such a lease as that submitted, reserving therein, as provided by this section, all interests in the coal, oil, gas and other minerals contained in or upon said lands. Such action it is believed will leave the way open for the lessee in the event he is not satisfied with the procedure of the State to appeal to the Courts for a decision in the matter. Hence, for the purposes of administrative policy your first question may be answered in the affirmative.

Pertinent to your second question it would seem that the same difficulty may obtain which arises in your first question, since under the terms of such a lease as that submitted it is difficult to determine the respective rights of the State and the lessee in the coal, oil, gas and other minerals in the lands covered by the said ninety-nine year lease. However, since the legislature has seen fit to enact Section 3209-1, and to provide a recourse to the lessee in the event he is damaged by reason of the State leasing said lands for oil, gas or other mineral privileges, it would seem that this difficulty is at least minimized. Without quoting this lengthy section it may be briefly noted that the auditor of State is by the terms thereof authorized to lease for oil, gas, coal or other minerals any unsold portions of sections sixteen and twenty-nine, or other lands granted in lieu thereof, of the original surveyed townships, for the support of schools and religion, to any person, persons, partnership or corporation, upon such terms and for such time as will be for the best interests of the beneficiaries thereof, provided that such lease shall require the lessee to pay all damages to the holder of the lease holding under a lease from the trustees of the original township.

It is believed then in conclusion, that in so far as the administrative policy of the State is concerned the section cited directly answers your second question in the affirmative and furnishes authority in the State Auditor to lease the coal, oil, gas and other mineral privileges contained in the school and ministerial lands held under the ninety-nine year lease mentioned.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3862.

MUNICIPAL CORPORATIONS—PUBLIC SERVICE CORPORATION—WHEN GRANT FOR USE OF STREETS NOT EXCLUSIVE—WHEN BONDS MAY BE ISSUED TO PAY COST OF APPRAISEMENT OF MUNICIPAL WATER WORKS.

1. *Where a public service corporation has received a grant of the right to construct its works and to use and occupy the streets of the corporation in connection therewith, and which grant is not expressly stipulated to be exclusive, it acquires thereby no exclusive franchise or right which would prevent any other corporation or the municipality itself from exercising similar privileges.*

2. *Under the provisions of section* 3916 *G. C. the council of a village may issue bonds for the purpose of paying the cost of the appraisement of a municipal water works which the corporation sought to purchase, provided the indebtedness*

for which the bonds are to be issued, is determined by council to be a valid and binding obligation of the corporation as provided under section 3917 G. C.

COLUMBUS, OHIO, January 4, 1923.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your letter of recent date reading as follows:

"We are enclosing herewith letter received from Mr. P. S. Olmstead, Solicitor for the Village of Newcomerstown, Ohio, in which he requests opinion of this department on the following proposition:

Question 1. In view of the water works franchise (copy of which is enclosed herewith), would such village of Newcomerstown have a right to install in said village its own new water system without regard to the old private system now in existence?

A board of appraisers was appointed to fix the valuation of the water works property under the provisions of the franchise and the village finds itself obligated to pay such board of appraisers $2500.00 for services rendered. The village is without funds to meet this obligation and has requested our opinion relative to issuing bonds for the purpose of paying such indebtedness.

Question 2. Are obligations of this character such as are comprehended in section 3916 G. C., for which the village could issue bonds when, through its limits of taxation, it is unable to pay such obligation?"

It is to be noted that the franchise granted "The Newcomerstown Water Company" by the village council of Newcomerstown, provides generally for the supplying of water by said company to village, at a price agreed upon by the parties to this instrument. An examination of the terms of the franchise which has been submitted does not evidence the granting of any exclusive privileges by the corporation to said water company in the supplying of water to the village, or in the use and occupation of the public streets thereof for such purpose. Thus, while the franchise in question grants no exclusive rights for such purposes, yet viewed in the light of the contractual relation arising by reason of the terms of this instrument, it is apparent that the village to a certain extent has obligated itself for payment of specified water rentals, so long as the present contract exists, and the terms thereof are complied therewith. This particular agreement is obviously indicated under that clause of the franchise noted as Sec. 153 M, wherein the village of Newcomerstown contracts to pay, in semi-annual installments, seven hundred and fifty dollars for the use of said water. Apparently, then, and without any evidence to the contrary, it is assumed that this contract is in full force and effect, and would so continue until such a time as the village shall have purchased said plant as provided by the option stipulated for this purpose, or the terms of existing agreement otherwise may be altered or nullified. None of these contingencies having transpired as gathered from your statement of facts, it could only follow, that there is a present and existing obligation upon the part of the Newcomerstown Water Company to furnish water to the village under the terms of the franchise,

and the corresponding obligation upon the part of the village to pay for the water so furnished. While such contractual relation and the obligations incurred thereunder remain constant and unimpaired so long as the franchise continues, it does not follow that a monopoly or exclusive grant for the purpose of supplying water to the village and its inhabitants has been vested in or conferred upon the said Newcomerstown Water Company. On the contrary it would appear that the franchise considered is merely general and does not import the granting of any exclusive right in this particular.

Considering then your first question from a strictly legal viewpoint it would seem that the franchise in question could not bar or preclude the village from its right to acquire its own water system. This authority is thought to be clearly expressed by the provisions of Section 4, Article XVIII of the Constitution of Ohio as adopted September 3, and which provides as follows:

> "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

Attention is directed to the second paragraph of the section above quoted as having a possible bearing upon your question, and it is significantly noted that this paragraph specifically provides that the acquisition of any such public utility may be by "*condemnation* or *otherwise*, and the municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility." It would thus seem apparent that while in the instance considered there may be an obligation on the part of the village to pay water rentals under the terms of the existing franchise, nevertheless ample authority of law is provided by the constitution for the acquisition by the village of its own municipal water system. Whether or not such a policy may be expediently followed by the village in the case considered is a question which this department is unable to pass upon, since it is believed that answer to the same depends materially upon local conditions.

It would seem then in specific answer to your first question an affirmative answer may be given, although the advisability or expediency of such a policy is not passed upon.

Proceeding to your second question, it is to be noted that section 3916 G. C. was amended by the enactment of House Bill No. 33, 109 O. L., 339, and it is obvious that the only change made in the law by this amendment is the limiting of the "indebtedness" provided by the section to those obligations created or incurred previous to the first day of January, 1924. Thus it would seem that this section contemplates the extension of the time of any indebtedness created or incurred before the first day of January, 1924, and which, from its limits of taxation the corporation is unable to pay at maturity.

Considering your second question in the light of section 3916 G. C., it is important to inquire into the nature of the indebtedness or obligation arising against the city by reason of the appraisement of the water works plant which the corpor-

ation was seeking to purchase, in order to determine whether said obligation may be such an indebtedness as to come within the meaning of this section.

It would seem that the compensation of the appraisers selected by the city to appraise the water works plant is a matter of the cost of the appraisement incurred by the city in its plan to purchase and acquire said water works plant, and seemingly may be considered as an expense incidental to such an enterprise. It is not believed that the cost of this appraisement could be said to be such as might be considered a current operating expense or such as is prohibited by the terms of section 2295-7 G. C., which precludes the borrowing of money for the purpose of paying obligations included within the meaning of the phrase "current operating expense," that is to say, that this section seemingly prohibits the borrowing of money for the purpose of paying the regular and recurring obligations of the city, such for example, as the salaries of city and county officials, etc., and it would seem evident that the obligation considered does not fall within this category. It is thought, on the contrary, that the peculiar nature of the obligation considered, implies rather a contractual indebtedness on the part of the city, which it has assumed in its plan to purchase and acquire said water works plant as specified by the terms of the franchise in which the city agrees to pay the cost of the appraisement in event said transaction was not consummated. It would seem then that the obligation imposed upon the city to pay the cost of the appraisement is an indebtedness arising upon contract, and if this be true it might be inquired whether or not the incurring of such an indebtedness is a matter subject to the requirements of the Burns Law certificate as required under the provisions of section 3806 G. C.

In this connection section 3809 G. C. provides:

> "The council of a city may authorize, and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more, nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel, nor to contracts by a municipality for the leasing or acquisition of the electric light plant and equipment, or the water works plant, or both, of any person, firm or corporation therein situated."

It would seem that this section exempts from the operation of section 3806 G. C. contracts entered into by the municipality for the purpose of acquiring a municipal water works, and although the cost of an appraisement of the said water works plant may not be directly termed a contract for the acquisition of the same, yet it would seem to be such a necessary and incidental step in this instance as to come within the spirit and meaning of the section. While other reasons might be assigned in support of the view that the certificate is not required in the instance considered, it is thought for the present purpose the exception provided by section 3809 G. C. may be considered sufficient.

Thus it is concluded that the obligation in question imposed upon the corporation by reason of the appraisement made for the purpose of acquiring the said water works plant is apparently such an indebtedness as may be said to be unlimited by the terms of section 2295-7 G. C. and unrestricted by the requirements of section 3806 G. C. From this conclusion it would follow that bonds may be issued for the payment of said indebtedness under the provisions of section 3916 G. C. provided council determines the same to be a present, fixed and valid obligation against the corporation as provided by section 3917 G. C.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3863.

MUNICIPAL CORPORATIONS—WHEN COUNCIL MAY NOT APPOINT "ANOTHER SUITABLE PERSON" POLICE JUSTICE.

Under the provisions of section 4544 G. C., council may not appoint "another suitable person" as police justice provided there is within the corporation a resident justice of the peace.

COLUMBUS, OHIO, January 4, 1923.

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

GENTLEMEN:—Receipt is acknowledged of your communication of recent date which reads as follows:

> "We respectfully request your written opinion upon the following matter:
>
> *Question*: In consideration of that provision of section 4544 G. C., which seems to require a mayor in appointing a police justice to appoint a resident justice of the peace, if there be such justice, could a village mayor legally appoint another suitable person as such police justice in case there was a resident justice of the peace?"

It may be noted that your question infers that the mayor under section 4544 G. C. may appoint a police justice. Strictly speaking however, it would seem that the appointing power under the statute is vested in council, "who may appoint," to use the words of the section, upon recommendation of the mayor.

Pertinent to your question however, section 4544 G. C provides:

> "Upon the recommendation of the mayor, the council may, by an affirmative vote of two-thirds of all the members elected, appoint a justice of the peace, resident of the corporation, or if there is no such justice of the peace, another suitable person resident of the corporation or a justice of the peace for the township in which such corporation is situated, police justice, who shall, during the term of office of such mayor, unless removed on suggestion of such mayor by a two thirds vote of all the members of