CITY OF THE THIRD CLASS--not authorized to invest "reserve fund" in United States Bonds.

April 15, 1943

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Hon. Fred F. Williams, Supt.
Municipal Lighting and Water System
Poplar Bluff, Missouri

Dear Mr. Williams:

The Attorney General wishes to acknowledge receipt of your letter of April 12, 1943, in which you request an opinion as follows:

> "The city of Poplar Bluff has a Municipal Light and Water Plant which is operated under the direction of the Board of Public Works.
>
> In the operation of these plants there has been created a reserve fund which has been carried on deposit in the local banks. These funds could be used, or rather invested, through the purchase of United States Savings Bonds, if such purchase will come within the limitation of the law governing such funds.
>
> Will you please advise as to the legality of such a transaction and if such funds can be so invested."

Statutory authority exists for the investment of public funds for United States Bonds.in numerous instances. County and municipal sinking funds may be so invested. Sections 3287, 3288, 13782 and 13783, school funds under certain circumstances may also be invested in such manner, sections 10335, 10704, 10871 and 10874 and cities of the first and second classes have authority to purchase United State Bonds with portions of their funds. Sections 6385 and 6834 respectively. But no such authority is given to a city of the third class.

Cities of the third class are those containing three thousand inhabitants and less than thirty thousand inhabitants, Section 6214 R. S. Mo. 1939. By the 1940 census, Poplar Bluff had a population of 11,163 and is therefore a city of the third class. Cities of this class have authority to own and operate light and water plants. Constitution of Mo., Article 10, Section 12 and 12a and Section 6961 and 6967 R. S. Mo. 1939.

Municipal corporations possess two classes of powers, governmental and legislative powers and private or proprietary powers. In owning and operating light plants and water plants, cities are held to be exercising the private or proprietary powers. Dillon on Municipal Corporations, (5th Edition), Volume 3, Section 1303, page 2134:

> " * * * Although it is probably impossible to lay down any rule by which it can be determined in all cases where its legislative, governmental, and discretionary functions end, and the so-called private and proprietary character of its acts begins, there are cases that hold that in executing and carrying into effect the powers conferred upon it by constructing and erecting its own water or lighting plant, in managing and operating the plant, and in the furnishing and distribution of water or light to inhabitants and consumers, it acts or under certain circumstances will be considered to act in a proprietary and individual capacity rather than by virtue of its legislative and governmental functions. * * *"

In the operation of light and water plants, large sums of money would be collected for electricity, gas and water.

The statutory provisions applying to the funds of cities of the third class are found in, Section 6939 R. S. Mo. 1939, requiring the selection of a city depository, Section 6940 R. S. Mo., 1939, requiring the depository to give bond in double the amount of the revenues of the city for any year,

Section 6941, R. S. Mo. 1939, requiring the city treasurer to deposit all funds in the selected depository, and Section 6945 R. S. Mo. 1939, which directs the manner of investing sinking funds of the city.

No mention is made in the Statutes of any provision made for a "reserve fund" in connection with a municipally operated light or water plants.

At this point it is desired to call to your attention that your letter fails to state from what source the "reserve fund" is derived, and we are assuming it is derived solely from the operation of the plants and the sale of electricity or gas and water to consumers.

In considering the power of a city to take any action, there is one fundamental rule which must be borne in mind. In the case of St. Louis vs. Kaime, 180 Mo. at l.c. 322, the Supreme Court cited this rule from Dillon on Municipal Corporations, 4th Edition, Volume 1, page 145., the rule is 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.'(Vol. 1 (4 Ed.), p. 145)"

This rule is also applied in the cases of Bull vs. McQuie, 119 S. W. (2d) 204, and Ex Parte Williams, 129 S. W. (2d) 929.

The city council of a city of the third class is the law-making body of the city, and the duties and powers of the city council are set out in Section 6949 and 6950 R. S. Mo., 1939.

Section 6949:
"The mayor and council of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

Section 6950:

"The council shall enact ordinances to prohibit and suppress houses of prostitution and other disorderly houses and practices, and gambling houses and all kinds of public indecencies, and may prohibit the selling or giving intoxicating liquors to any minor or habitual drunkard. The council shall also enact ordinances to restrain and prohibit riots, noises, assaults and battery, petit larceny, disturbances of the peace, disturbances of religious and other lawful assemblies, indecent shows, exhibitions or concerts in any street, house or place in the city, disorderly assemblies, and to regulate, restrain and prevent the discharge of firearms and the keeping and discharge of rockets, powder, fireworks or other dangerous combustible materials in the streets or in the limits of the city. The city council may also regulate and control the construction of buildings, the construction and cleaning of fireplaces, chimneys, stoves and stovepipes, ovens, boilers, kettles, forges or any apparatus used in any building, manufactory or business which may be dangerous in causing or promoting fires, and may provide for the

> inspection of the same. The council may also provide, by ordinance, limits within which no building shall be constructed except of brick or stone or other incombustible materials, with fire-proof roofs, and impose a penalty for the violation of such ordinance, and may cause buildings commenced, put up or removed into such limit, in violation of such ordinance, to be removed or abated. The council may also purchase fire engines, hook and ladder outfits, hose and hose carts, buckets and all other apparatus useful in the extinguishing of fires, and organize fire companies, and prescribe rules of duty for the government thereof, with such penalties for the violation thereof as they may deem proper, not exceeding one hundred dollars, and to make all necessary expenditures for the purchase of such fire apparatus and the payment of such fire companies. The council may, by ordinance, regulate and fix reasonable maximum rates and charges for the rental and use of telephones and telephone service within such city, and the price and quality of water, gas, gasoline, petroleum, electric lights and other means of lighting furnished by any person, firm or corporation operating under any franchise granted by the city, and may prescribe the candle power of the gas and electric lights furnished the city and private consumers. The council may, by ordinance, regulate and fix reasonable maximum rates, charges and prices of steam heat or other means of heating furnished by any person, firm or corporation operating under any franchise granted by the city, and may prescribe the pressure to be maintained, on its mains, by any steam heating company, person or firm operating the same."

Section 6949, supra, may be called the "general welfare clause" of the city charter. And it would seem that

under this section of the statute, absent any other statutory provision, the council might be authorized to enact an ordinance creating a reserve fund and providing for the investment of it. This requires a consideration of the authority conferred by Section 6949, supra. The Springfield Court of Appeals in the case of State ex rel. Smith vs. Berryman, 142 Mo. App. 373, had before it a similar section and spoke in the following manner at l. c. 383:

> "The 'general welfare clause' as generally understood, is like adding general words to special ones in a statute, and not to be considered as overruling or enlarging the powers expressly granted. (St. Louis v. Kaime, 180 Mo. 309, 79 S.W. 140; 1 Dillon on Municipal Corporations (4 Ed.), 392, 393; Ruschenberg v. Railroad, 161 Mo. 70, 61 S. W. 626.)
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> In the first case above cited, Judge Fox quotes approvingly from Dillon, as follows: 'Occasionally, the charter or incorporating act, without any special enumeration of the purposes for which by-laws may be made, contains a general and comprehensive grant of power to pass all such as may seem necessary to the well-being and good order of the place. More frequently, however, the charter or incorporating act authorizes the enactment of by-laws in certain specified cases, and for certain purposes; and after this specific enumeration a general provision is added, that the corporation may make any other by-laws or regulations necessary to its welfare, good order, etc., not inconsistent with the Constitution or laws of the State. This difference is essential to be observed, for the power which the corporation would possess under what may, for convenience, be termed 'the general welfare clause,' if it stood alone, may be limited, qualified, or, when such intent is manifest, impliedly taken away by provisions specifying the particular purposes for which by-laws may be made. It is clear that the general clause can confer no authority to abrogate the limitations contained in special provisions. When there are both special and general provisions, the power to pass by-laws under the special or express grant can only by exercised

> in the cases and to the extent, as respects those matters, allowed by the charter or incorporating act; and the power to pass by-laws under the general clause does not enlarge or annul the power conferred by the special provisions in relation to their various subject-matters.'
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> In State v. Butler, 178 Mo. 272, we find the rule to be declared as follows: 'The powers of a municipal assembly to pass by-laws under a general welfare clause, can never be exercised to enlarge or annul specific provisions.'"

The light and water plants need to be maintained and to have provisions made for replacement. Such matters could not be well taken care of by current revenue as the current revenue of any year would hardly be sufficient to meet replacement costs. If the inhabitants are to receive the best service and full benefit from the plants, some method should be devised for providing a "reserve fund" for these purposes out of the profits of the operation of the plants.

There being no statutory provision for taking care of such a "reserve fund", preserving it by the most advantageous method until needed, it would appear reasonable and logical that the council by ordinance could make provision for setting up such a fund and its investment in safe securities until needed. And this is especially true for the statutes relating to the funds of cities of the third class seem to contemplate only the safe keeping of the current annual revenue for any one year (bond being required to be given for double the revenue of any year). However, cities acting in their proprietary character are bound by statutes which limit their powers. Flinn vs. Gillen, 10 S. W. (2d) 923 l. c. 926 (Mo. Sup.)

> "The principle of the common law, that the sovereign is not bound by general terms of statutes which would restrict his powers, does not apply to cities in the exercise of their municipal powers; that is, the exercise of powers ministerial or proprietary in character. In County of St. Charles v. Powell, 22 Mo. 525, it is said (loc. cit. 528, 66 Am. Dec. 637):

> 'The immunity, however, it seems, was, even at common law, an attribute of sovereignty, only, and did not belong to the municipal corporations or other local authorities established to manage the affairs of the political subdivisions of the state.'
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> See, also, Hunter v. Pinnell, 193 Mo. 142, 91 S. W. 472; Palmer v. Jones, 188 Mo. 163, 85 S. W. 1113; Lumber Co. v. Craig, 248 Mo. 330 154 S. W. 73; Dunklin County v. Chouteau, 120 Mo. 577, 25 S. W. 553."

The city of Poplar Bluff has such powers as are especially granted to it and those powers which are necessarily implied as indispensable for the carrying out of the express powers. While it might be advantageous to the citizens to have created a "reserve fund" to be built up from the profits of the operation of the light and water plants, to be used for replacement or repair purposes, such a fund is not absolutely indispensable, for the plants may be replaced or repaired as originally acquired. And the rates could be lowered or the profits used in defraying expenses of the city. There is a definite prescribed method of handling the funds of the city.

CONCLUSION

No statutory provision exists for the investing of any "reserve fund" derived from the operation of the light and water plants in United States Bonds.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

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