2539

VILLAGE ALLOWING TAP-INS TO A SEWER LINE, WHICH OVERLOAD SAID SEWERS AND DAMAGE PRIVATE PROPERTY, IS LIABLE FOR DAMAGES TO SAID PRIVATE PROPERTY.

SYLLABUS:

Where a village allows additional tap-ins to an existing sewer line, thereby overloading the sewer, and the village is aware that said overloading is causing damage to private property, the village has a duty to remedy the situation, and is liable for damages to private property caused by the negligent failure to perform that duty.

Columbus, Ohio, September 27, 1961

Hon. John E. Zimmerman, Prosecuting Attorney
Defiance County, Defiance, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I would appreciate your formal or informal opinion to the following question:

" 'Is a village liable for damages as result of their allowing additional taps to a sewer line, which in turn, over-taxes the capacity of said sewer line, causing damage to other property owners connected to said sewer line?'

"It is my opinion, from reading the case law, that the construction of a sewer and the legislative decision to allow connections to said sewer, falls within the governmental capacity of the municipality as distinguished from the responsibility of the village to properly maintain the sewer, which in my understanding, falls within the proprietary decision of the village, and they would be liable for the negligent maintenance of said sewer.

"I refer to you, the case reported in 18 Ohio Circuit Court, new series 138, which case answers my question in the affirmative and has caused much concern to the several villages within the county as to their liability in allowing these sewer taps, due to the many requests for sewer taps on sewers that are, in times of heavy rainfall, taxed to capacity. Most of the villages who maintain combined storm and sanitary sewers are having complaints of property owners due to the flooding of basements and have asked me for an opinion as to whether or not they can be held liable by these damaged property owners, in the event they allow additional taps to the sewer.

"I would appreciate your distinguishing the case above referred to, if it is not the controlling law of Ohio as to the village's liability and any other cases which you feel answers the question which I have propounded. Your expediting the answer to this question will be most appreciated."

The well-established rule in Ohio is that in the absence of a statutory provision to the contrary, a municipality is not liable for injuries occurring in connection with matters relating to its governmental functions, as distinguished from its proprietary powers and functions. 39 Ohio Jurisprudence, 2d, Municipal Corporations, Section 430, page 222. This distinction, although plain in theory, is oftentimes difficult of application to particular cases. The Supreme Court has recognized this difficulty as evidenced by the comment of Zimmerman, J. in *Eversole* v. *City of Columbus,* 169 Ohio St., 205 (1959), reading as follows:

"We are frank to confess that it is impossible to reconcile all the decisions of this court dealing with the subject of governmental and proprietary functions in relation to a municipality. for example, * * * why should the construction of sewers (*Hutchinson* v. *City of Lakewood,* 125 Ohio St., 100, 180 N.E., 643, and *State, ex rel, Gorden, City Attorney* v. *Taylor* 149 Ohio St., 427, 435, 79 N.E. (2d), 127) be considered as a governmental function, whereas the maintenance and repair of sewers, after construction (*City of Portsmouth* v. *Mitchell Mfg. Co.,* 113 Ohio St., 250, 148 N.E., 486, 43 A.L.R., 961, *City of Salem v. Harding,* 121 Ohio St., 412, 169 N.E., 457, and *Doud v. City of Cincinnati,* 152 Ohio St., 132, 87 N.E. (2d), 243) is regarded as a proprietary function?"

Until such time as the Supreme Court establishes a uniform rule regarding municipal liability in these sewer cases, however, we must continue to make the difficult distinction between governmental and proprietary functions based on the facts in the particular case.

From the facts stated in the request, it appears that additional taps to the existing sewer will overtax the capacity of the sewer which may result in the flooding of basements of property owners already connected to this sewer. The question, therefore, is whether a village, knowing that additional taps to the existing sewer may damage the property of persons already connected to such sewer, may escape liability for such damage on the ground that the decision to allow additional taps to the sewer is a governmental one.

In *Werzweiler* v. *City of Akron,* 18 C.C. (N.S.), 138 (Circuit Court of Summit County, 1910), the city overloaded a sewer by constructing other sewers leading into it, thereby damaging a lot owner's property which was connected to such sewer. The court held that such overloading amounted to a failure on the city's part to perform its ministerial duty to keep its sewers in repair. The plaintiff was entitled to recover, not because of the acts of the city in constructing the sewer, but in the overloading of such sewer by constructing other sewers leading into it. See also *City of Cincinnati* v. *Frey,* 3 N.P. N.S. 627, 16 Ohio Dec., 77 (Superior Court of Cincinnati, 1905).

The village in the instant case is aware that the allowance of additional taps to the existing sewer may result in the flooding of basements in property already connected to the sewer. In this regard, your attention is directed to the statement in *Accurate Die Casting Co.* v. *City of Cleveland,* 68 Ohio L. Abs., 230 (Cuyahoga Co. C.A., 1953) reading as follows:

> "The law with reference to the liability of a municipality for flooding one's premises seems to us to be well stated in *Price* v. *City of Akron,* 23 Oh Ap 513, where Washburn, J., said, at p. 519:
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> " 'If I have a low lot which needs draining, and which adjoins a city street, and the city adopts a plan of drainage for that neighborhood, and constructs the same in said street, and the drain so provided fails to drain my lot, the city would not be liable to me; but, if the drain so provided by the city not only fails to drain my lot, but casts upon it water that otherwise would not have flowed or reached my lot, and thus adds to the depth of water standing on my lot, and the city has notice that such drain-

> age system so operates to injure and damage my property, it becomes its ministerial duty to remedy the situation so as to discontinue such direct invasion of my rights, and it is liable for a negligent failure to perform that ministerial duty.'
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> "To the same effect are: *Doud* v. *City of Cincinnati,* 152 Oh St 132, paragraph 2 of syllabus; *McBride* v. *City of Akron,* 12 C.C. 610; *City of Toledo* v. *Lewis,* 17 C.C. 588 (affirmed, 52 Oh St 624)."

It would thus appear that where a village allows additional taps to a sewer line, knowing that such may cause damage to other property owners, the village is liable for any damages caused, but that the liability is incurred by the overloading of the sewer rather than by the act of allowing the tap-ins—the duty to maintain the sewer so as to prevent overloading being a proprietary function.

Answering your specific question, therefore, it is my opinion and you are advised that where a village allows additional tap-ins to an existing sewer line, thereby overloading the sewer, and the village is aware that said overloading is causing damage to private property, the village has a duty to remedy the situation, and is liable for damages to private property caused by the negligent failure to perform that duty.

Respectfully,

MARK MCELROY

Attorney General