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MAHONING VALLEY SANITARY DISTRICT — PROPRIETARY FUNCTIONS — MAY PURCHASE INSURANCE, AGAINST LIABILITY, DAMAGE, IN EXERCISE OF FUNCTIONS.

SYLLABUS:

The Mahoning Valley Sanitary District is engaged in carrying on proprietary functions and it may legally expend its funds for the purpose of purchasing insurance insuring it against liability for damage occasioned by the carrying on of its functions.

Columbus, Ohio, June 18, 1941.

Hon. William A. Ambrose, Prosecuting Attorney,
Youngstown, Ohio.

Dear Sir:

Your recent request for my opinion is as follows:

"The Mahoning Valley Sanitary District was organized February, 1926, under and by virtue of General Code, Sec. 6602-34, et seq., the district being comprised of land and streams in Mahoning and Trumbull Counties, and constitutes a watershed, whereby, by means of a dam, a large body of water has been impounded. The lands comprising the district were acquired by private purchase and eminent domain from funds obtained from the sale of bonds issued by the district.

The district sells, at a price fixed annually by the Common Pleas Courts of Mahoning and Trumbull Counties, water to the cities of Youngstown and Niles, Ohio, which cities, in turn, sell it to their citizens and users. The district is not operated for profit and the funds it secures from the sale of its water, to the two above mentioned cities, are used entirely for the expense and maintenance of the district itself. The bonds issued for the construction of the district are being, and are to be, retired in the following manner: Each year the Directors of the district certify to the Auditors of Mahoning and Trumbull Counties, respectively, an annual levy upon the cities of Youngstown and Niles, as provided in Sec. 6602-82, General Code.

Upon the above state of facts, I respectfully request your opinion as to whether or not the district functions as a pro-

prietaryship or a governmental function.

> The question arises from the request of the Mahoning Valley Sanitary District, for the reason that if the district operates as a proprietaryship then it should like to carry public liability and property damage on its various activities. On the other hand, if it is functioning in a governmental capacity, it realizes it would have no authorization in law to purchase such insurance."

Section 6602-35, General Code, which is a part of the Sanitary District Act of Ohio, provides in part:

> " * * * Such sanitary districts may be established for all or any of these purposes:
>
> (a) To prevent and correct the pollution of streams;
>
> (b) To clean and improve stream channels for sanitary purposes;
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> (c) To regulate the flow of streams for sanitary purposes;
>
> (d) To provide for the collection and disposal of sewage and other liquid wastes produced within the district;
>
> (e) To provide a water supply for domestic, municipal and public use within the district, and incident to such purposes and to enable their accomplishment, to construct reservoirs, trunk sewers, intercepting sewers, siphons, pumping stations, wells, intakes, pipe lines, purification works, treatment and disposal works; to maintain, operate and repair the same, and do all other things necessary for the fulfillment of the purposes of this act."

An examination of the copy of the decree incorporating the Mahoning Valley Sanitary District filed with the Secretary of State pursuant to Section 6602-40, General Code, discloses that the court found that said district was incorporated for the following purposes:

> "That the purposes for which said district is established are to provide a water supply for domestic, municipal and public use within said District, and incident to such purposes, and to enable their accomplishment, to construct reservoirs, trunk sewers, intercepting sewers, siphons, pumping stations, wells, intakes, pipe lines, purification works, treatment and disposal works; to maintain, operate and repair the same and to do all other things necessary for the fulfillment of the purposes of such District."

The decree concludes with the following language:

> "That the territory as above described be, and the same hereby is erected into and created a sanitary district for the purpose of supplying water for domestic, municipal and public use, under the Sanitary District Act of Ohio under the corporate name of Mahoning Valley Sanitary District, with its office or principal place of business at Youngstown, Mahoning County, Ohio."

The Mahoning Valley Sanitary District therefore was established only for the purpose of providing a water supply for domestic, municipal and public use within the district and for the other purposes incident thereto provided in paragraph (e) of that portion of Section 6602-35, General Code, heretofore quoted.

Section 6602-39, General Code, provides that upon organization "the district shall be a political subdivision of the State of Ohio, a body corporate with all the powers of a corporation, shall have perpetual existence, with power to sue and be sued, to incur debts, liabilities and obligations." In the case of Shook v. Mahoning Valley Sanitary District, 120 O.S., 449, it was urged that sanitary districts act in a private or trading capacity rather than in a public or governmental capacity. The court, however, refused to decide the question and stated that its determination was not necessary to a decision of the case. So far as I have been able to ascertain, there are no reported cases in this state in which the question has been answered.

However, I believe that the principle announced in decisions by the courts of this state with respect to the liability of municipal corporations will by analogy apply to your question. It seems to be firmly established in this state that where a municipal corporation acts in a private or proprietary capacity it is regarded as an agent of those residing within its territorial limits and that it is liable for any torts it may commit while acting in such capacity. On the other hand, where a municipal corporation carries on public or governmental functions, it is considered to be an instrumentality of the state government and is immune from liability unless otherwise provided by statute.

In Ohio it is well established that a city acts in a proprietary capacity where it builds and maintains a system for supplying water to its inhabi-

tants. Thus, in City of Barberton v. Miksch, 128 O.S., 169, it was said in the second paragraph of the syllabus:

> "In the construction and maintenance of a system for supplying water to its inhabitants, a municipality acts in a proprietary capacity."

See also City of Piqua v. Morris, 98 O.S., 42, and Werner v. Cincinnati, 3 O.C.C.(N.S.), 276, affirmed without opinion in 70 O.S., 455.

Although a sanitary district is not a municipal corporation within the meaning of the term as used in the Constitution and statutes of Ohio, it is expressly declared by statute to be a political subdivision and a corporation. It is unquestionably a public corporation and it would seem that in determining the nature of its functions, the same rules of law should apply to it as apply to municipal corporations.

The express purpose for which the district was established was to provide a water supply for domestic, municipal and public use within its limits. If a municipal corporation established a system to provide water for similar purposes within its limits, there is no question but what it would be liable for any torts committed by it in connection therewith.

Undoubtedly, a supply of pure, wholesome water is conducive to the public health and it might be very plausibly argued therefore that furnishing water is a governmental rather than a proprietary function. However, in City of Barberton v. Miksch, supra, Chief Justice Weygandt quoted from 19 R.C.L., 1130, as follows:

> "While an ample supply of pure water doubtless enhances the public health, this result is merely incidental, and the primary object of a city or town in securing a water supply is to increase the comfort and convenience of its own inhabitants."

Since the primary purpose of this sanitary district is to supply water within its limits to the inhabitants thereof, it is acting in a proprietary capacity.

In my Opinion No. 3516 rendered to the Bureau of Inspection and Supervision of Public Offices under date of March 4, 1941, I advised that where a park district engages in a proprietary function it may lawfully expend its funds for the purchase of insurance indemnifying it against

liability for damage or injury to persons or property occasioned by negligence in carrying on such function. Several of my predecessors have ruled that where a political subdivision may be liable in damages, such political subdivisions may purchase insurance indemnifying them against such loss. See Opinions of the Attorney General for 1931, Vol. I, 303; Opinions of the Attorney General for 1934, Vol. II, 1120; Opinions of the Attorney General for 1937, Vol. II, 1451.

Since the Mahoning Valley Sanitary District is engaged in a proprietary function, it may legally purchase what is commonly known as property damage and public liability insurance.

I am therefore of the opinion, in specific answer to your question, that the Mahoning Valley Sanitary District is engaged in carrying on proprietary functions and that it may legally expend its funds for the purpose of purchasing insurance insuring it against liability for damage occasioned by the carrying on of its functions.

Respectfully,

THOMAS J. HERBERT,
Attorney General.