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1. MUNICIPALITY MAY ACQUIRE ANY PUBLIC UTILITY, INCLUDING WATER SYSTEM, BY CONDEMNATION OR OTHERWISE—MAY CONTRACT WITH OTHERS FOR PRODUCT OR SERVICE OF ANY SUCH UTILITY—ARTICLE XVIII, SECTION 4, CONSTITUTION OF OHIO.

2. MUNICIPALITY, ACQUIRING LAND FOR EXTENSION OF WATERWORKS, MAY PURSUANT TO CONTRACT WITH CONSERVATION AND NATURAL RESOURCES COMMISSION, CONVEY TO STATE SAID LAND OR AN INTEREST THEREIN IN CONSIDERATION OF CONSTRUCTION THEREON BY COMMISSION, OF A DAM AND RESERVOIR —MUNICIPALITY TO RESERVE RIGHT TO OBTAIN WATER SUPPLY.

3. CONSERVATION AND NATURAL RESOURCES COMMISSION AUTHORIZED AND REQUIRED TO ENTER INTO CONTRACTS WITH POLITICAL SUBDIVISIONS FOR CO-OPERATIVE AGREEMENTS WHERE PURPOSES OF COMMISSION AND INTERESTS OF SUBDIVISIONS OVERLAP SECTION 1438-2f G. C.

4. COMMISSION MAY ENTER INTO CONTRACT WITH MUNICIPALITY FOR MUNICIPALITY TO DRAW WATER SUPPLY FROM RESERVOIR TO BE CONSTRUCTED BY COMMISSION ON LAND TO BE ACQUIRED FROM MUNICIPALITY.

SYLLABUS:

1. Under the powers granted by Section 4 of Article XVIII of the Constitution, a municipality may acquire any public utility, including a water system, by condemnation or otherwise, and may contract with others for the product or service of any such utility.

2. A municipality, having acquired land for the extension of its waterworks, may, pursuant to contract with the conservation and natural resources commission convey to the state of Ohio for the use of such commission, the said land or an interest therein, in consideration of the construction thereon by the commission of a dam and reservoir from which the municipality reserves the right to obtain its water supply.

3. The conservation and natural resources commission is authorized and required by the provisions of Section 1438-2f, General Code, in carrying out the purposes of its creation, to enter into contracts with political subdivisions for cooperative agreements as to matters in which the purposes of such commission and the interests of such subdivisions overlap.

4. The conservation and natural resources commission may lawfully enter into a contract with a municipality whereby such municipality may draw a water supply from a reservoir to be constructed by said commission on land to be acquired from such municipality.

Columbus, Ohio, May 29, 1945

Hon. Don Waters, Commissioner,
Department of Conservation and Natural Resources
Columbus, Ohio

Dear Sir:

I have your letter requesting my opinion, and reading as follows:

"The village of West Union recently approached the Ohio Division of Conservation and Natural Resources and advised that they have a water supply of approximately two million gallons. This supply comes from the creek and a quarry adjacent to their water works. Recently they floated bonds for $7500.00 to purchase land to expand their water supply system.

The following questions have come up and we would like for you to advise us:

(1) Could the village of West Union buy the necessary land for the impoundment of water, with additional land for recreational purposes, and then deed this land over to the State with a provision that they would receive an adequate water supply from the impoundment of the water?

(2) Could this Division enter into a joint project and guarantee a supply of water from this reservoir? Our part in this project would be to construct the dyke and spillway from money derived from the sale of fishing and hunting licenses? * * *

The proposed lake would impound about 43 acres of water. The present water consumption at West Union is about 600,000 gallons per month. It is estimated that if this lake was drawn down two feet from spillway crest level it would supply about 30 million gallons of water, or enough to supply their present needs for fifty months."

I shall consider your questions in the order submitted: first, as to the authority of the village to enter into such an arrangement as suggested; and second, as to the authority of your Division.

The statutes of Ohio have for a great many years authorized municipalities to construct and maintain waterworks and to supply the inhabitants of the municipality with water, as well as to provide water for extinguishing fires. Section 3619, General Code, reads as follows:

> "To provide for a supply of water, by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs, and water-works, for the protection thereof, and to prevent unnecessary waste of water, and the pollution thereof. To apply moneys received as charges for water to the maintenance, construction, enlargement and extension of the works, and to the extinguishment of any indebtedness created therefor."

Section 3939, General Code, which contains an extensive enumeration of the powers conferred upon municipalities by the legislature also gives authority in the following words:

> "(7) To construct or acquire waterworks for supplying water to the corporation and the inhabitants thereof and to extend the waterworks system outside of the corporation limits;"

Both of the above sections seem to contemplate that a municipality may construct or acquire a waterworks as a means of supplying water to its citizens, and neither in express terms authorizes the acquisition by purchase or otherwise of a *water supply* provided by some other person. But having in mind the general purposes of waterworks, I have no doubt that if reliance must be had on statutory powers, these statutes would be so construed as to authorize the acquisition of a water supply either by the construction of dams, reservoirs and wells, or by some other means.

In an opinion rendered by one of my predecessors and found in 1915 Opinions Attorney General, page 987, it was held:

> "A contract between a municipal corporation and a private corporation, whereby the latter is to furnish a supply of water to the former, which is to filter and distribute the same, is not governed by Section 3981, G. C., and need not be submitted to a vote of the people."

Section 3981 above referred to, which is still in force, provided:

> "A municipal corporation may contract with any individual or individuals or an incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares and other public places within the corporate limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as may be agreed upon. But such contract shall not be executed or binding upon the municipal corporation until it has been ratified by a vote of the electors thereof, at a special or general election, and the municipal corporation shall have the same power to protect such water supply and prevent the pollution thereof as though the water works were owned by such municipal corporation."

In the opinion just referred to, the Attorney General had before him the question whether a municipality could enter into a contract with a private corporation to furnish to the municipality a water supply for a period of thirty-one years, the village to own and operate the purification plant and distribution system, and if it could, must such contract be submitted to a vote of the people, under the provisions of said Section 3981? The Attorney General held that the contract proposed was not a contract that came within the purview of Section 3981, since it was not a contract for supplying water for fire purposes, etc. and was not a contract for supplying the citizens of the municipal corporation with water. He said that "the company is merely to deliver to the city a sufficient amount of raw water which the city is to filter, distribute and sell."

The Attorney General, however, did find authority for a contract of that character under Section 3809, General Code, then in force, which provided in part as follows:

> "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,* * * * 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, * * *."
>
> (Emphasis added.)

He therefore held that the proposed contract did not have to be submitted to a vote of the people, under the provisions of Section 3981 supra.

Since said Section 3809 is no longer in effect, we look elsewhere for

clear authority given to a municipality to acquire by contract a water supply for its waterworks and, in my opinion, we find this authority in Section 4 of Article XVIII of the Ohio Constitution, which reads 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."

With this authority a municipality need not rely upon legislative grants. It will be noted that every municipality is, by this constitutional provision, given authority not only to "acquire * * * any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants" but also to "contract with others for any such product or service." Furthermore, it may acquire such public utility by condemnation "or otherwise." This language would seem to give a wide latitude of discretion to the municipality to make any contract which it finds necessary or advisable for securing its water supply so long as it is not limited by any law which the legislature is authorized to enact; and the courts have declared that a municipality in the exercise of the power given by the section above quoted is left practically free from any possible interference on the part of the legislature.

In the case of Dravo-Doyle Company vs. Orrville, 93 O. S. 237, the Supreme Court said in the first branch of the syllabus:

> "Section 4, Article XVIII of the Constitution, confers *plenary power* on 'any municipality' to acquire, construct, own, lease and operate any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and to contract with others for any such product or service."
>
> (Emphasis added.)

The court in that case had before it Section 3990 of the General Code, which authorized a municipality to erect or acquire gas or electric works, but contained a proviso that in villages where such works had already been erected by any person, company or corporation, council must before pro-

ceeding procure the consent of the owner of such private utility. It was held that the proviso was unconstitutional and void by reason of the provisions of Article XVIII, Section 4, above quoted. The court, in the course of its opinion, referring to the limitations contained in the statutes, said:

> "This limitation is wholly inconsistent with the plenary grant of power contained in the article of the constitution referred to, and the statute, so far as this inconsistent provision is concerned, fell simply because it was inconsistent. Authority given by the constitution cannot be lessened by statute. There is no equivalent for a constitutional provision."

Again, the court in the case of Power Company v. Steubenville, 99 O. S. 421, speaking of the effect of statutes inconsistent with the constitutional grant in question, said in its opinion at page 428:

> "* * * and if there were any conflict between the provisions of the Constitution and the provisions of any statute of this state existing at the time or enacted since this constitutional amendment was adopted such statute must fall."

In the case of State, ex rel. vs. Weiler, 101 O. S. 123, the court in discussing the effect of Article XVIII, Section 12 of the Constitution, said:

> "The purpose to grant to the municipalities of the state full and complete power with reference to the acquirement, ownership and operation of public utilities was clearly manifested by the members of the constitutional convention in their discussion of the provisions in question as well as by the express language of the constitutional amendments then under consideration and subsequently adopted."

The power of a municipality to issue bonds for this or any other public uitlity is clearly given by Section 2293-2, General Code, which provides in part as follows:

> "The taxing authority of any subdivision shall have power to issue the bonds of such subdivision for the purpose of acquiring or constructing, any permanent improvement which such subdivision is authorized to acquire or construct. * * *."

I note the statement in your letter that the Village of West Union has already issued and sold bonds to purchase land to extend their water

supply. Having issued the bonds for a legal purpose, no question could be made as to the expenditure of the proceeds for the purposes indicated, to wit, the purchase of land to extend the water supply system.

I note that in your first question you suggest the propriety of using the proceeds of the bonds which it has issued not only to buy the necessary land for the impoundment of water, but also "additional land for recreational purposes." It would of course be wholly inconsistent with the lawful purpose of the bond issue to expend the money for the purpose of buying land for recreational purposes, as the bonds were issued only for the purpose of purchasing land for extending the water supply system. Section 5625-10 of the General Code, provides in part:

> "All proceeds from the sale of a bond, note or certificate of indebtedness issue except premium and accrued interest shall be paid into a special fund for the purpose of such issue. * * *
>
> Money paid into any fund shall be used only for the purposes for which such fund is established."

It would, however, be within the sound discretion of the village council to determine what additional land was required to secure the impounding of the water needed for the extension of its system and the fact that it was known that the division of conservation to whom it was contemplated conveying an interest in this land, would use it in part for recreational purposes would not, in my opinion affect the legality of the village's action, assuming that the plan contemplated is lawful in other respects.

If the proposed arrangement were to be made with a private individual or corporation, it would doubtless fall within the ban of Section 6 of Article VIII of the Constitution, which forbids any subdivision to invest in or lend its credit to any private organization, and which has been construed by the courts as prohibiting anything in the nature of a partnership or joint enterprise between the public body and such private interest. But the contrary spirit seems to be evident in the matter of joint action and cooperation between public bodies. This is evidenced throughout the laws of the state in such matters as joint construction by municipalities of public works, utilities, and improvements, (Section 3615-1, General Code); joint erection and maintenance of workhouses by county and city, (Section 4139, General Code); service contracts between county and municipality, (Section 2450-1, General Code); cooperative agreements between municipalities

and school districts for conduct of recreational activities, (Section 4065-5, General Code); cooperation between state and municipality in road improvement, (Section 1189-2, General Code); joint maintenance of fire departments by townships and municipalities, (Section 3298-54, General Code) and numerous other like provisions.

The fact that the legislature has seen fit to make all these and other specific provisions granting power to municipalities, as well as to other political subdivisions does not in the slightest degree imply the absence of power on the part of the municipalities to do many things without legislative grant, under authority conferred directly by the Constitution.

Up to this point I have only considered the power generally of the village to enter into some cooperative arrangement with the state which will accomplish its admittedly legitimate purpose. After discussing the power of your division I will undertake to point out what I believe to be a practical and lawful procedure.

Coming then, to your question as to the power of the division of conservation to enter into the arrangement suggested in your letter, I note the provisions of Section 1438 et seq. of the General Code, which provide for the organization of the division of conservation and natural resources, and define its powers and duties. The act itself, creating the division was passed in 1939, and in the original act a provision was put in Section 1438-1 reading as follows:

> "The division of conservation is hereby authorized to and shall cooperate with the several state departments and officials in the conduct of matters in which the interests of the respective departments or officials overlap."

By the amendment of that section in 1941, the provision just quoted was dropped out and Section 1438-2f newly enacted contained the following:

> "The commission is hereby authorized to enter into contracts and agreements with persons, other departments and subdivisions of this state and with other states and the United States for the accomplishment of the purposes for which it is created, and shall cooperate with and shall not infringe upon the rights of other state departments, political subdivisions, and other public officials and public and private agencies in the conduct of conservation plans and other matters in which the interests of the commission and such other departments and agencies overlap."

By this provision the legislature appears to have emphasized its desire to encourage the greatest possible cooperation between the department and other departments and subdivisions of the State and even with individuals, and to give the Commission abundant discretion in making and carrying out cooperative agreements to that end.

So far as the division of conservation is concerned, it would appear to me that a plan such as is suggested by your communication would be strictly in furtherance of the legislative intention. From the facts which have been given me it would accomplish the purpose of procuring for the division of conservation, without cost, the land upon which a lake of some forty-three acres could be constructed, and at the same time it would provide for the village a source of abundant water supply for many years to come without the cost of building a dam or spillway and at a very substantial saving. That arrangement would appear to me to be decidedly in line with the policy as declared by the law, of cooperation "in the conduct of matters in which the interests of the respective departments or officials overlap."

The general purposes and powers of your division are indicated by Section 1435-1, General Code, which reads in part as follows:

> "The commission shall be empowered to acquire by gift, lease, purchase or otherwise, lands or surface rights upon lands and waters or surface rights upon waters for wild animals, fish or game management, preservation, propagation and protection, soil erosion control, reforestation, outdoor and nature activities, public fishing or hunting grounds, flora and fauna preservation, and for the preservation and development of the natural resources of the state * * *."

Also by Section 1438-2f reading in part:

> "The commission shall determine the policies of the division of conservation and natural resources and shall plan, develop and institute programs and policies of the division and establish such bureaus and positions as it deems necessary to carry into effect its policies and programs * * * ."

In applying the above conclusions to the plan proposed, and particularly as affects the exercise of municipal power in the matter, I am not unmindful of the fact that the Constitution in granting home rule to municipalities and in granting the powers hereinabove discussed relative

to the acquisition of public utilities, reserved to the legislature the right to limit or restrict the powers of municipalities in borrowing money and levying taxes. However, I do not find any statutes enacted by the legislature pursuant to this reserve power which appear to me to limit the municipality in making a contract along the general lines proposed. The only statute which I have found which might in any degree appear to limit a municipality in making such an agreement is Section 3981, General Code, to which attention has already been called and which was held by a former Attorney General not to be applicable to a contract such as he had under consideration. I regard that opinion as sound, and equally applicable to the precise situation here under consideration.

Nor do I consider that the village is bound by the provisions of Sections 3698 and 3699, General Code, relative to the sale or lease of property not needed for any municipal purpose. In the first place the property here under consideration does not fall within that description, for it is and will be very much needed, and in the second place, those sections, enacted long before the adoption of Article XVIII of the Constitution granting home rule, are no longer controlling. My immediate predecessor held in an opinion found in 1942 Opinions Attorney General, page 746:

> "A municipality, by virture of the power granted to it by Section 3, Article XVIII Constitution of Ohio, may sell personal property, not needed by it, in such manner as may be prescribed by its charter, if any charter has been adopted, and *in the absence of any charter provision* in such manner as may be provided by ordinance, and need not comply with the provisions of Section 3699 and 3703, General Code." (Emphasis added.)

The principle set out in that opinion would apply equally to the sale of real estate or of an interest therein.

The agreement contemplated by your letter of inquiry, contemplates in effect, an exchange by the village of a perpetual interest in lands acquired or to be acquired for waterworks extension, in return for the building of a dam and creation of a reservoir upon such land, from which the village would reserve the right to obtain its water supply. The conveyance of the land by the village, might either be an outright conveyance of title with a reservation of the right to the water and a provision for reversion in case of the failure of your division to build or maintain the dam, or it

might be a conveyance in the nature of a perpetual lease or easement for the uses and purposes contemplated by your division. The latter course would seem to me to be somewhat more conservative and desirable. It would appear to give you all the rights necessary to carry out your purposes as suggested by the statutes to which I have already referred.

Although your letter does not specifically so state, I have assumed, for the purpose of this opinion, that the lake proposed to be created by your division is intended for the propagation and control of fish and game, and for such recreational activities as the division is authorized to carry on by use of moneys derived from fishing and hunting licenses.

I do not deem it necessary in this connection to discuss the details of an agreement which might be drawn up between the Village of West Union and your division in order that both parties might be protected. I have only undertaken to discuss the matter of the powers of the respective authorities in the matter.

Respectfully,

HUGH S. JENKINS

Attorney General