cause they are not costs actually incurred by the wrecker contractor.

The statutory provisions giving rise to your question are silent, for all practical purposes, about how a city should collect these additional costs from the property owner. Obviously, such costs can not be merged into the mechanic's lien the city takes as subrogee of the contractor doing the demolition work. There is no statutory provision for a city to have a separate, second lien against a property to cover the incidental costs incurred by the city.

Therefore, in answer to your question, the statutes you have cited provide the procedure a city should follow in obtaining a mechanic's lien as subrogee of the wrecking contractor who is required to file such a lien covering the amount of the actual wrecking costs. The incidental costs incurred by the city in the proceedings against the property owner cannot be merged into the contractor's mechanic's lien. The statutes do not provide a way for the city to collect the incidental costs to which I have referred. New statutes could be drafted to provide a way for the city to bill these costs to the landowner on his tax duplicate. The costs might then be considered a tax lien, if the statutes so provided.

OFFICIAL OPINION NO. 65

November 19, 1964

Hon. Earl F. Landgrebe
State Senator
P. O. Box 270
Valparaiso, Indiana

Dear Senator Landgrebe:

This is in reply to your request for an Official Opinion on the following question:

"Can an applicant to the Valparaiso City Police Force qualify as a member of the Police Force and the Police Pension Fund under Burns' 48-6409, who is otherwise qualified, by waiving any rights to benefits on
behalf of himself and his heirs resulting from death or disability from a latent or specified physical condition which existed previously?"

The factual situation as presented in your letter and the enclosures is not entirely clear. Under one interpretation it would appear the applicant has successfully passed the physical examination and that the latent defect is being considered only from a practical standpoint as it may relate to the advisability of employing the applicant. Under another interpretation it would appear that the applicant cannot successfully pass the physical examination because of the latent physical condition, but that regardless of such condition it is desired to employ the applicant.

However, determination of the correct set of facts is not necessary to answer the question generally, since the legal principles involved are applicable to either interpretation.

You refer in your letter to the Acts of 1935, Ch. 185, Sec. 3, as amended and found in Burns' (1963 Repl.), Section 48-6409, which reads as follows:

"Every member of the police force of any such city who was in active service at the time of taking effect of chapter 94 of the Acts of the General Assembly of 1937 and who is now in active service as a member of any such police force but who is not a member of the police pension fund of such city, shall be admitted to membership in the police pension fund of all second, third and fourth class cities by a majority vote of the trustees of the police pension fund, if such police officer shall successfully pay [pass] the physical examination required by the trustees of the pension fund and shall pay the same amount into the pension fund as he would have paid as dues if he had been a member of the pension fund during all the years of his service."

Another section which is also applicable is the Acts of 1935, Ch. 185, Sec. 1, as amended, and found in Burns' (1963 Repl.), Section 48-6407, and reads as follows:

"No person shall be appointed as a member of the police force of any city of the first, second, third,
fourth or fifth class after he or she has attained his or her thirty-fifth [35th] birthday. No person shall be reappointed as a member of the police force of any such city unless the person so reappointed was a former member of such city police pension fund and can complete his twenty [20] years of service on or before his sixtieth [60th] birthday. No person shall be appointed or reappointed as a member of the police force of any such city unless he shall successfully pass such physical examination as may be required by the trustees of the police pension fund of such city. The term 'Board of Trustees of the Police Pension Fund,' as used in this section, means the mayor, treasurer, chief of police and all of the elected trustees of the police pension fund.'"

The answer to your question involves consideration of the power to waive a right which is granted by statute. Or stated more specifically, can either the applicant or the proper city officials waive statutory provisions relative to pensions and disability payments? Although the statutes do not designate the exact nature of the physical examination, the city has implemented the statute by adopting physical requirements of some nature which must be considered as part of the statute.

As stated in the Annotation in 125 A. L. R. 728, which concerns the "Validity of waiver of, or agreement to waive, disability benefit, annuity, pension, or bonus incident to public office or employment," there is little authority on the subject. The reported case which is the basis for the Annotation is set forth beginning in 125 A. L. R. 720 and is School District No. 1, Multnomah County, Respt. v. Teachers' Retirement Fund Association of School District No. 1, Multnomah County, Appt. (1939), 163 Ore. 233, 95 P. (2d) 720, 96 P. (2d) 419, and states as follows on page 724:

"The requirements of a statute enacted for the public good may not be nullified by private contract * * * Statutory contracts of the public with individuals may not be varied by private contract * * * The statute creating the disability annuity was enacted for the
public good within the meaning of the foregoing rule * * *”

And further on page 725:

“The public policy of the state of Oregon is plainly indicated by the provisions in regard to the payment by the district to the Teachers' Retirement Fund for the purpose of paying the annuity provided for in the statute.

“We think that the contract of waiver was clearly against public policy and void. A condition against public policy, imposed on an annuity by the donor or grantor thereof, is not binding on an annuitant * * *”

The theory advanced has been followed by the courts in Indiana and in the case of Zumpfe v. Gentry (1899), 153 Ind. 219, 54 N. E. 805, the court stated on page 227:

“It may be stated in general terms, that where the waiver by contract is contrary to public policy, it will not be sustained.”

A waiver of part of a pension payment was upheld in Freyermouth et al. v. State ex rel. Pinter et al. (1939), 215 Ind. 693, 21 N. E. (2d) 707, but a distinction exists. At the time the waiver was executed the policeman was already drawing his pension and had a vested right in the fund.

The waiver which you refer to is only of future intangible rights and the public policy decreed by the Legislature as part of the police system of the state cannot be frustrated by any device of the parties.

I am of the opinion that a prospective member of a police department cannot execute an enforceable waiver of rights in the police pension fund as those rights may be granted by the Legislature.