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MUNICIPAL CORPORATIONS - IMPLIED POWER TO SELL APPLIANCES AS INCIDENTAL TO POWER TO OPERATE MUNICIPAL LIGHT PLANT

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MUNICIPAL CORPORATIONS — IMPLIED POWER TO SELL APPLIANCES AS INCIDENTAL TO POWER TO OPERATE MUNICIPAL LIGHT PLANT — A Massachusetts statute [1] authorized municipalities to "construct, purchase or lease, and maintain . . . one or more plants for the manufacture or distribution of gas or electricity for municipal use, or for the use of its inhabitants." Pursuant to this statute the town of Concord contracted with the Edison Electric Company of Boston to supply the municipal light plant with electrical energy for distribution by the latter to local consumers. In order to take advantage of a lower rate to enable it to meet the competition of a privately owned gas company, the municipality sought to increase consumption by selling electric appliances to its residents as distributor for various manufacturers and wholesalers. A suit was brought by several taxpayers to enjoin the municipal officers from continuing this "load-building program." The court granted the injunction on the ground that authorization for the undertaking was not expressed in the statute, and was not impliable from the express powers delegated. *McRae v. Selectmen of the Town of Concord*, (Mass. 1937) 6 N. E. (2d) 366.

No doubt a private corporation facing the same financial problem which confronted the municipality in the principal case would be deemed to possess incidental power to sell appliances and thus encourage increased consumption of its primary product.[2] A private corporation is expected to have some discretion in the use of its funds in the hope of realizing an ultimate profit; therefore, its charter is properly interpreted to include broad incidental powers permitting varied and extensive activity. While there is some conflict in the cases,[3] a contrary judicial attitude has ordinarily been adopted with respect to use of municipal resources to invade the business domain. The courts have been reluctant to imply the requisite authority from general legislative grants,[4] particularly if the business involved is non-monopolistic in character, or there is no widespread public need for the service, so that the speculative element bulks large.[5] It is true that where, as in the principal case, express authority has been granted, and the question is one of *incidental* powers, a majority of

[1] Mass. Gen. Laws (Ter. ed. 1932), c. 164, § 34.

[2] Malone v. Lancaster Gas, Light, & Fuel Co., 182 Pa. St. 309, 37 A. 932 (1897); Burke v. Mead, 159 Ind. 252, 64 N. E. 880 (1902).

[3] Courts differ even as to whether a municipality has implied power to produce energy necessary for the illumination of *public* streets and places. 5 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 1927 (1928). Assuming this power is conceded, the further question remains as to whether the municipality may incidentally supply its inhabitants for their private purposes. 5 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 1929 (1928).

[4] Posey v. Town of North Birmingham, 154 Ala. 511, 45 So. 663 (1908); Consumers' Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643 (1922); Peoples' Gas & Fuel Co. v. Town of Ruston, 174 La. 485, 141 So. 36 (1932); Clark v. La Guardia, 245 App. Div. 325, 281 N. Y. S. 54 (1935). *Contra*: City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849 (1891) (dictum). See generally, 5 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., §§ 1926-1927 (1928).

[5] See Atty. General v. Detroit Common Council, 150 Mich. 310, 113 N. W. 1107 (1907); Consumers' Coal Co. v. City of Lincoln, 109 Neb. 511, 189 N. W. 643 (1922); American Petroleum Co. v. Ogden City, (Utah, 1936) 62 P. (2d) 557.

courts purport to apply the liberal rules of construction used in defining the powers of private corporations.[6] But, on close analysis, these cases appear to present little more than efforts of the municipality to make economic use of existing plant facilities and to involve little, if any, new risk or expenditure. Thus, from express authority to operate a municipal light plant or water works, these courts have implied incidental power to insure against liability,[7] to dispose of by-products profitably,[8] to distribute the excess primary product either within [9] or outside [10] the municipal area, and to install connections necessary for the operation of electrical appliances.[11] On the other hand, the venture in the principal case was relatively independent of the main project, apparently required a considerable expenditure by way of salesmen's salaries, advertising and office expenses, and was launched in a fairly competitive business field. Consequently, it is not all clear (despite the Massachusetts court's contrary belief) that a conclusion opposed to that of the principal case would be reached in many of the supposedly liberal majority jurisdictions. However, whatever may be the reaction of other courts, the decision in the principal case is not at all surprising. Presumably because of a local history of minute legislative specification of powers intended to be delegated,[12] the Massachusetts court has consistently confined incidental municipal powers, both proprietary and governmental, within an unusually narrow scope. For example, in a leading case,

[6] City of Henderson v. Young, 119 Ky. 224, 83 S. W. 583 (1904); Andrews v. City of South Haven, 187 Mich. 294, 153 N. W. 827 (1915); Milligan v. City of Miles, 51 Mont. 374, 153 P. 276 (1915); McDonald v. Ward, 201 Ala. 245, 77 So. 835 (1918); City of Mayfield v. Phipps, 203 Ky. 532, 263 S. W. 37 (1924); Hammler v. City of Jacksonville, 97 Fla. 807, 122 So. 220 (1929).

[7] Travelers' Ins. Co. v. Village of Wadsworth, 109 Ohio St. 440, 142 N. E. 900 (1924).

[8] Milligan v. City of Miles, 51 Mont. 374, 153 P. 276 (1915).

[9] McDonald v. Ward, 201 Ala. 245, 77 So. 835 (1918); Smith v. Nashville, 88 Tenn. 464, 12 S. W. 924 (1890).

[10] Municipal League of Bremerton v. City of Tacoma, 166 Wash. 82, 6 P. (2d) 587 (1931); Muir v. Murray City, 55 Utah 368, 186 P. 433 (1920); Larimer County v. Fort Collins, 68 Colo. 364, 189 P. 929 (1920).

[11] Hammler v. City of Jacksonville, 97 Fla. 807, 122 So. 220 (1929). In City of Mayfield v. Phipps, 203 Ky. 532, 263 S. W. 37 (1924), the court implied incidental power to install "necessary plumbing and electric supplies and material." However, it is not clear from the opinion, whether the quoted words in fact included sale of appliances.

In the only other case found by the writer in which the municipality sought to sell electric appliances, a decision in accord with the principal case was reached. Attorney General v. Corporation of Leicester, [1910] 2 Ch. Div. 359. However, this case is distinguished in Andrews v. City of South Haven, 187 Mich. 294, 153 N. W. 827 (1915), on the basis of restrictive statutory language. An analogous case is Keen v. Waycross, 101 Ga. 588, 29 S. E. 42 (1897), in which power to engage in a general plumbing business incident to operation of a waterworks was denied. This case differs from the principal case in the important respect that the necessity of increased consumption to insure successful operation of the plant was not shown.

[12] See Spaulding v. Inhabitants of Town of Peabody, 153 Mass. 129, 26 N. E. 421 (1891).

the court denied the power to operate a light plant pursuant to express power to erect and maintain street lamps.[13] Consequently, it was to be anticipated that the hazardous and unusual employment of municipal funds attempted in the principal case would be given short shrift by the court.

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[13] Ibid.