

WATERWORKS OWNED BY MUNICIPALITY - Cities of the Third Class - Power to use Surplus Earnings for other Municipal Purposes.

7-30
July 20, 1934.



Honorable Harry M. Cornell, City Clerk,
City of Carthage,
Carthage, Missouri.

Dear Sir:

A request for an opinion has been received from you dated June 28, 1934, such request being in the following terms:

"I have a few questions which I would be very grateful to you to give me your decisions on. The reason for this is to try and help the taxpayers of our city, if possible.

1. If bond issues are voted by the people of a city and the ordinance calling for the election states that the interest and principal on bonds will be met by a direct tax against the taxable property of a city, is it legal or possible for a municipal water and electric plant to retire all or a part of any bond issues from the earnings of said plant?
2. If a municipally owned plant cannot help retire the bonds is it permissible for them to meet the interest on various bond issues?
3. Can a municipally owned plant contribute to the General Revenue fund in order to help keep up the streets and sewer systems of a city, thereby helping the city to employ laborers?
4. If a municipally owned plant cannot meet any of the questions asked in Nos. 1, 2 or 3, is it possible for a City council to pass an ordinance requiring the plant to pay a monthly license tax into the General Revenue Fund?

The City of Carthage has at the present time the sum of \$38,000.00 in delinquent taxes on the books and I do not see how it is going to be possible for the majority of the property owners to meet the taxes by November, and according to the new State law these properties are to be put up for sale on the first Monday in November.

It would be a great relief to our property owners if we would get some relief from our Water and Electric Light Plant.

Due to the hard times the City of Carthage has been out a considerable amount of money in purchasing materials and etc. for the C. W. A. men and also the cost of charity in our city has more than doubled in the past year."

You have likewise advised us that Carthage is a city of the third

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class, that of \$100,000 in face amount of bonds originally issued to pay for a city waterworks \$50,000 in face amount are now outstanding, and that said waterworks is managed and administered by a Board of Public Works.

The first three questions raised in your request for opinion can be resolved into two questions, I, the power of the city to use surplus revenue from its waterworks for other municipal purposes, and II, assuming such power to exist under the Constitution and laws of the State of Missouri the possible liability which might arise from such use.

I.

POWER TO USE REVENUE FROM WATERWORKS FOR OTHER MUNICIPAL PURPOSES

A. - RIGHT TO USE SURPLUS

We have found no statutes or decisions in the State of Missouri specifically authorizing use of surplus revenue from municipally owned waterworks for other municipal purposes, nor have we found any express statutory prohibitions against such use. We believe that the case of *Travaille v. Sioux Falls*, 240 N. W. 336 (S. D. 1932) states a suitable and proper rule of law to govern this matter. The court in that case said:

"A municipal corporation is not required to limit the rate to the actual cost of furnishing water, but may fix a rate which is reasonable, resulting in a profit to the municipality. 27 R. C. L. 1436; 1 *Farham on Waters*, p. 855, par. 790; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 345, 21 L. R. A. 519; *Twitchell v. Spokane*, 55 Wash. 86, 104 P. 150, 24 L. R. A. (N. S.) 290, 133 Am. St. Rep. 1021. It is not alleged that the city of Sioux Falls is charging an unreasonable rate for water. If the revenues derived from such rate are applied to municipal purposes, we fail to understand wherein the defendants have contravened any statutory provision." (240 N. W. 336.)

Revised Statutes of Missouri 1929, Section 7651, provides for the appointment of a Board of Public Works and Section 7654 authorizes such Board to "take charge of and exercise control over" such waterworks, and Section 7655 authorizes such Board to "exercise such other powers and perform such other duties in the superintendance of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said Board shall make all necessary regulations for the government of the Department not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof." All of these three sections just named are applicable to cities of the third class.

Section 7661, also applicable to cities of the third class, authorizes them to erect waterworks, and Section 7668 provides that waterworks when acquired "shall be subject to the control and management of a board known as the 'Board of Waterworks Commissioners'".

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Section 7679 provides that "said board of waterworks commissioners shall have full control and management of said waterworks system * * * and shall have power to fix the water rates so as to raise funds sufficient for the purposes mentioned in Section 7675, and to adopt such reasonable rules and regulations for the enforcement and collection thereof as it may deem expedient." There is some difficulty in interpreting Article 31 of Chapter 38 of Revised Statutes of Missouri, 1929, in which all of the above sections are included in view of the fact that in frequent instances the same subject matter, or substantially similar subject matter, seems to be found in several different statutes such as, for example, the authority and powers granted to manage city waterworks systems for cities of the third class which is contained in Sections 7654, 7668 and 7679, and see also Section 6821. However, for the purposes of the present inquiry the question of which one of these several statutes, or if all of such statutes, are applicable to the City of Carthage, is immaterial, because in none of such statutes is there any express limitation on the use by the City of Carthage of surplus revenue from its waterworks for other municipal purposes. It must not be understood that we express any approval of such action by the City or its Board in charge of the waterworks as would maintain water rates at a higher rate than necessary for the purpose of raising revenue for other purposes, in view of Section 7675 which provides that the rate shall be sufficiently high to raise money for certain named purposes, and does not include any purposes other than expense of maintenance, bond interest and retirement, but if the rates established by the City of Carthage or its duly authorized Board are reasonable, and if they result in a surplus over the statutory requirements of Section 7675, we find nothing in the statutes or decisions of this state prohibiting the use of a surplus for other municipal purposes, and we believe the rule of *Travaille v. Sioux Falls* set out above would apply, in the absence of some inhibition in the charter of the waterworks company.

B. RIGHT TO TAKE SURPLUS BY TAXATION.

In view of the conclusion above reached that as far as the law of this state is concerned there would be no absence of power in a municipality to use surplus earnings from waterworks owned by it for other municipal purposes, it may be unnecessary to consider your question 4 about the right to take such surplus by taxation, but we might say that we do not believe that such taxation would be justified. We have not before us the charter of the waterworks company, but absent some contrary provision in it we believe that because such waterworks plant is public property it would not be subject to taxation under the rule of law announced in *Foster v. Duluth*, 120 Minn. 484, 140 N. W. 123 (1913) which held that land owned by a city and used for a garbage plant was not subject to taxation, and that a tax sale under a tax lien attaching to such property before the city acquired it was void. The court said:

"After its purchase by the city in July, 1905, the property was devoted to public uses, and became public property. It was not thereafter subject to taxation. This is conceded by plaintiff. It is technically inaccurate to say that it was exempt from taxation, for the term 'exemption' rather presupposes a liability removed by some constitutional or statutory provision. The

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property is 'exempt,' not because of any such provision declaring it exempt, but because of its character as public property devoted to a public use. The property of the state and of its political subdivisions, arms, or agencies, such as cities within its borders, when used exclusively for public purposes, is not subject to taxation, in the absence of constitutional or statutory provisions making public property subject to the tax laws of the state. This is the undisputed rule; but it is no better established than is the proposition that proceedings for the assessment of taxes against public property, or for their collection by judgment and sale, are absolutely void. This is not only because the property was exempt from taxation, but because it was public property. A reason for the rule is that a sale of the property to enforce collection of taxes assessed against it would destroy its character as public property, to the public injury." * * * * *

" * * the property is owned by the state, or by its agencies, is devoted to a public use, and is not subject to taxation " * * "

" * * the taxation of public property owned by the state or its municipal divisions would mean that the state would be taxing itself in order to raise money to pay over to itself, and the reason, before suggested, that the collection of such taxes might result in destroying the public character of the property."

Revised Statutes of Missouri, 1929, Section 7681 exempting a waterworks system owned by a city from "seizure, levy or sale under any judgment, execution, decree of court or other proceeding in invitum" would seem to strengthen this view for by it the most effective means for collecting a tax even if it could be assessed would be removed, and it would hardly be presumed to be the intention of the General Assembly to authorize an uncollectible tax especially when the right to assess such a tax would need to be implied in derogation of the common law rule against taxation of public property.

II.

PRIVATE LIABILITIES FOR USE OF SURPLUS FOR MUNICIPAL PURPOSES NOT CONNECTED WITH WATERWORKS

It has been demonstrated above that the city would have power to use a surplus from its waterworks for other municipal purposes as far as the question of municipal power delegated by the State of Missouri is concerned, and that to do so would violate no principle of public law. However, there would be a serious danger as far as private liability is concerned in the use of a surplus in this manner. Revised Statutes Missouri 1929, Section 7669 provides that a city may authorize the issuance of bonds in payment for the construction of a waterworks plant which bonds "will be a first lien in the nature of a mortgage or vendor's lien upon all the property, rights, issues

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and revenues of the waterworks system when erected, or in any way appertaining thereto, including any and all funds that may have been or may be derived therefrom, whether in existence at the time of the issuing of the bonds or thereafter acquired." From this statute it appears that the holders of bonds issued to pay for the construction of a waterworks plant would have a first lien on all revenue from the plant. Of course, such holders only have a right to receive interest on the dates fixed in such bonds, and to receive the principal upon the date or dates of maturity of such bonds, and if these payments were made according to the provisions in the bonds there would be no right of complaint by such bondholders. However, if there should be a failure to meet any of the interest or principal payments according to the terms of such bonds, the bondholders would have a right, based on contract, to bring an action for a diversion of property which was subject to their lien, and if such bondholders reasonably felt that even though at present there is no default that there was a probability that such default would be caused in the event funds were diverted from the waterworks fund, such bondholders might be able to enjoin such diversion by an appropriate proceeding. Therefore, the only problem of the City of Carthage in connection with such transfer of funds would be in connection with the holders of bonds secured by the waterworks and its revenues, and the possibility of civil liability in connection with such transfer would be the problem to be faced by the city.

In conclusion it is our opinion that, assuming the water rates of the City of Carthage to be reasonable, any surplus income over and above the requirements of R. S. Mo. 1929, Section 7675 could be transferred by ordinance from the waterworks fund and used by the city for other public municipal purposes, but that holders of bonds issued to pay for such waterworks system would have a cause of action for a disturbance of their prior lien on such funds if by such transfer and use interest or principal payments on such bonds were prevented or endangered.

Yours very truly,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

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APPROVED:

ATTORNEY GENERAL.