

OPINION NO. 70-043**Syllabus:**

It is not lawful to use a municipal corporation sewer fund to defray the cost of the corporation's share of a railroad grade crossing elimination project.

To: Fred V. Skok, Lake County Pros. Atty., Painesville, Ohio
By: Paul W. Brown, Attorney General, April 14, 1970

Your request for my opinion reads as follows:

"The Lake County Commissioners have submitted to this office a request to obtain an opinion, i.e., whether or not, in the Willoughby-Mentor Sanitary Sewer District now encompassing Mentor, Mentor-on-the-Lake, part of Willoughby, part of Painesville Township, and part of Concord Township, all of which pay a uniform sewer service charge to the District at this time, there can be established a different rate of sewer service charge for the City of Mentor, Ohio, only, which increase would cover the cost of relocating sewer lines in S. R. 615 within Mentor City due to the construction of an overpass crossing of railroad tracks within the City of Mentor.

"Therefore, please render an opinion upon the following question: May a different rate of sewer service charge be established for the City of Mentor only, which increase in the rate of sewer service

charge would cover the cost of relocating sewer lines in S. R. 615 within Mentor City due to the construction of an overpass crossing of railroad tracks within the City of Mentor, notwithstanding the fact that the City of Mentor is a member of the Willoughby-Mentor Sanitary Sewer District now encompassing Mentor, Mentor-on-the-Lake, part of Willoughby, part of Painesville Township, and part of Concord Township, all of which now pay a uniform sewer service charge to the Willoughby-Mentor Sanitary Sewer District at this time."

Along with your request you have submitted a "Statement of Facts" in which you said:

" * * * The relocation of the sewer lines would undoubtedly be of benefit only to the people of Mentor City. * * *"

I am not apprised of how the relocation of a properly operating sewer line could possibly benefit anyone to meet the requirements of law for a special assessment to be made against the users thereof.

Section 729.52, Revised Code, provides that the funds received from the collection of sewer rentals

" * * * 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 construction and reconstruction of main and interceptor storm sewers, 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.)

These stated purposes cannot be implied to include the cost of relocation of a useful and operating sewer.

Your basic project is a railroad grade crossing separation improvement and the entire cost of the same must be financed pursuant to Chapter 5523, Revised Code, between the state (including any of its cooperating political subdivisions) and the railroad company involved in the grade separation improvement. Section 5523.08, Revised Code, states that "the cost of moving or changing existing structures * * * shall be chargeable to the improvement." The sewer in question, in my opinion, is so classified.

Section 5523.15, Revised Code, reads in part as follows:

"A municipal corporation may co-operate with the department of highways in the abolishment of railway grade crossings and the construction or reconstruction of bridges and viaducts within such municipal corporation, and may pay such portion of the cost of any of such work as is agreed upon between the legislative authority of such

municipal corporation and the director of highways. * * *

Section 5521.01, Revised Code, explains the method by which the municipal corporation provides the funds for its share of the costs of the improvement and particularly applicable is the following:

"* * * That part of the cost of the work assumed by the municipal corporation shall be paid from the proceeds of taxes, or special assessments, or both, or from the proceeds of notes or bonds issued and sold in anticipation of the collection of such taxes and assessments. For the purpose of providing funds for the payment of that part of the cost of the work assumed by the municipal corporation, such municipal corporation shall have the same authority to make special assessments, levy taxes, and issue bonds or notes, in anticipation of the collection of the same, as it has with respect to improvements constructed under the sole supervision and control of the municipal corporation. * * *

Again there is no mention of sewer rentals in this statute. The special assessment spoken of may pertain only to special benefits accruing from the project or improvement and must necessarily be those inuring from the grade crossing separation and not from re-locating the sewer.

From the foregoing, it is my opinion and you are advised that it is not lawful to use a municipal corporation sewer fund to defray the cost of the corporation's share of a railroad grade crossing elimination project.