OFFICIAL OPINION NO. 5

February 4, 1949.

Mr. Walter R. Mybeck, Director
Division of Public Works and Supply
404 State House
Indianapolis, Indiana

Dear Mr. Mybeck:

You state that the City of Richmond proposes to make an annual charge in the sum of $4,380.00 for the Richmond State Hospital's use of the city's sewage disposal plant. You further state that in view of Chapter 113 of the Acts of 1927, you question the legality of this charge and, therefore, request an official opinion on same.

Chapter 113 of the Acts of 1927, page 295, provides as follows:

> "Section 1. *Be it enacted by the general assembly of the State of Indiana,* That the board of trustees of the Eastern hospital for insane is hereby authorized to enter into a contract with the board of public works of the city of Richmond, Indiana, for the purpose of providing for the installation and construction of a trunk sewer and a sewage disposal plant through which the sewage from the Eastern hospital for insane will discharge.
>
> "Sec. 2. The contract so entered into shall be subject to the approval of the governor and the attorney-general, and shall provide, among other things, that such sewer and disposal plant shall be constructed and installed by the board of public works of the city of Richmond, under and pursuant to the provisions of the laws of this state authorizing cities to construct sewers; that such sewer and disposal plant, when installed and constructed, shall be maintained and kept in repair by the city of Richmond; that the sewer pipes of the Eastern hospital for insane shall be joined to the sewer installed by the city of Richmond, and that an outlet therefor shall be afforded for the disposal of the sewage of the Eastern hospital for insane; that the operation

of the sewage disposal plant of the Eastern hospital for insane shall be discontinued; and that the board of trustees of the Eastern hospital for insane, from any funds which may be made available for that purpose, will pay, as their pro rata share of the construction and installation of such sewer and disposal plant, an amount equal to thirty-three and one-third per cent of the total contract cost of the construction and installation of such trunk sewer and disposal plant. No part of the payment for the construction of such sewer and disposal plant which the board of trustees of the Eastern hospital for insane is hereby obligated to pay shall be paid until such sewer and disposal plant shall have been completed and accepted, nor until the board of trustees shall have ascertained and found that the sewer and disposal plant so installed and constructed will be satisfactory and adequate for the purposes of the Eastern hospital for insane.

"Sec. 3. As soon as such sewer and disposal plant shall have been completed and accepted, the board of public works of the city of Richmond shall certify to the board of trustees of the Eastern hospital for insane a statement showing the total cost of such sewer and disposal plant and the amount thereof that the board of trustees is required, under the terms of the contract so entered into, to pay. The board of trustees shall thereupon certify to the auditor of state a statement of such amount, together with a properly executed voucher, and the auditor of state shall thereupon issue his warrant for the amount so certified to the proper fiduciary officer of the city of Richmond.

"Sec. 4. A sufficient amount of money is hereby appropriated out of any money in the general fund of the state treasury not otherwise appropriated to defray the expense which the board of trustees of the Eastern hospital for insane may incur in paying the proportion of the cost of such sewer and disposal plant which the state is hereby obligated to pay.

"Sec. 5. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage."

I have not been furnished with a copy of the contract, however, the general rule is that where a contract is entered into pursuant to a statute, the statute forms a part of the contract. If the law has made the instrument necessary, the parties are deemed to have had the law in contemplation when the contract was executed. The provisions of the statute become a part of the contract whether written in it or not.

Dept. of Insurance v. Church Members Relief Association (1939), 217 Ind. 58, 60;

General Asbestos and Supply Co. v. Aetna Casualty and Surety Co. (1935), 101 Ind. App. 207, 216;

United States Fidelity v. Poetker (1913), 180 Ind. 255, 264, 265.

The authorization granted by the statute in question is limited by the terms of the statute, therefore, the whole act must be read in conjunction with, and as a part of the contract made pursuant to it.

As a preliminary to the determination of the main question, it is probably advisable to dispose of one or two collateral considerations. It is now firmly established in our system of constitutional law that taxes can be levied for public purposes only.

State *ex rel.* Jackson, Attorney General v. Middleton (1938), 215 Ind. 219 at 230.

To warrant the appropriation granted in the act in question, it was necessary that the act be for a public purpose.

Furthermore, all persons dealing with public officers exercising statutory powers are bound to know the authority of such officers and to ascertain for themselves whether the statute is wholly complied with.

Railroad School Township v. First State Bank (1920), 73 Ind. App. 358, 365, 366;

Ness v. Board of Commissioners (1912), 178 Ind. 221, 226;

Hord v. State (1906), 167 Ind. 622, 631, 633.

The question presents itself as to whether or not the statute and the terms thereof comply with the rules of statutory construction above stated.

Section 2 of said act provides: 1st, that the contract entered into shall be subject to the approval of the Governor and the Attorney General; 2nd, that such sewer and disposal plant shall be constructed and installed by the Board of Public Works of the City of Richmond pursuant to the provisions of the laws of this state; 3rd, that when installed and constructed the plant shall be maintained and kept in repair by the City of Richmond; 4th, that the sewer pipes of the hospital shall be joined to the sewer installed by the City of Richmond and that an outlet therefor shall be afforded for the disposal of the sewage of the hospital; 5th, that the sewage disposal plant of the Eastern Hospital shall be discontinued; 6th, that the trustees of the hospital will pay as their pro rata share of the construction and installation of such plant an amount equal to 33⅓ per cent of the total contract costs of the construction; 7th, that the board of trustees of said hospital shall make no payments until the plant has been completed and accepted as satisfactory and adequate for the purposes of the hospital. Section 4 of the act provides for the appropriation.

In accordance with the above cited authorities it becomes apparent that however the contract between the City of Richmond and the Eastern Hospital actually reads, in as much as authorization to enter into said contract and payment was made pursuant to the act in question, the terms of the act must be read into the contract.

It is under Section 4, to-wit: that the pipes of the Eastern Hospital shall be joined to the sewer installed by the City of Richmond and that an outlet therefor shall be afforded for the disposal of the sewage of the Eastern Hospital, that we see the public purpose for which the act was enacted and the money constitutionally appropriated. For the hospital or the State of Indiana to pay a part of the costs of the construction and installation of the plant simply for the purpose of causing the city to maintain and operate same at the city's expense would not have been for a public purpose.

To me it is clear that the statute provided for part-payment of the construction of the plant in consideration for the use

thereof by the hospital. I am fortified in this opinion by the fact that twenty years have passed since the completion of this plant and the fact that the administrative officers of both the City of Richmond and the State of Indiana have so interpreted the act. There has never been any attempt on the part of the city until now to charge the hospital for the use of said plant.

Zoercher v. Indiana Associated Telephone Corp. (1936), 211 Ind. 447, 7 N. E. (2) 232;
Zoercher v. Indianapolis Union Railway Co. (1937), 211 Ind. 703, 7 N. E. (2) 289.

wherein it was said:

> "* * * the practical construction given to a statute by the public officers of the state, and acted upon by those interested, and by the people, is to be considered in cases of doubt."

It would, therefore, in my opinion in the absence of further legislation, be a gratuity and wholly unlawful for the State of Indiana or any agency thereof to pay the City of Richmond for the use and services of the plant in question. Furthermore, there is no appropriation to pay for same.

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OFFICIAL OPINION NO. 6

February 23, 1949.

Hon. James M. Propst,
Auditor of State,
State House, Room 238,
Indianapolis, Indiana.

Dear Sir:

I have your letter of the 17th instant in which you request an opinion on "whether or not the office of city councilman is a lucrative office and whether or not one person could hold a state appointive position and at the same time hold the position of city councilman. Also, whether or not this person could draw salary as city councilman and state appointee?"