

CITIES, TOWNS AND VILLAGES: Authority of board of public
BOARD OF PUBLIC WORKS: works subject to board of
aldermen.

7336-1939

April 30, 1943

Honorable A. F. Pulliam
City Clerk
Sullivan, Missouri



Dear Sir:

We acknowledge receipt of your letter of April 13 last, requesting an opinion, which letter is as follows:

"The City of Sullivan established a Board of Public Works to look after the new established municipal light plant, in so doing do they have the power under the State law to collect the revenue and deposit same draw warrants or checks in payment of bills and salaries without going through the regular channels as other City bills and salaries are paid.

"In other words can they legally pay such bills and salaries without them being allowed by the city council, signed by the mayor and attested and signed by the city clerk and also failing to go through the city treasurer's hands.

"They have been proceeding as above and the question has come to the attention of the city council as to whether or not they had that power.

"Will appreciate very much if you can advise us on same."

In order to answer your question it will be necessary to discuss, first, the authority of municipalities, and,

second, the authority granted by statute to boards of public works and such additional powers as may be given boards of public works by ordinances duly passed by the cities creating such boards.

The first proposition is clearly answered in the case of *State v. McWilliams* (Supreme Court en banc 1934), 74 S. W. (2d) 363, 1. c. 364, as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' * * * * *"

Cities of the fourth class have the power to operate utilities through a board of public works. This question was discussed in *State v. McWilliams*, supra, at page 365 as follows:

"* * * Sections 7641, 7651, and 7661 of this article (Mo. St. Ann. Secs. 7641, 7651, 7661, pp. 6030, 6034, 6037) all confer on cities of the fourth class the power to erect, maintain, and operate waterworks, either by particularly designating such cities or by general inclusion. Consequently, there can be no doubt that the power has been conferred both by Constitution and statute on cities of the fourth class to erect, maintain, and operate waterworks. The crucial question in this case is: Has the Legislature prescribed the manner and method of the exercise of this power and does the record in this case show that relator has met those requirements?"

"The only legislative source of power cited by relator is section 7641, which merely confers the naked power on cities of the fourth class to erect or purchase and maintain and operate waterworks and to supply their inhabitants with water. Section 7651 also confers the same power, and further authorizes such cities to establish a 'board of public works.' The power to erect or purchase waterworks is also conferred by section 7661, as follows: 'The city council of any city of the first, second, third or fourth class in this state, or any city operating under a special charter, having three thousand inhabitants or more and less than one hundred and fifty thousand inhabitants shall have the power to erect, maintain and operate waterworks or to acquire waterworks by purchase as hereinafter provided, and to operate and maintain the same and supply the inhabitants thereof with water and to charge therefor reasonable rates as hereinafter provided.'"

All reference to section numbers in the above quotation is to Revised Statutes of Missouri for the year 1929.

Article 31, Chapter 38, R. S. Mo. 1939, entitled "WATERWORKS, LIGHT AND POWER PLANTS" and consisting of Section 7786 to Section 7823, inclusive, deals with the acquisition and operation of public utilities.

Section 7796, R. S. Mo. 1939, provides for the ownership of public utilities and for the establishment of boards of public works, and is as follows:

"Any city of the third or fourth class, and any town or village, and any city now organized or which may hereafter be organized and having a special charter, and which now has or may hereafter have less than thirty thousand inhabitants, shall have power to erect or to acquire, by purchase or otherwise, maintain and operate, waterworks, gas works, electric light and

power plant, steam heating plant, or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system, public auditorium or convention hall, which are hereby declared public utilities, and such cities, towns or villages are hereby authorized and empowered to provide for the erection or extension of the same by the issue of bonds therefor, and any city, town or village which may own, maintain or operate, and which may hereafter acquire, by purchase or otherwise, and operate, or which may engage in the construction of any of the plants, systems or works mentioned in this section, is hereby authorized and empowered to establish, by ordinance, within such city, town or village, an executive department to be known as the 'board of public works,' to consist of four persons, electors of said city, town or village, who have resided therein for a period of two years next before their appointment, who shall be appointed by the mayor of such city, town or village, and confirmed by the common council in such manner as other appointive officers of such city, town or village are appointed and confirmed. The members of such board shall hold office for a term of four years each, or until their successors are appointed and qualified. Provided, that the members of said board shall hold office for a term of four years each, except the first incumbents, as members of said board of public works, who shall be appointed and hold office for the term of one, two, three and four years respectively."

Section 7799, R. S. Mo. 1939, provides further powers for such board:

"Whenever any such city mentioned in section 7796 shall have by ordinance established a board of public works, as herein provided,

such board so established in such city, town or village shall, during the existence of said board, have the power, and it shall be its duty, to take charge of and exercise control over any waterworks, gas works, electric light and power plant, steam heating plant or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system or any other public utility whatever which may be owned by such city, town or village at the time such board is so established, or which may be thereafter established or acquired by such city, town or village, by purchase or otherwise, and all appurtenances thereto belonging, and shall enforce the performance of all contracts and work, and have charge and custody of all books, property and assets belonging or appertaining to such plant or plants."

Further powers for and duties of such board are provided for in Section 7800, R. S. Mo. 1939, as follows:

"Said board shall also exercise such other powers and perform such other duties in the superintendence 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."

Section 7803, R. S. Mo. 1939, makes it the duty of the board to keep books of account and is as follows:

"It shall be the duty of said board to keep books of account, showing with en-

tire accuracy contemporaneous current entries of the receipts and expenditures of the board in such manner as to enable the same to be understood and investigated, and also to preserve on file in its office duplicate vouchers for all its expenditures, which books and duplicates shall at all times be open to the examination of the finance committee of the city council, or any other committee appointed by the common council, and such board shall make such reports of its business and transactions to the mayor and city council of such city, town or village as may be provided by ordinance."

Section 7821, R. S. Mo. 1939, provides for the selection of a depository for funds of water works systems and is as follows:

"There shall be selected a depository for the funds of the waterworks system in the manner as provided by article 5 of chapter 38, R. S. 1939, and all moneys received from water consumers shall be deposited daily by the manager of the said waterworks system, and all to be drawn out of such depository on warrants drawn upon said depository and signed by the president of the board of waterworks commissioners with the seal of the board attached, countersigned by the mayor."

Section 7818, R. S. Mo. 1939 provides as follows:

"All the provisions of sections 7786 to 7828, inclusive, which concern the purchase of waterworks shall apply, so far as the same are applicable, to the erection or purchase of electric light plants, gas plants, ice plants or other lighting plants."

The issue raised by your letter is centered upon the provisions of Section 7802, R. S. Mo. 1939, which is as follows:

"All bills of such board and all salaries of its employees shall be allowed and paid in the same manner that bills and salaries of other officers and employees of such city are allowed and paid."

Section 7802 originally appeared in an act passed in 1903, and Section 7821 originally appeared in an act passed in 1905. Apparently neither of these sections has been amended or re-enacted. The question is whether or not Section 7802 by the term "in the same manner" means that the common council or city council must approve and pay bills, or whether the bills must be approved and paid by the Board of Public Works in the same manner as bills and salaries are approved and paid by the city council. In statutory construction the phrase "in the same manner" was held in the case of Commonwealth v. Hildebrand, 139 Pa. Super. 304, 11 A 2d 688, to be applicable, not to substance, but only to procedure, and is the equivalent of "by similar proceedings, so far as applicable to the subject matter."

In the case of Brownfield v. Social Security Commission of Missouri (Springfield Court of Appeals 1941) 155 S. W. (2d) 905, the court held that under statute appeals from judgments in social security cases may be taken at any time within ninety days from the date of the judgment in the circuit court, since the statutory provision that appeals may be taken "in the same manner" as provided for appeals from the State Commission to the circuit court includes the time as well as other things to be done by the Commission to effectuate appeals from its orders to the circuit court. We quote from the opinion of the court as follows, l. c. 907:

"It must be conceded that all appeals must be provided for by statute, or no appeal is allowable. The time and manner of such appeal is also governed entirely by statute. It is the opinion of this

court that the General Assembly has provided for the time of such appeal when it said: 'Appeals may be had by either party from the circuit court upon the record in the same manner as provided herein for appeals from the State Commission to the Circuit Court.'

The above quotation has no direct bearing on our question except that it does demonstrate that the court recognizes the meaning of the term "in the same manner" as a reference term for the purpose of establishing procedure.

In the case of Wilder's S. S. and Co. v. Low, 112 Fed. 161, l. c. 164, 50 C.C.A. 473, the court held that the phrase "in the same manner" has a well understood meaning in legislation, and that meaning is not one of restriction or limitation, but of procedure. It means "by similar proceedings, so far as such proceedings are applicable to the subject matter."

If Section 7802 is construed to mean that the term "in the same manner" means what the cases above cited seem to indicate, namely, that the board shall allow the bills and salaries by the same procedure as that used by the city council, then, under Section 7800, above quoted, which provides that the board "shall also exercise such other powers and perform such other duties * * * as may be prescribed by ordinance," the city council may authorize the payment of bills and salaries by passing proper ordinance. It seems to be contemplated that such authority will be given the board of public works by the language of Section 7821, above quoted, which provides that a depository shall be selected for the funds of the waterworks system and then provides that the warrants shall be signed by the president of the board and countersigned by the mayor.

In the case of State ex rel. and to the use of George B. Peck Co. v. Brown, 340 Mo. 1189, 105 S. W. (2d) 909, the court held that statutes, though seemingly in conflict, should be harmonized and force and effect given to each, since the legislature, in the enactment of subsequent statutes, will not be presumed to have intended to repeal earlier statutes, unless it has done so in express terms. Therefore, in enacting Section 7821 in 1905, providing for the issuance and signing of warrants, the legislature must have had before it Section 7802, which was then a law providing for the pay-

ment of bills and salaries. But where statutes are conflicting the court held in *Collins v. Twellman*, 344 Mo. 330, 126 S. W. (2d) 231, that the later statute, all else being equal, will take precedence over an earlier statute. In the case of *State v. Mangiaracina*, 344 Mo. 99, 125 S. W. (2d) 58, the court held that statutes relating to the same general subject matter should be read together and harmonized, if possible, with a view to giving effect to consistent legislative policy.

The question has been raised as to whether or not all of the facts above referred to apply to cities of the fourth class. We believe that this question was raised and definitely settled in the case of *Dobyns v. Bank of Ava* (Springfield Court of Appeals 1936), 99 S. W. (2d) 495. In deciding this case the court in effect held that all of Chapter 38 is construed together. Ava was a city of the fourth class and had failed to comply with the terms of what is now Section 7821, providing for the establishment of a depository. We quote from the opinion of the court at l. c. 497 as follows:

"There is practically no dispute as to the facts in this case; the only contention being as to whether section 7676, R. S. Mo. 1929 (Mo. St. Ann, Sec. 7676, p. 6046), is applicable and controlling in this case.

"We are of the opinion that section 7676, R. S. Mo. 1929, does apply and is controlling in this case, and applies to all cities owning and operating waterworks, under the provisions of article 31, chapter 38, R. S. Mo. 1929 (section 7641 et seq. (Mo. St. Ann, Sec. 7641 et seq., p. 6030 et seq.)). Section 7641, R. S. Mo. 1929 (Mo. St. Ann. Sec. 7641, p. 6030), which is the statute empowering cities to operate and own waterworks plants, states that 'the city council of any city, town or village in this state shall have power to erect, maintain and operate waterworks, or to acquire waterworks by purchase and to operate and maintain the same, and to supply the inhabitants thereof with water.' The right of a city to own waterworks plants is governed by article 31, chapter 38, R. S. Mo. 1929. This gives

any city, town, or village the right to operate a waterworks system, and therefore would apply to the city of Ava.

"Section 7676 is a part of chapter 38, article 31, and provides that the funds shall be deposited in a depository selected as provided by article 4 of chapter 38 (section 6719 et seq. (Mo. St. Ann. Sec. 6719 et seq., p. 5587 et seq.)). While it is true that article 4 of chapter 38 applies only to cities of the third class, and is not mandatory in its terms, however, article 4, chapter 38, R. S. Mo. 1929, is merely referred to in section 7676 to provide the method by which the depository must be chosen. Section 7676 makes it mandatory that a depository shall be selected. It states 'there shall be selected a depository for the funds of the waterworks system in the manner as provided by article 4 of chapter 38, R. S. 1929.' Undoubtedly section 7676 makes the selection of a depository mandatory on all cities, towns, and villages owning and operating waterworks, under article 31, chapter 38, and merely refers to article 4, chapter 38, to give the method and procedure to be followed, in selecting the depository.

"We are therefore of the opinion that, the depository not having been selected, in accordance with the statute, section 7676, which is a mandatory statute, the bank became a trustee ex maleficio, because the deposit was unlawful, * * * *"

Under this decision it is necessary that the terms of Section 7821 be complied with. It is possible that this section could be complied with by establishing the depository and when funds have accumulated that a warrant be drawn on the depository, signed by the president of the board and countersigned by the mayor, and payable to the city, thereby transferring the funds from the Board of Public Works depository to the city, and then allow the city to pay the bills. This

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procedure probably should be followed in the event that an ordinance providing for the payment of bills by the Board of Public Works has not been enacted.

The sections above quoted give broad powers of control, management and operation to the Board of Public Works when established, and makes it mandatory that a depository be selected and provides for bonds to be given by the members of the board, and that books be kept and submitted to the city council. It is even required that the warrants be signed by the president of the board and countersigned by the mayor, and then provides for such other powers as may be prescribed by ordinance. It seems that Section 7802 does not make it mandatory that the bills be allowed and paid by either the board of public works or the city council, but if the board of public works, under proper ordinance, attempts to pay the bills and salaries, it is mandatory that they follow the same procedure as that followed by the city in the allowance and payment of bills and salaries.

CONCLUSION

It is, therefore, the opinion of this department that funds collected by the Board of Public Works from the operation of public utilities of the city must first be deposited in a depository, selected as provided in Section 7821, R. S. Mo. 1939, and, if proper ordinance has been duly passed by the city council, the Board of Public Works may then pay bills subject to the provision of said ordinance. If no ordinance providing for the payment of bills by the Board has been enacted then the funds may be transferred by warrant from the Board of Public Works' depository to the City Special Light Plant Fund. And, in this event, the bills would be allowed and paid by the City Council.

Respectfully submitted,

APPROVED:

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LAP:CP