OPINION NO. 75-001

Syllabus:

A municipal corporation, which owns and operates a waterworks system may enact and charge a special rate for its service according to classifications based on an individual reaching retirement age and having a limited income.

To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio
By: William J. Brown, Attorney General, January 9, 1975

Your request for my opinion reads as follows:

> "For many years Lucas County has been contracting with the city of Toledo for water service from the city of Toledo to the residents of the county outside the limits of the city of Toledo.
>
> "There is presently being considered restructuring the water rates so as to provide a lesser rate for persons on retirement or over 65 years of age.
>
> "Section 4905.33 of the Ohio Revised Code prohibits a public utility from providing any type of special rate for services rendered. While the term 'public utility' is defined in the chapter so as to confine the same to utilities other than those owned by political subdivisions of the state of Ohio, it is still a matter of concern as to whether, on principle, a city or county is precluded from enacting a special rate for the above classes of users of publicly owned utility services."

Pursuant to conversations between this office and yours it is my understanding that the purpose of the proposed classification is to assist elderly citizens, who because of retirement are restricted in their ability to pay for water service. To the extent then that retirement is used as a classification, I will treat it as qualified by the additional criteria of an income within fixed limits.

A municipal corporation is empowered to own and operate a water works system by Article XVIII, Sections 4 and 6, Constitution of Ohio, and by R.C. Chapter 743. With respect to the specific situation you have posed, Article XVIII, Section 6, supra, provides:

> "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 cent 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."

When a municipal corporation is providing water service to non-residents pursuant to a contract between the municipal corporation and the county, the rates charged by the municipal corporation must be approved by the board of county commissioners. R.C. 6103.02.

Article XVIII, Section 6, supra, is part of the home rule amendment of the Constitituion found in Article XVIII. It has been held that since the adoption of this amendment, the power of municipalities with respect to public utilities stems from this section and Section 4 which confers complete power upon municipalities to own and operate public utilities, to contract with others for the products and services thereof and to fix the rate therefor and any legislative enactment restricting, limiting or conflicting with this power is invalid. Grandview Heights v. Redick, 79 Ohio L. Abs. 59 (1955 Com. Pl. Ct. Franklin Co., aff'd. 79 O.L.A. 63 (1956)). See also Link v. The Public Utilities Commission of Ohio, 102 Ohio St. 336 (1921), and State, ex rel. City of Toledo v. Weiler, 101 Ohio St. 123 (1920), on this point.

Consistent with these cases the General Assembly has in R.C. 4905.02 expressly excepted municipally owned public utilities from the definition of "public utility" for purposes of that chapter and hence from the prohibition in R.C. 4905.33 against the provision of special rates to any person, firm or corporation.

It appears, therefore, that a municipal corporation may charge different rates to different classes of consumers provided that the classification itself does not operate as a violation of the equal protection clauses of either United States Constitution or the Constitution of Ohio.

The Fourteenth Amendment of the Constitution of the United States reads in pertinent part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 2, Constitution of Ohio provides:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

It has been held that a statutory classification in the area of social welfare is consistent with the equal protection and due process clauses of the Fifth and Fourteenth Amendments if it is rationally based and free from invidious discrimination. Richardson v. Belcher, 404 U.S. 78, 81, 92 S.Ct. 254, 257 (1971); Dandridge v. Williamson, 397 U.S. 471, 487, 90 S.Ct. 1153, 1162 (1970).

In Richardson v. Belcher, supra, the court in considering the reduction of Social Security disability benefits under an "offset" provision of the Social Security Act (42 U.S.C., Section 424a) said at page 84 that "[I]f the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the due process clause of the Fifth Amendment."

Similarly the rationality or reasonableness of a classification with respect to a legitimate purpose has been applied as the test in cases arising under Article I, Section 2, supra. Painesville v. Bd. of County Commrs., 17 Ohio St. 2d. 35, 37 (1969); State v. Buckley, 16 Ohio St. 2d 128, 134 (1968); Porter v. Oberlin, 1 Ohio St. 2d 143, 151 (1965).

With respect to the classification you propose I would refer you to the unreported case of Mazer v. Weinberger, No. 73-616 (U.S.D.E. Pa., 11/21/74), in which it was held that a "classification as to age is not an invidious one on its face." In that case a court considered the exemption in 42 U.S.C. 403(B) of persons 72 years of age or older from provisions for the reduction of Social Security benefits when the individual's earnings from wages or self-employment exceed a certain amount. The court in upholding the exception ruled that "there is nothing irrational per se with granting an advantage to persons reaching an advanced age which is not conferred upon younger people."

The practical effect of this view can be seen in state as well as federal legislation and programs. See, for example, R.C. 323.151 et seq. which provide a homestead exemption for persons 65 years of age or older who are on a limited income. With respect to a municipal corporation I would refer you to Opinion No. 73-102, Opinions of the Attorney General for 1973, in which I had occasion to discuss the power of a municipality to contribute funds to a council on aging. The council, a private non-profit organization, was established to provide social services for the aged pursuant to the Older Americans Act of 1965, 42 U.S.C., Section 3001 et seq.. Concluding that such a contribution did serve a public municipal purpose, I held that a municipal corporation may use

public funds to support the programs of the federally funded council on aging, provided the contribution has sufficient restrictions to ensure that the funds are in fact used for the public purpose. See also Opinion No. 74-086, Opinions of the Attorney General for 1974, in which I approved of a municipality's participation in a program to provide warm lunches to senior citizens.

It appears clear then that the assistance of older persons and persons with a diminished earning capacity is a legitimate purpose, and classification reasonably designed to accomplish such a purpose would be proper. Therefore, since a municipal corporation has authority under Article XVIII, Section 4, supra, to own and operate a water-works system, and has authority under Article XVIII, Section 6, supra, to sell this service to non-residents, I must conclude that that muncipal corporation may adopt a rate structure which is reasonably designed to achieve such a purpose.

In specific answer to your question, it is my opinion and you are so advised that a municipal corporation, which owns and operates a water-works system may enact and charge a special rate for its service according to classifications based on an individual reaching retirement age and having a limited income.