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A MUNCIPALITY MAY OPERATE A PUBLIC UTILITY BOTH WITHIN AND WITHOUT ITS CORPORATE LIMITS—REIMBURSE THE ORIGINAL INSTALLERS—§ 6, ARTICLE XVIII OHIO CONSTITUTION.

SYLLABUS:

1. Under Section 6 of Article XVIII, Ohio Constitution, a municipality may operate a public utility both within and without its corporate limits in the same manner as a private corporation would operate such utility and may enter into a contract with an individual landowner providing for the extension of city sewerage lines to a previously unsewered area at the sole cost and expense of such individual with the agreement subsequently to reimburse such individual for the cost of construction of the lines.

2. Such contract for sewage facilities pursuant to Section 6, Article XVIII of the Ohio Constitution may also provide for reimbursement by subsequent users paying a certain sum directly to the original installers of the line, payment to be enforced by the refusal of the municipality to permit taps until such payment is made, or by requiring each subsequent user to pay the municipality a proportionate share of the cost, the municipality in turn to reimburse the original installers.

Columbus, Ohio, April 20, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion on the following two questions:

> "1. Where the present sewage system has been constructed and is being paid for through the retirement of bonds out of sewer rental charges under a mortgage indenture, may a municipality enter into a contract with an individual providing for the extension of city sewerage lines to a previously unsewered area, at the sole cost and expense of such individual, and agree to reimburse such individual for the cost of construction of the lines, keeping in mind that prospective users will be charged the same sewerage rental rate as present users?
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> "2. If the answer to question one is in the affirmative may such contract provide for reimbursement by subsequent users paying a certain sum directly to the original installers of the line, payment to be enforced by the refusal of the municipality to permit taps until such payment is made; or by requiring each subsequent user to pay the municipality a proportionate share of the cost, the municipality in turn to reimburse the original installers."

While I have been unable to locate any case which directly holds that a municipality operated sewage system is a public utility, this fact is directly implied in *State, ex rel. City of Fostoria v. King*, 154 Ohio St., 213. For this reason, I shall proceed on the assumption that a municpally owned sewage system may be considered a public utility. Operation of a public utility by a municipality, both within and without the corporate limits of such municipality, is specifically authorized by Article XVIII, Section 6 of the Constitution of Ohio, reading as follows:

> "Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality."

The powers of a municipality to operate a public utility within the provisions of this section were construed by the Ohio Supreme Court in the case of *The Travelers Insurance Co., v. Village of Wadsworth,* 109 Ohio St., 440. The second branch of the syllabus in that case reads as follows:

> "2. The power to establish, maintain, and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may exercise its powers as would an individual or private corporation."

The broad grant of constitutional authority to a municipality to operate a public utility both within and without its corporate limits in the same way as a private corporation might conduct such a business has been repeatedly affirmed by the Supreme Court of Ohio. *State, ex rel. White v. Cleveland,* 125 Ohio St., 233; *Zangerle v. Cleveland,* 145 Ohio St., 347; *Akron v. Public Utilities Commission,* 149 Ohio St., 354.

The most recent case in which the Supreme Court affirmed this position was that of *State, ex rel. McCann v. City of Defiance,* 167 Ohio St., 313. The syllabus in that case reads as follows:

> "1. The General Assembly has no power to enact any statute for the purpose of limiting or restricting by regulation or otherwise the power and authority of a municipality, that owns and operates a public utility for the purpose of supplying the product thereof to such municipality or its inhabitants, to sell and deliver to others the portion of the surplus product of such utility that it is authorized by Sections 4 and 6 of Article XVIII of the Constitution to sell and deliver to such others. *Swank v. Village of Shiloh,* 166 Ohio St., 415, *Village of Euclid v. Camp Wise Assn.,* 102 Ohio St., 207, and *Board of Education v. City of Columbus,* 118 Ohio St., 295, approved and followed. *City of Akron v. Public Utilities Commission,* 149 Ohio St., 347, *City of Cincinnati v. Roettinger, a Taxpayer,* 105 Ohio St., 145, *City of Lakewood v. Rees,* 132 Ohio St., 399, *Hartwig Realty Co. v. City of Cleveland,* 128 Ohio St., 583, and *Travelers Ins. Co. v. Village of Wadsworth,* 109 Ohio St., 440, distinguished.
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> "2. To the extent that Section 743.13, Revised Code, requires a municipality to furnish water to noninhabitants of such municipality or limits the price which such municipality may charge for such water, such statute is unconstitutional and void."

Turning to your specific questions, the application of the Supreme Court's interpretation of Article XVIII, Section 6 of the Ohio Consti-

tution constrains me to conclude that a municipality may operate a public utility in the execution of its proprietary powers in the same way as a private corporation could exercise such powers. It may contract with persons either inside or outside its corporate limits and supply them with whatever public utilities service, including sewage disposal, which it deems desirable and on whatever conditions and terms it may prescribe. See also Opinion No. 487, Opinions of the Attorney General for 1951, which held that a municipality may furnish water to residents living outside its corporate limits.

The only authority I have been able to find which is in conflict with this conclusion is Opinion No. 1701, Opinions of the Attorney General for 1920. In this opinion the then Attorney General held unlawful a reimbursement contract where the municipality and land owners contracted that the municipality would construct a water pipe line through a certain area and assess the land owners, for its cost, such assessment to be reimbursed by the municipality to the land owners at such time as the property should become improved. This holding was based on an interpretation of Section 3812, General Code, which is now Section 727.01, Revised Code. This section authorizes municipal corporations to levy and collect assessments on specially benefited real property, to provide any part of the cost of public improvements including water mains and sewers.

On page 1160 of Opinion No. 1701, *supra*, it is stated:

> "However, if the village proceeds under such plan, it may not, in the opinion of this department, resort to the proposed 'reimbursement contract.' In the first place, such a contract is not expressly authorized by statute; and in the second place, such contract would be inconsistent with the theory of the assessment plan, and in practical effect would be doing away with the assessment altogether. If, as against the statement just made, it be urged that the reimbursement contract merely affords a method whereby, in effect, the village may construct the pipe lines at its own expense at the present time, instead of at a later date, the answer suggests itself that the very consideration of the assessment would be a conferring of benefit on the affected lots and lands *at the present time*, instead of at a later date when the village would in ordinary course construct the lines at its own expense without an assessment."

In view of the decision of the Supreme Court in the *McCann* case, *supra*, it is my opinion that Opinion No. 1701, Opinions of the Attorney General for 1920 is no longer applicable.

I am, therefore, of the opinion and you are accordingly advised as follows:

1. Under Section 6 of Article XVIII, Ohio Constitution, a municipality may operate a public utility both within and without its corporate limits in the same manner as a private corporation would operate such utility and may enter into a contract with an indidividual landowner providing for the extension of city sewerage lines to a previously unsewered area at the sole cost and expense of such individual with the agreement subsequently to reimburse such individual for the cost of construction of the lines.

2. Such contract for sewage facilities pursuant to Section 6, Article XVIII of the Ohio Constitution may also provide for reimbursement by subsequent users paying a certain sum directly to the original installers of the line, payment to be enforced by the refusal of the municipality to permit taps until such payment is made, or by requiring each subsequent user to pay the municipality a proportionate share of the cost, the municipality in turn to reimburse the original installers.

Respectfully,

MARK MCELROY

Attorney General