5685

1. SEWAGE DISPOSAL PLANT — MUNICIPALITY, TO CONSTRUCT OR EXTEND, IF EXPENDITURE INVOLVES FIVE HUNDRED DOLLARS OR MORE, MUST PROCEED, IF A VILLAGE, UNDER SECTION 4221 ET SEQ., G.C. — IF A CITY, UNDER SECTION 4328 ET SEQ., G.C.

2. WHERE MUNICIPALITY HAS CERTAIN MATERIAL, NOT PRESENTLY NEEDED BY IT, IT MAY BECOME BIDDER FOR ITS SALE WHERE ANOTHER MUNICIPALITY ADVERTISES TO PURCHASE SUCH MATERIALS.

3. STATE COUNCIL OF DEFENSE — EMERGENCY POWERS.

SYLLABUS:

1. A municipality desiring to purchase materials necessary for the construction or extension of its sewage disposal plant must, if the proposed purchase involves an expenditure of more than five hundred dollars, proceed under the provisions of Section 4221, et seq., of the General Code, in the case of a village, and Section 4328, et seq., of the General Code, in the case of a city.

2. A municipality having in its possession material designed for construction or extension of a sewage disposal plant, and not presently needed by it, may become a bidder for the sale of such materials in response to the advertisement of another municipality desiring to purchase such materials.

3. Emergency powers of the State Council of Defense discussed.

Columbus, Ohio, December 16, 1942.

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

Gentlemen:

I have your request for my opinion, reading as follows:

"We are enclosing herewith a letter from the Chief Engineer of the State Department of Health, and one from the Solicitor for the Village of O., Ohio, concerning the purchase of vital materials for use in constructing sewage disposal plants, which materials are now on hand and owned by the Village of C., and are not immediately needed by that Village but are immediately needed by said Village of O.

In other words, the Village of O. desires to secure the said

materials from the Village of C. for construction of a sewage disposal plant or extension to an existing plant, in the manner set forth in your Opinion No. 5558, dated October 22, 1942, covering the sale or exchange of materials and equipment by municipal waterworks plants.

Due to the fact that only purchases for the municipal water plant may be made without advertisement and competitive bids under the provisions of section 3965 of the General Code, we find it necessary to seek further advice from you in answer to the following question:

Is the Village of O. authorized to purchase the sewage disposal materials now owned by the Village of C., with the consent of the latter village, or, in case such consent to the sale is not given voluntarily, may the Village of O. requisition said materials through the office of the State Council of Civil Defense?"

Accompanying your communication, I note the letters from the solicitor of the Village of O. and from the Chief Engineer of the Department of Health, setting out in some detail the situation existing in the two villages mentioned in your letter. I copy from the letter of the solicitor the following:

"The Village of O. is proposing to enlarge its sewage disposal plant at a cost of $114,930.00; that the United States of America has made to it a definite offer of grant for $74,930.00, and a loan of not to exceed $40,000.00; that all of the preliminary steps in connection with the project of O. have been taken care of, and apparently the only thing that is now in the way of immediately advertising for bids is the fact that there is so much critical material involved; that the War Production Board is hesitant about approving priorities until at least the Village of O. has exhausted every means practicable toward obtaining such critical material.

We would like the opinion of your department and /or the Attorney General of Ohio as to whether the Village of C., if it follows procedure as outlined by the statutes of Ohio, may legally sell to the village of O., Ohio, the material to which reference is made herein, and likewise if the Village of O., Ohio, may legally purchase the same.

We will appreciate an early reply to this letter, because time is very much of the essence of this whole project. The present Sewage Disposal Plant of O. is over-burdened, and there is being added daily additional burdens. You know we are in the midst of very active defense work here. I make these last statements so that you may understand why we are asking for an early reply."

By reference to my Opinion No. 5558, under date of October 22, 1942, you will note that as to a municipality which has property which it does not need, I there expressed the opinion that it may proceed to dispose of the same in such manner as prescribed in its charter or, in the absence of a charter, in such manner as may be prescribed by ordinance of its council.

Relative to the mode of procedure on the part of the municipality desiring to purchase material, the 2nd branch of the syllabus of that opinion stated as follows:

> "A municipality desiring to purchase any material required for its waterworks plant must, if the proposed expenditure exceeds five hundred dollars, proceed under the provisions of Section 4328, et seq., General Code; except that by the provision of Section 3965, General Code, the council by two-thirds vote may in case of emergency authorize the purchase of such material without advertising."

It will be observed that reference is there made to Section 3965 of the General Code, which gives authority to the council of a municipality in case of an emergency, by a vote of two-thirds of all its members, to authorize a contract for construction and repair of its waterworks without advertising for bids. But this section goes no farther than indicated, and as to any other contract of purchase or construction, I find no statute authorizing that summary procedure.

This leaves us with the procedure outlined by Section 4221, et seq., General Code, applying to villages, and Section 4328, et seq., in substantially the same language, applying to cities, as the only legal method whereby a municipality desiring to contract for the construction of a sewage disposal plant, or for the purchase of necessary materials therefor, might proceed.

Section 4221 reads as follows:

> "All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall

be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him."

Section 4222 reads as follows:

"Each such bid shall contain the full name of every person or company interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank that, if the bid is accepted, a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material, they shall be separately stated, with the price thereof. The council may reject any and all bids. The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash. When a bonus is offered for completion of contract prior to a specified date, the council may exact a prorated penalty in like sum for each day of delay beyond the specified date. When there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected."

In the case of Phillips v. Hume, 122 O.S. 11, it was held that the restrictions and limitations contained in Section 4328 apply as well to municipalities operating under charter as to those having no charter. To the same effect is Berry v. Columbus, 104 O. S. 607, and State ex rel. v. Bish, 104 O. S. 206.

Plainly, therefore, the village of O. should proceed to advertise for bids for the material required, and if the village of C. is willing to sell, it may put in its bid; and if it be found to be the lowest and best bidder, the contract would be awarded to it and the materials delivered and paid for.

Your inquiry further raises the question whether the materials required could be procured by the village of O. from the village of C. by requisition through the office of the state council of civil defense. In my opinion No. 5558, above referred to, the 3rd branch of the syllabus reads as follows:

"In the event of an emergency growing out of the present war, whereby the preservation of the vital water supply of any municipality is found by the state council of defense to be essential to the national security or defense, said state council of defense may, under the power conferred upon it by Section 5288, General Code, requisition for the use of such municipality materials belonging to any other municipality and not immediately needed by it."

You will note from the language of that syllabus, as well as from the opinion, that the situation constituting the emergency therein referred to must be of such character that it "is *essential* to the *national* security or defense." Plainly such emergency power could not be invoked merely to enhance the convenience or comfort of the people of a particular city or village or community. It could not be invoked even to save the community from serious loss or disaster, unless in some vital way the situation involved the national security or defense. It is predicated solely on the existence of the war in which our entire nation is involved, and would have to be used with very great caution. I am not willing to extend the principle of the exercise of this extraordinary power to any purely local emergency, no matter how serious.

There is no exact definition of "emergency". It is impossible to state in the abstract what circumstances would in any situation constitute an emergency which would justify the exercise of this extraordinary power of the state council of defense. The best I can do is to point out what our courts have said relative to an emergency as the term is used in certain statutes.

In the case of State ex rel v. Zangerle, 95 O.S. 1, the court had under consideration a provision of what was then known as the Smith one per cent. tax law, and particularly Section 5649-4 of the General Code, which read as follows:

> "For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, seventy-four hundred and nineteen and 7630-1 of the General Code, the taxing authorities of any district may levy a tax sufficient to provide therefor irrespective of any of the limitations of this act."

It will be noted that certain sections are referred to in that statute as possibly giving rise to emergencies for which a tax could be levied without keeping within the one per cent. limitation of the Smith act. Of these sections, 4450 authorized municipalities to borrow money and levy a tax to meet the expenses necessary in case of the prevalence of a dangerous communicable disease. Section 5629 provided for the levy of a tax to meet the expense of rebuilding a county infirmary or children's home when the same had been destroyed by fire or other casualty. Section 7630-1 made provision for the rebuilding of school houses damaged or destroyed by fire or other casualty. The court said that

the conditions set forth in the three last mentioned sections were plainly emergencies.

Section 7419, which was the one about which the controversy revolved, provided for a general tax to pay the cost of repair of principal highways of a county which "have been destroyed or damaged by freshet, land-slide, wear of water-courses, or other casualty, or, by reason of the large amount of traffic thereon, or from neglect or inattention to the repair thereof, have become unfit for travel or cause difficulty, danger or delay the teams passing thereon."

The 2nd branch of the syllabus in this case reads as follows:

> "Section 5649-4, General Code, is not a legislative declaration that all the conditions enumerated in Section 7419, General Code, are emergencies for which taxes may be levied in excess of the limitations prescribed."

The court in its opinion emphasizes that not all of the conditions enumerated in Section 7419, which cause the highway to become dangerous for travel, would be regarded as emergencies within the purview of the tax law. Those defects in the highway which resulted from heavy traffic and from inattention or neglect to make repairs were excluded from the classification of emergencies.

Undertaking to define what constitutes an emergency, the court said:

> "The word 'emergency' as used in this statute is to be taken in its natural, plain, obvious and ordinary signification. The Century Dictionary defines it as follows:
>
> (1) 'A sudden or unexpected happening; an unforseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances.'
>
> (2) 'A sudden or unexpected occasion for action; exigency; pressing necessity.' "

This case was followed and approved in a case arising out of similar facts in Kress v. Wilson, 8 Oh. App. 395.

A similar definition of "emergency" was adopted in an opinion which I rendered on March 21, 1941, found in 1941 Opinions Attorney General,

p. 174. In construing Section 2293-15a of the General Code, which authorized a board of education to "declare an emergency" and submit a bond issue to the electors of the school district under certain circumstances set forth in the statute, it was there held that an emergency could not exist except under the facts and circumstances explicitly set forth in the statute and that the powers of the board in such a case could not be enlarged or increased by construction or implication.

In an opinion of one of my predecessors, found in 1927 Opinions Attorney General, p. 1441, in discussing the powers of the state emergency board, it was said at page 1447 of the opinion:

> "While the power and duty of determining whether or not 'a case of an emergency' exists is primarily vested in the board itself, the board is to be guided by legal principles in determining what is an emergency and not by questions of policy. The word emergency has been defined many times and its meaning is not difficult to ascertain. The definition given by the Century Dictionary, quoted with approval by the Supreme Court of Ohio, in the case of State ex rel v. Zangerle, auditor, 95 O.S.1,8, is readily understandable".

If the need for enlargement of the sewage disposal plant of the village of O. is the result of a lack of foresight on the part of the village in anticipating its needs, or if the proposed enlargement is merely for the greater comfort of the people, or because of anticipated growth in population, there would certainly be no such emergency as would justify the exercise of extraordinary powers on the part of the state council of defense. If, on the other hand, the sewage disposal works of that village now in operation should be destroyed by some great disaster, such as invasion or act of God, and if the national security or defense were thereby imperiled, then a different view would doubtless be taken. Between these two extremes it is impossible to lay down any positive rule.

A situation might arise where industries very essential to the national defense were directly imperiled by the breakdown of a sewage disposal system in the community, which condition might endanger the security and defense of the state or nation and therefore constitute a real emergency, but the correspondence submitted does not reveal any such situation.

A rather significant statement in the portion of the letter of the solicitor which I have quoted is to the effect that "the War Production

Board is hesitant about approving priorities until at least the village of O. has exhausted every possible means practicable toward obtaining such material." The irresistible inference is that the War Department does not recognize the situation as constituting an emergency of such seriousness as to vitally affect the national security or defense. It merely wishes the municipality to obtain the material, if possible, pursuant to the laws of the state, and if that is impossible then it will release the material required. We should not undertake to declare a situation a national emergency which the War Department is unwilling to characterize as such.

Respectfully,

THOMAS J. HERBERT
Attorney General.