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City Document.— No. 45.

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CITY OF BOSTON.

CITY SOLICITOR'S OPINION

ON THE

WATER RENTS.

In Common Council, Dec. 18, 1848.

Read, laid on the table, and ordered to be printed.

Attest,

W. P. GREGG, *Clerk.*

CITY OF BOSTON.

In Common Council, Dec. 14, 1848.

Ordered, That the City Solicitor be requested to present to the Common Council his written opinion upon the construction of the "Act for supplying the City of Boston with Pure Water," in reference to the power of the Water Commissioners to establish the Water Rents; and whether the City Council have power to establish the same.

BENJAMIN SEAVER, *President.*

CITY SOLICITOR'S OFFICE,
Dec. 18, 1848.

BENJ. SEAVER, ESQ.,
President of the Common Council.

SIR :—

In reply to the order of the Common Council, requesting my opinion upon the construction of the "Act for supplying the City of Boston with pure Water," in reference to the power of the Water Commissioners to establish the Water Rents, and whether the City Council have power to establish the same, I have the honor to submit the following as the result at which I have arrived.

The order embraces two questions,—

1. What power have the Water Commissioners to establish the Water Rents?

2. Have the City Council power to establish the same?

The authority to introduce water into the City, and the precise manner in which it must be done, are contained in the Act of the Legislature above referred to. By that Act the City of Boston is authorized to take, hold and convey to, into and through the said City, the water of Long Pond; to make and build one or more permanent Aqueducts; to make and maintain Reservoirs; to make and establish public Hydrants; to distribute the water through the City; "to regulate the use of the said water within and without the said City, *and establish the prices or rents to be paid therefor.*" Such, in a very condensed

form, is the authority granted to the City of Boston. It is important to notice, however, that the grant is made with the express qualification or limitation, that this power is to be exercised *by and through the agency of three Water Commissioners*, who are to hold their offices for three years, unless the aqueducts and works shall be sooner completed, or unless they shall be removed.

The authority is granted to the City, but the *manner in which it is to be exercised* is also expressly defined, and it must be exercised in this manner, or it cannot be exercised at all. It is true, that the Water Commissioners are the Agents of the City, but they are Agents with a power irrevocable while they remain in office. They may be removed, but others must be chosen in their place, and the works cannot be carried on in any other manner, than by and through their agency.

Now, the power to establish Water Rents is granted in precisely the same form as that to take land, to lay Aqueducts and to build Reservoirs. It is a power to be exercised in a peculiar manner, namely, by the Water Commissioners. If the Act stopped here, I could entertain no doubt, that the City can establish the Water Rents in no other manner whatsoever than by or through the agency of the Water Commissioners; or, what is the same thing, that the Rents must be established by the Commissioners, or they cannot be established at all.

But the third Section of the Act provides, that the Water Commissioners shall hold their offices only three years after their appointment, unless the works are sooner completed; and the Act (in §5,) provides that whenever the said office of Commissioners shall cease, all the rights, powers and authority, given to

the City of Boston by the Water Act *shall be exercised by the said City*, subject to all the duties, liabilities and restrictions therein contained, in such manner and by such agents, officers and servants, as the City Council shall, from time to time, ordain, appoint and direct. The Act then goes on to specify certain duties to be performed, and the manner of their performance by the City. Among these duties, the eleventh Section provides that the City Council shall, from time to time, regulate the price of rents for the use of the water, with a view to the payment, from the net income, rents and receipts therefor, not only of the semi-annual interest, but ultimately of the principal also of the "Boston Water Scrip," so far as the same may be practicable and reasonable.

It thus appears to be clear, that the City by and through the agency of the Water Commissioners, may "establish" the Water Rents, during their continuance in office, but, *on the expiration of their office*, then the City Council may "regulate" the prices or rents which have already been established. To adopt a different construction from this, would be admitting that there is an inconsistancy in the second and eleventh Sections of the Act; for by such a construction, the City Council may change the Rents whenever and as soon as the Water Commissioners establish them. This would in effect be giving substantially the same power to two different bodies. Moreover, the Water Commissioners have the same authority to establish the Water Rents, that they have to perform the other duties imposed upon them, and if the City Council may regulate their proceedings in one respect, there seems to be no reason why they may not in others. Thus the whole power in the premises might be

taken from the Commissioners, and exercised by the City Council.

It is true, that the third Section provides, that the Water Commissioners shall execute and perform, and superintend and direct the execution and performance of all the works, matters and things, mentioned in the preceeding Sections, "which are not otherwise specially provided for in this Act;" and an argument may be made that the establishment of the Water Rents by the City Council is otherwise specially provided for in the eleventh Section. But this would be begging the question, because the real point to be determined is, whether the establishment of the Water Rents *is* otherwise provided for in that Section. In my judgment it is not, because the eleventh Section provides for the *regulation*, and not the *establishment* of the Rents; but mainly because the provision in that Section must be construed to take effect after the office of the Water Commissioners has expired.

The third Section also provides, that the Water Commissioners shall be subject to such ordinances, rules and regulations, in the execution of their said trust, as the City Council may, from time to time, ordain and establish, *not inconsistent with the provisions of this Act*, and the laws of the Commonwealth. Now it *is* "inconsistent with the provisions of this Act" for the City Council to establish the Water Rents in any other manner, than by or through the agency of the Water Commissioners, because the Act expressly requires that it shall be done by or through their agency.

The whole structure of the Act is consistent with the construction before stated. It seems very clearly to have been the intention of the Legislature to impose upon the Water Commissioners, the duty and

the responsibility of this great undertaking, for three years, or until the work was completed. They cannot shift this duty and this responsibility upon others; and the intention of the Legislature seems to be equally clear, that the Water Commissioners shall not be interfered with in the exercise of their own judgment, in discharging the duties imposed upon them by the law. When their duties and responsibilities cease, the care and management of the Water Works are imposed upon the City itself, to be exercised in the manner pointed out by the Act.

Upon the whole, I am of the opinion, upon the two branches of the question submitted to me, *first* that the Water Commissioners may, in the first instance, and while they are in office, *establish* the Water Rents, free from the control of the City Council; and *secondly*, that the City Council are authorised and required to *regulate* these Rents, from time to time, *after the expiration of the office of the Water Commissioners*, "with a view to the payment, from the net income, rents and receipts therefor, not only of the semi-annual interest, but ultimately of the principal also, of the "Boston Water Scrip," so far as the same may be practicable and reasonable."

I have the honor to be

Respectfully,

Your ob't servant,

PELEG W. CHANDLER,

City Solicitor.