

OPINION NO. 86-109**Syllabus:**

1. A vendor selling real property under a land installment contract is responsible to the county for delinquent water and sewer charges which have become liens against his property as a result of the vendee's failure to pay such charges.
2. A vendor of real property under a land installment contract may be refused county water and sewer services to property to which liens have attached as a result of the vendee's failure to pay for such services.

To: James L. Flannery, Warren County Prosecuting Attorney, Lebanon, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 19, 1986

I have before me your request for my opinion which reads as follows:

By virtue of Opinion 81-030, you indicated that a county may not charge delinquent water and sewer accounts against a subsequent purchaser who has acquired and recorded his interest prior to the attachment of the lien. Please issue your opinion on the following fact situation:

1. "A" owns real estate and sells same to "B" on land contract.
2. "B" receives the benefit of water and sewer from the county.
3. "B" defaults on the water and sewer bill and also defaults on the land contract.
4. The delinquency is certified to the County Auditor and placed upon the County Treasurer's general tax duplicate.

Is "A" responsible for the delinquent water and sewer bill by virtue of a lien being placed against the property? Does the County have the right to refuse utility services to "A"?

Before addressing your specific questions, I must discuss the authority vested in a board of county commissioners with regard to the collection of unpaid water and sewer charges. See generally State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (a board of county commissioners, as a creature of statute, has only those powers expressly granted by statute or implied therefrom); 1986 Op. Att'y Gen. No. 86-085.

In the provision of water services, a board of county commissioners, pursuant to R.C. 6103.02, may "acquire, construct, maintain, and operate any public water supply or waterworks system within its county for any sewer district." See generally 1933 Op. Att'y Gen. No. 1792, vol. III, p. 1662. R.C. 6103.02 further empowers a board of county commissioners which operates a water supply to fix reasonable rates, to levy special assessments upon benefited properties whenever the rents are insufficient to pay the cost of the system's operation and maintenance, and to "adopt, publish, administer, and enforce rules for the construction, maintenance, protection, and use of public water supplies." See 1932 Op. Att'y Gen. No. 4705, vol. II, p. 1218 at 1219 ("[t]he authority conferred on boards of county commissioners to maintain and operate waterworks systems and to fix reasonable rates to be charged for water clearly includes...the power to collect the 'water rents' or charges which accrue from the sale or furnishing of water to customers of the said water supply or waterworks system"). The board must also fix a reasonable tap-in charge when the county owns the distributing pipes. R.C. 6103.02. R.C. 6103.02 specifically directs that:

When any rents or charges are not paid when due, the board may do either or both of the following:

(A) Certify them, together with any penalties, to the county auditor. The county auditor shall place the certified amount upon the real property tax list and duplicate¹ against the property served by the connection if he also receives from the board additional certification that the unpaid rents or charges have arisen pursuant to a service contract made directly with an owner who occupies the property served.

The amount placed on the tax list and duplicate shall be a lien on the property from the date placed on the list and duplicate and shall be collected in

¹ R.C. 319.28 directs the county auditor to annually compile and make up a general tax list of real property in the county which shall include, among other things, parcel numbers, the names of persons in whose names the real property has been listed, a description of each parcel, and the value of such parcel and the improvements thereon. If the name of the owner is unknown, the auditor shall so indicate. Each list shall be prepared in duplicate, one copy to be maintained by the county auditor and the other to be maintained by the county treasurer. The copies "shall constitute the auditor's general tax list and the treasurer's general duplicate of real and public utility property for the current year." R.C. 319.28. R.C. 319.28 imposes a mandatory duty and method of compiling the general tax list and duplicate. See 1966 Op. Att'y Gen. No. 66-090; 1966 Op. Att'y Gen. No. 66-052.

the same manner as other taxes,² except that, notwithstanding section 323.15 of the Revised Code, a county treasurer shall accept a payment in such amount when separately tendered as payment for the full amount of such unpaid water rents or charges and associated penalties. The lien shall be released immediately upon payment in full of the certified amount. All money collected as rents or tap-in charges or for waterworks purposes in any district shall be paid to the county treasurer and kept in a separate and distinct fund to the credit of such district.

(B) Collect them by actions at law in the name of the county from an owner, tenant, or other person who is liable to pay the rents or charges. (Emphasis and footnotes added).

See note 4, infra.

R.C. 6117.01 similarly authorizes boards of county commissioners to "establish, and maintain one or more sewer districts within their respective counties, outside of municipal corporations." The board "shall fix reasonable rates to be charged for the use of the sewers or sewerage treatment or disposal works referred to in [R.C. 6117.01] by every person, firm, or corporation whose premises are served by a connection to such sewers or sewerage treatment or disposal works when such sewers or sewerage treatment or disposal works are owned or operated by the county," and must establish reasonable charges for connecting to the sewers or sewerage treatment or disposal works. R.C. 6117.02. The board may adopt and enforce rules for the use of the sewers and sewer improvements. Id. R.C. 6117.02 further provides:

When any rents or charges are not paid when due, the board shall certify the same together with any penalties to the county auditor, who shall place them upon the real property tax list and duplicate against the property served by such connection. Such rents and charges shall be a lien on such property from the date the same are placed upon the real property tax list and duplicate by the auditor and shall be collected in the same manner as other taxes. (Emphasis added.)

In your fact situation, the unpaid water and sewer rents and charges were certified to the county auditor and placed upon the real property tax list and duplicate, thereby becoming a lien³ on the property, after "B", the vendee, defaulted on the land installment contract.⁴

² See generally R.C. Chapters 323 and 5719 (providing for the collection of taxes).

³ The attachment of a valid lien is necessary to create a charge against the property served. See generally Home Owners' Loan Corp. v. Tyson, 133 Ohio St. 184, 12 N.E.2d 478 (1938); Western Reserve Steel Co. v. Village of Cuyahoga Heights, 118 Ohio St. 544, 161 N.E. 920 (1928).

⁴ I must note that at the time when the events giving rise to your opinion request occurred, R.C. 6103.02 authorized the county auditor to place the amount of unpaid

In 1981 Op. Att'y Gen. No. 81-030, which you cited in your opinion request, my predecessor examined R.C. 6117.02, as well as R.C. 343.08, which also provides that certain unpaid utility charges shall be certified to the county auditor to be placed on the real property tax list and duplicate, at which time such charges shall be a lien on the property and collected in the same manner as other taxes. The opinion concludes that under R.C. 343.08 and R.C. 6117.02, the lien attaches when the delinquent charges are certified to the county auditor and placed upon the tax duplicate, and further concludes that a good faith purchaser who records his deed prior to the attachment of a lien arising from the prior owner's delinquent utility charges takes the property free of the encumbrance. There is a significant difference in the factual circumstances analyzed in Op. No. 81-030 and those presented by your hypothetical question. In Op. No. 81-030 there was a completed conveyance of the property to the purchaser who acquired the deed and legal title to the property prior to the attachment of the lien. Unlike a conveyance by deed, a vendee under a land installment contract does not acquire legal title until the purchase price is paid in full. Butcher v. Kagey Lumber Co., 164 Ohio St. 85, 128 N.E.2d 54 (1955); Kuhn v. Griffin, 3 Ohio App. 2d 195, 209 N.E.2d 824 (Lucas County 1964); Blue Ash Building & Loan Co. v. Hahn, 20 Ohio App. 3d 21, 484 N.E.2d 186

rents upon the tax list and duplicate against the property served upon certification of the amount by the board of county commissioners. See Am. Sub. H.B. 551, 115th Gen. A. (1984)(eff. Sept. 21, 1984). Subsequent to the date of submission of your opinion request, however, R.C. 6103.02 was amended to require that in order for the county auditor to place the unpaid rents upon the tax list so as to create a lien against the property served for unpaid water rents or charges, he must receive from the board of county commissioners not only certification of the unpaid amount, but "additional certification that the unpaid rents or charges have arisen pursuant to a service contract made directly with an owner who occupies the property served." Am. Sub. H.B. 754, 116th Gen. A. (1986) (eff. Sept. 25, 1986). Prior to the enactment of Am. Sub. H.B. 754, there was no requirement that the owner occupy the property in order for the county auditor to place unpaid water charges and rents upon the tax duplicate.

If your fact situation were to arise now, after the enactment of Am. Sub. H.B. 754, the unpaid water rents and charges would not become a lien against the property since the owner did not occupy the property when the charges were incurred, but would be collectable pursuant to R.C. 6103.02(B) in an action at law against "an owner, tenant, or other person who is liable to pay the rents or charges." See R.C. 5313.02(A)(15)(a land installment contract must contain a requirement that the vendee is responsible for the payment of taxes, assessments, and other charges against the property from the date of the contract, unless the parties agree to the contrary). Since you have inquired about a vendor's responsibility with regard to delinquent water and sewer charges which have become a lien against the property, I will proceed to discuss the vendor's liability for liens which have attached to the property, noting that R.C. 6103.02 now provides that, unless the county auditor receives certification that the unpaid rents and charges have arisen

(Hamilton County 1984). A land installment contract is an executory agreement in which the vendor agrees to convey legal title at a future date to a vendee who agrees to pay the purchase price in installments; the vendor retains title as security for the vendee's obligation. R.C. 5313.01(A).

Thus, where property is sold under a land installment contract, the vendor remains the legal owner of record until the purchase price is paid in full with the subject property remaining in his name on the tax list and duplicate. See R.C. 319.28.⁵ The vendor is responsible to the taxing authorities for the taxes, assessments, and other charges placed on the tax list against his property. See R.C. 323.41; Spector Terminals Inc. v. Board of Education, 10 Ohio App. 3d 194, 461 N.E.2d 16 (Summit County 1983)(even though a lease provided that the lessee was to pay all taxes, the record owner remained primarily liable therefor); 1970 Op. Att'y Gen. No. 70-135 at 2-264 ("all parcels of real property must be taxed in the name of the record titleholder"). While the parties to the contract may agree that the vendee will be responsible to pay the taxes, assessments, and other charges against the property, see R.C. 5313.03(A)(15) (making such a provision a minimum requirement of a land installment contract),⁶ such contractual term may not bind the taxing authorities.

I note that a related situation was considered in 1966 Op. Att'y Gen. No. 66-090. Under the terms of a lease agreement, lessors had leased lots to lessees who were to build cottages on the lots while retaining the right to remove the cottages upon termination of the lease. Delinquent sewer rents and charges, which were certified to the county auditor, were mistakenly placed upon separate tax duplicates against the lessees. The opinion concludes that, although the buildings belonged to the lessees, it was of no concern to the taxing

pursuant to a service contract made with an owner who occupies the property served, unpaid water rents and charges may not be placed on the tax duplicate so as to become a lien on the property. If no such certification is received, the county must bring an action at law pursuant to R.C. 6103.02(B) to recover unpaid rents and charges. I note that unpaid sewer rents and charges may be placed on the tax duplicate so as to become a lien on the property regardless of whether the owner occupies the property. See R.C. 6117.02.

⁵ R.C. 319.20 provides that the county auditor shall transfer any land charged with taxes on the tax list from the name in which it stands into the name of the owner on application and presentation of title when rendered necessary by a conveyance, partition, devise, descent, or otherwise. Since the vendee under a land contract does not become the owner until completion of payments and receipt of a deed, there is no transfer of names on the tax list and duplicate pursuant to R.C. 319.20 at the time the land installment contract is entered into.

⁶ R.C. 323.43 provides that an owner of lands may "authorize or consent to the payment by another of the taxes levied upon such lands." R.C. 323.13 also authorizes the county treasurer to mail or deliver tax bills to the person charged on the duplicate or to an agent designated by such person.

authorities in compiling the general tax list and duplicate pursuant to R.C. 319.28. In light of R.C. 6117.02, the "county auditor had no alternative but to place [the certified unpaid charges] upon the real property tax list and duplicate against the name of the owner of the real property served." Op. No. 66-090 at 2-171. See also Spector Terminals, Inc. v. Board of Education; 1966 Op. Att'y Gen. No. 66-089 (because there exists only one real property tax duplicate in the name of a lessor, the lessor remains liable for taxes on both the land and any buildings thereon, but he may recover, under the terms of the lease, from the lessee any amounts which the lessee agreed to pay; however, the lease provision may not bind the taxing authorities).

I understand that your fact situation differs in that it presents a purchaser under a land installment contract instead of a lessee under a lease, but I believe that the analysis used in Op. No. 66-090 is applicable in this instance. While the vendee under a land installment contract does have an interest in the property, he is not the legal owner of the property until he has completed payment and received a deed giving him legal title. The vendor, as legal owner, remains the owner of record on the tax duplicate, and therefore, remains liable to the taxing authorities for any unpaid taxes, assessments, and charges. As between the vendor and vendee, the vendor has some protection in that under the terms of the contract he has a cause of action against a vendee who has not paid utility charges for any amounts the vendor must pay to the county, unless the parties have agreed to the contrary, see R.C. 5313.03(A)(15); Cobb v. Bohm, 11 Ohio Dec. Rep. 844 (C. P. Hamilton County 1893), but the contract may not bind the county or absolve the vendor of liability. I conclude, therefore, that the vendor, "A" in your hypothetical question, is responsible for delinquent water and sewer charges which have been certified by the county auditor and which have become a lien against the property, but the vendor may recover from the vendee any amounts the vendor has paid to the county, if so provided under the terms of the land installment contract.

In your second question, you inquire whether the county may refuse to provide water and sewer services to the vendor under a land contract after the vendee defaults in his payments to the vendor and in making payments for water and sewer services, and the unpaid water and sewer charges have become liens against the property. The Supreme Court of Ohio has considered a different but related question of when a utility may refuse services to a subsequent purchaser who fails to pay the unpaid utility charges of a prior owner. In Western Reserve Steel Co. v. Village of Cuyahoga Heights, 118 Ohio St. 544, 161 N.E. 920 (1928), the court held that a municipal waterworks could not refuse service to a property owner where the previous owner's bill had not been paid and the unpaid bill had not become a lien against the property. See also Op. No. 81-030. A subsequent purchaser, who records his interest prior to the attachment of a lien, takes the land free of the encumbrance. Home Owner's Loan Corp. v. Tyson, 133 Ohio St. 184, 12 N.E.2d 478 (1938). If, however, a subsequent purchaser fails to record his interest prior to the time the delinquent water and sewer charges are certified to the county auditor, thereby becoming liens against the property, the purchaser becomes responsible for any obligations so attached to the property and he may be refused service. See Western Reserve Steel Co. v. Village of Cuyahoga Heights.

Your fact situation differs from that discussed in Western Reserve in that there is no subsequent purchaser or transfer of the record title. The vendee, who has no legal record interest in the property, has merely defaulted on payment of water and sewer charges, resulting in liens upon the property which remains in the name of the vendor. Thus, it is even more compelling to hold the vendor responsible in this situation since there is no transfer of title and, as discussed above, the vendor under a land installment contract bears the risk of nonpayment by the vendee. Once the unpaid sewer and water charges are certified to the county auditor, becoming liens against the property, they are considered an indebtedness of the property even though such charges were originally incurred as an indebtedness of the vendee. See Western Reserve Steel Co. v. Village of Cuyahoga Heights. Since legal title to the property remains in the vendor, he remains liable for any indebtedness of the property. The county may, therefore, as part of its power to operate and fix rates for water and sewer systems under R.C. 6103.02 and R.C. 6117.01-.02, refuse continued services to the vendor if he fails to pay the delinquent charges.⁷

I, note, however, that the vendor may be denied services only to the particular property which is subject to the lien for unpaid charges. R.C. 6103.02(A) provides, in part, that "[t]he county auditor shall place the certified amount [of any unpaid rents or charges] upon the real property tax list and duplicate against the property served by the connection." (Emphasis added.) Similarly, R.C. 6117.02 provides that any unpaid certified amounts shall be placed upon "the real property tax list and duplicate against the property served by [the] connection." (Emphasis added.) I conclude, therefore, that a vendor of real property under a land installment contract may be refused water and sewer services⁸ to the property to which liens have attached as a result of the vendee's failure to make payments when due.

Accordingly, it is my opinion, and you are advised that:

1. A vendor selling real property under a land installment contract is responsible to the county

⁷ I note that in 1986 Op. Att'y Gen. No. 86-085, I concluded that a county may not require a deposit from new customers for water or sewer services as a form of protection against unpaid or uncollectable bills since the legislature has expressly provided for the methods of collecting unpaid rents and charges in R.C. 6103.02 and R.C. 6117.02. While the termination of services may, at times, have the effect of compelling payment, it is distinguishable from a deposit requirement in that it is not a method of collection, but rather a termination of further services to a party who has failed to make payment for past services rendered. The services may be refused to the vendor as the person responsible for the actions of the vendee. Once the vendor has made payment, he may seek recovery from the vendee if the terms of the land installment contract so permit.

⁸ R.C. 4933.12-.123 place restrictions upon natural gas, gas, and electric light companies as to when and how services may be terminated. I am unaware of any analogous provisions applicable to a county providing water and sewer services.

for delinquent water and sewer charges which have become liens against his property as a result of the vendee's failure to pay such charges.

2. A vendor of real property under a land installment contract may be refused county water and sewer services to property to which liens have attached as a result of the vendee's failure to pay for such services.