2078

A MUNICIPAL CORPORATION HAS THE AUTHORITY TO CHANGE REASONABLE RENTALS FOR SERVICES IT PROVIDES BY ITS SEWAGE SYSTEM, AND MAY USE THE SURPLUS THEREFROM FOR THE EXTENSION OF THE SEWAGE SYSTEM TO SERVE AN UNSERVED AREA—§§4 & 5, ARTICLE XVIII, OHIO CONSTITUTION—§729.52, R.C.

SYLLABUS:

A municipal corporation has the authority pursuant to sections 4 and 6 of Article XVIII, Ohio Constitution, to charge reasonable rentals for the services it provides by its sewage system, and may use the surplus therefrom for the extension of the sewage system to serve an unsewered area in spite of any provisions of Section 729.52, Revised Code, to the contrary.

Columbus, Ohio, March 25, 1961

Hon. James A. Rhodes, Auditor of State
State House, Columbus 16, Ohio

Dear Sir:

I have before me your request for my opinion which request relates to a municipal corporation operated under the general statutory plan of

government, city council of which has adopted legislative action directing the city auditor to pay the city's portion of the cost of extending a sewage system to serve an unsewered area from the sewer revenue fund established pursuant to Section 729.52, Revised Code. The question you raise is whether a city has the power to prescribe by ordinance that funds received from the collection of sewer rentals shall be used for the extension of a sewage system to serve an unsewered area.

On the authority of *State, ex rel. City of Fostoria v. King,* 154 Ohio St., 213 (1950), I have no doubt that a municipally operated sewage system is a public utility. The question presented, then, is to what extent the General Assembly may limit a municipal corporation's operation of such utility.

Section 729.52, Revised Code, reads as follows:

> "The funds received from the collection of sewer rentals under section 729.49 of the Revised Code shall be deposited weekly with the treasurer of the municipal corporation. Money so deposited shall be kept as a separate and distinct fund and shall be known as the sewer fund. When appropriated by the legislative authority of the municipal corporation, the fund shall be subject to the order of the director of public service of a city or of the board of trustees of public affairs of a village. The director or board shall sign all orders drawn on the treasurer of the municipal corporation against such fund, which fund shall be used for the payment of the cost of the management, maintenance, operation, and repair of the sewerage system and sewage pumping, treatment, and disposal works. Any surplus in such fund may be used for the enlargement or replacement of the system and works, for the payment of the interest on any debt incurred for the construction thereof, and for the creation of a sinking fund for the payment of such debt. *but shall not be used for the extension of a sewerage system to serve unsewered areas or for any other purpose.*" (Emphasis added)

If the underlined portion of the above statute is valid, then, unquestionably your request must be answered in the negative. This statute is, however, one of many enacted by the General Assembly seeking to place limitations upon the operation of a public utility by a municipal corporation.

In a long line of cases the Supreme Court has found many such statutes to be in conflict with Article XVIII, Sections 4 and 6 of the Ohio Constitution. Article XVIII, Section 4 reads, in part, as follows:

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. * * *"

Article XVIII, Section 6, reads 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, provided that such fifty per cent limitation shall not apply to the sale of water or sewage services."

In *Swank v. Village of Shiloh,* 166 Ohio St., 415 (1957), the Supreme Court reiterated its view of the unfettered power of a municipality to operate a public utility as it sees fit. The first paragraph of the syllabus in that case reads as follows:

"The power to acquire, construct, own or lease and to operate a utility, the product of which is to be supplied to a municipality or its inhabitants, is derived from Section 4, Article XVIII of the Constitution, and the General Assembly is without authority to impose restrictions or limitations upon that power. (*Village of Euclid v. Camp Wise Assn.,* 102 Ohio St., 207, and *Board of Education of City School Dist. of Columbus v. City of Columbus,* 118 Ohio St., 295, approved and followed."

In *State, ex rel. McCann v. The City of Defiance,* 167 Ohio St., 313 (1958), the Supreme Court reviewed again its position on this question and held unconstitutional Section 743.13, Revised Code, which statute sought to place a limit on the operation of a utility by a municipality. The syllabus in the *McCann* 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 Section 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 Cleevland,* 128 Ohio St., 583, and *Travelers Ins. Co. v. Village of Wadsworth,* 109 Ohio St., 440, distinguished.

"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."

The spirit of these decisions has been followed consistently by the Attorney General. See Opinion No. 2190, Opinions of the Attorney General for 1958, page 347; Opinion No. 706, Opinions of the Attorney General for 1959, page 413; and Opinion No. 1280, Opinions of the Attorney General for 1960.

The uniformity of opinion on this matter eliminates any necessity for further elaboration. It should be noted, however, that the Court of Common Pleas of Licking County in *Shoemaker v. Village of Granville,* 79 Ohio Law Abs., 573, ruled on this exact question. That court held that the General Assembly had no power to restrict the use of sewer funds for the expansion of such municipal utility as the powers granted by the people pursuant to Article XVIII, Sections 4 and 6 of the Ohio Constitution were not made subject to legislative limitation or restriction. The only limitation placed by the court on this doctrine is that any surplus arising from sewage rentals must be reasonable in size and must not be diverted to a use totally unrelated to the operation of the utility. This caveat has no application to the facts you present as the expansion of the sewage system to serve an unsewered area is certainly a use related to the operation of the sewage system.

It is, therefore, my opinion and you are accordingly advised that a municipal corporation has the authority pursuant to sections 4 and 6 of Article XVIII, Ohio Constitution, to charge reasonable rentals for the services it provides by its sewage system, and may use the surplus therefrom for the extension of the sewage system to serve an unsewered area in spite of any provisions of Section 729.52, Revised Code, to the contrary.

Respectfully,
MARK MCELROY
Attorney General