficient to cover the cost of all operating expenses and to provide a sufficient amount for the interest and retirement of such bonds need not, to that extent, be considered in ascertaining the limit of indebtedness of the municipal corporation. Your question, however, presents a situation whereby a municipality may have a bonded indebtedness up to the limit of net indebtedness as set forth in this section under consideration, and such municipality *estimates* that, upon completion of the improvement of its waterworks for which bonds are to be issued, the utility will operate upon a basis sufficiently profitable to be able to pay all of its operating expenses and also to meet the interest and sinking fund requirements of the bond issue contemplated. If, in fact, the estimate of earnings proves to be accurate and substantiated by the actual results, the authorization and issuance of such bonds would, of course, fall within the provisions of paragraph (d) of Section 2293-14, General Code, *supra*, and the debt limitations would, accordingly, not be exceeded. In this case, however, if such earnings should

prove to be not sufficient so to do, obviously the limitations of debt prescribed in this section would be exceeded to such extent as actual earnings fall short of estimated earnings.

It is noted that the statute makes no provision whatsoever for estimated earnings of a utility in determining whether or not such bonds may be disregarded in computing the net indebtedness, but, on the contrary, provides that such bonds need not be considered only to the extent that the income of such utility is sufficient to cover all operating expenses and provide a fund sufficient to cover interest and sinking fund requirements on such bonds. It is further noted that this paragraph (d) of Section 2293-14, *supra*, only refers to "bonds issued". There is no reference to bonds hereafter issued as is found elsewhere in this section; nor is there any reference to bonds *to be issued* for the purpose of purchasing, constructing, improving or extending a waterworks. Manifestly, if bonds proposed to be issued for improving or extending a waterworks are to be disregarded in computing the limitations of a debt of a municipality under this section, they must, in every instance, be disregarded on the grounds of estimated earnings, or, in other words, upon grounds for which no provisions are made in this section.

I am, therefore, of the opinion that:

(1) Waterworks improvement bonds proposed to be issued by a municipality may be issued only within the limitations of debt of a municipality as provided in Section 2293-14, General Code.

(2) Paragraph (d) of Section 2293-14, General Code, providing that waterworks improvement bonds need not be considered in ascertaining the limitations of debt of a municipality, to the extent that the income from such waterworks is sufficient to cover the cost of all operating expenses, and interest charges on such bonds, and to provide a sufficient amount for their retirement as they become due, refers only to waterworks bonds issued and outstanding at the time a computation is being made for the purpose of ascertaining the debt limitations of a municipality, and has no reference to waterworks improvement bonds proposed to be issued, and for which such computation is being made.

Respectfully,

GILBERT BETTMAN,
Attorney General.

296.

COUNTY COMMISSIONERS—DUTY TO PAY CITY SOLICITORS PROSECUTING STATE CASES IN POLICE AND MAYOR'S COURTS MANDATORY—WHEN ALLOWANCES CAN BE LEGALLY MADE.

SYLLABUS:

1. *It is the mandatory duty of the county commissioners to make allowances to city solicitors or their assistants for services performed in the prosecution of State cases in police and mayor's courts, in accordance with the provisions of Section 4307, General Code.*

2. *If the county commissioners fail to make allowances to city solicitors or their assistants for the prosecution of State cases in mayor's and police courts for any year,*