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ELECTRIC LIGHT PLANT—FUNDS RECEIVED BY MUNICIPAL CORPORATION THROUGH OPERATION OF PLANT—MAY BE USED TO PURCHASE AND ERECT WHITE WAY STREET LIGHTING SYSTEM—STANDARDS AND FIXTURES —APPROVAL OF COUNCIL.

SYLLABUS:

The funds received by a municipal corporation through the operation of its electric light plant may lawfully be used for the purchase and erection of a white way street lighting system, including such standards and fixtures as the council may approve.

Columbus, Ohio, January 7, 1949

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

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

"It has come to the attention of the Bureau of Inspection and Supervision of Public Offices, through the examination of electric light funds, and transactions in connection with municipally owned electric light plants in various municipal corporations of this state, that the revenue derived from the operation of such electric light utility plants has been expended for the purchase of ornamental street lighting standards and fixtures used in lighting the city streets.

"It is recognized that a municipality may lawfully furnish free of charge the products of its municipally owned utility plants, when used for public purposes, and such free service has been properly authorized by council in accordance with the provisions of Section 3982-1, General Code. However, the cost of purchasing and installing ornamental boulevard type street lighting standards and fixtures does not appear to be a proper charge against the electric light fund.

"The cost of installing such ornamental street lighting standards is usually assessed against the abutting, adjacent and contiguous, or other specially benefitted lots or lands, pursuant to the authority of Sections 3812-4 and 3820 G. C., or paid from the proceeds of bonds issued and sold for that purpose.

"The purchase of street lighting standards and fixtures from the electric light fund may be compared with the use of waterworks funds for the purchase of 'fire hydrants', in which instance the courts have held that fire hydrants are not appurtenances of the waterworks, but should be paid for out of funds raised from taxation and appropriated for that purpose out of moneys credited to the general fund.

"The case of Alcorn v. Deckebach, Auditor, 31 Ohio Appellate Reports, page 142; and Attorney General Opinions No. 401, page 305 of 1913 Opinions and No. 697, page 1056 of 1939 Opinions, are cited as authority for the proposition that fire hydrants are not appurtenances of the waterworks and, therefore, waterworks funds may not lawfully be expended for their purchase.

"We are in receipt of a letter from the Chairman of the Board of Public Affairs of the village of Blanchester, Ohio, under date of November 12, 1948, requesting information as to the legality of expending electric light funds for the purchase and installation of ornamental street lighting standards and fixtures. Since this matter is one involving the expenditure of public funds, and the answer thereto will be of statewide interest, we respectfully request that you give consideration to the following question, and furnish us with your formal opinion as to the legality of such expenditures from the electric light utility revenue:

"May the funds received by a municipal corporation through the operation of a municipally owned electric light generating plant be used lawfully for the purchase and erection of a whiteway street lighting system consisting of ornamental lighting standards and fixtures?"

You call attention to the statutes authorizing special assessments

to be levied upon abutting or other specially benefited lots and lands for improvements such as street lighting. These provisions are contained in Section 3812 et seq. of the General Code. Section 3812-4, General Code, relates specifically to the levy of special assessments for lighting any street, alley or other public place. There is nothing in any of these sections relating to assessments which makes that the exclusive method of paying the cost of public improvements. There are certain limitations on the amount of the cost that may be assessed, among others, the provisions of Section 3820, General Code, which reads as follows:

> "The corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections."

There is nothing in this or any other section of the statutes, so far as I am aware, which prevents the municipality from paying the entire cost of any of the improvements which it has the right to assess against abutting or other specially benefited property.

I find in the statutes no limitation imposed by the legislature upon municipalities as to ornamental boulevard type street lighting standards, and it appears to me that the question whether such standards and fixtures should be ornamental or otherwise is a matter of discretion on the part of the municipality, and would have no bearing on the question you submit. If the municipality may lawfully use the income from its sale of current for the installation of lighting equipment and for furnishing light for the streets, it would appear to make no difference whether the standards and fixtures are ornamental or otherwise.

In the case of Niles v. Union Ice Corporation, 133 O. S. 169, the court had before it the question of the right of a municipality to transfer surplus earnings from its municipal light plant to its general fund. The court held that a municipality not only had the right to make a profit from the sale of electric current but that it had the right by proper legal proceedings to transfer such surplus earnings to its general fund.

In that case, the complaint was made by a consumer that if a municipal utility is permitted to charge a rate in excess of the cost of the service and if such excess is used to finance the cost of municipal

government such revenue would be used in lieu of taxation and the municipality would thereby be undertaking to evade the constitutional limitation upon its power of taxation. In answer to this the court said at page 181, of the opinion:

> "This contention proceeds on the theory that a municipality has no right to charge for its utility service or product a rate in excess of cost, i.e., that it has no right to make a profit. Nevertheless, we are not referred to any statute or constitutional provision denying this right. In the absence of such prohibition, a municipality, no less than a private corporation engaged in the operation of a public utility, is entitled to a fair profit. In the operation of a public utility, a municipality acts, not in a governmental capacity as an arm or agency of the sovereignty of the state, but in a proprietary or business capacity."

In the earlier case of Butler v. Karb, 96 O. S., 472, the court said at page 483 of the opinion:

> "We think it must be conceded that the city, acting in a proprietary capacity may exercise its powers as would an individual or private corporation. It may be that for a time the business will not be remunerative at the rates charged, yet with proper management the business may develop to a point where it will even yield a profit to the city and therefore result to 'its own special benefit and advantage.'"

In the case of Travelers Insurance Company v. Wadsworth, 109 O. S. 440, the court held:

> "The power to establish, maintain, and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may exercise its powers as would an individual or private corporation."

My immediate predecessor, considering the use of the revenues arising from the operation of the Cleveland transit system in an opinion found in 1943 Opinions of the Attorney General, page 737, held:

> "The officials charged with the operation of a municipal transit system may, if they in good faith deem it essential to the efficient operation of the system, make such purchases and incur such expense as would be made or incurred under like circumstances by a private owner in the operation of such system. (1942 Opinions Attorney General, p. 773, approved and followed.)"

In the light of these authorities I can see no objection to the purchase by a municipality of such street lighting standards and fixtures as it deems proper, from the funds arising from the operation of a municipally owned electric light plant.

An opinion by one of my predecessors, found in 1928 Opinions of the Attorney General, page 1544 recognizes the right of a municipality to pay the entire cost of an improvement such as the one to which your letter refers. It was there held:

> "A city may issue bonds for the purpose of installing a white-way lighting system."

The then attorney general found authority for this holding in Section 2293-2 of the General Code, which is a part of the uniform bond act and which then read and still reads 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."

Your reference to the holding of the court and opinions of this office regarding the purchase of fire hydrants from waterworks funds, does not appear to me to have any bearing upon the question submitted. The court in the case of Alcorn v. Dekebach, 31 O. App. 142, held that such fire hydrants could not be purchased out of waterworks funds, resting its reasoning and conclusion solely upon the proposition that a fire hydrant is no part of a waterworks system but is a part of the apparatus and equipment designed for use by the fire department.

Accordingly, in specific answer to your question, it is my opinion that the funds received by a municipal corporation through the operation of its electric light plant may lawfully be used for the purchase and erection of a white way street lighting system, including such standards and fixtures as the council may approve.

Respectfully,

HUGH S. JENKINS,
Attorney General.