OPINION NO. 73-021

Syllabus:

The board of health of a general health district does not have power to require a municipality within its jurisdiction to permit tap-in of its sanitary sewers from lots outside the municipality but abutting upon the existing sewers.

To: Nicholas A. Carrera, Greene County Pros. Atty., Xenia, Ohio
By: William J. Brown, Attorney General, March 19, 1973

I have before me your predecessor's request for my opinion, which reads as follows:

> The Greene County Board of Health is a general health district having jurisdiction throughout Greene County, Ohio. The City of Xenia, Ohio, has a building department and has constructed, within its boundaries, a sanitary sewer. Immediately outside of the city limits of the City of Xenia, private construction is under way. No part of this construction is within the city limits of Xenia, Ohio, but the construction abutts the existing sanitary sewer of the City of Xenia, Ohio.
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> The Building Department of the City of Xenia, Ohio, does not exercise its power to regulate water closets, privies, cess pools, sinks, plumbing and drains. The Greene County Board of Health exercises this power throughout the county.
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> Question: May a general health district which exercises powers under Section 3707.01 of the Ohio Revised Code require a municipality to permit tap-in of its sanitary sewers when the lots tapping in are outside of the municipality but abutting upon the existing sewers?

The fact situation you describe is a familiar one in Ohio. Suburbs often do not want to be annexed to municipalities, but want access to municipal utilities, especially sanitary sewers. The municipalities refuse to provide utility services unless the suburbs agree to annexation. The Ohio Supreme Court has held

that a municipality may properly refuse such services under the broad power over its utilities granted by Article XVIII, Sections 4 and 6 of the Ohio Constitution. Section 4 reads 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. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Article XVIII, Section 6, provides authority for a municipality to sell the surplus product, or service, of its utilities. That amendment 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 percent of the total service or product supplied by such utility within the municipality, provided that such fifty percent limitation shall not apply to the sale of water or sewage services.

A sewer is a utility for purposes of these two constitutional provisions, as evidenced by the specific mention of "sewage services" in Article XVIII, Section 6. The first branch of the syllabus of Mead-Richer v. Toledo, 114 Ohio App. 369, 19 Ohio Op. 2d 392 (1961), reads as follows:

> A sewage system acquired, constructed, owned and operated by a city within its corporate limits, the service of which is to its inhabitants, is a public utility within the purview of Section 4, Article XVIII of the Constitution.

See also Colley v. Englewood, 80 Ohio App. 540 (1947).

The Ohio Supreme Court has construed these amendments to grant broad powers to municipalities. In State, ex rel. Indian Hills Acres, Inc. v. Kellogg, 149 Ohio St. 461 (1948), the court held that a municipality, absent contract, has full power to determine the terms upon which surplus water will be sold to consumers outside the municipality, and may even require annexation as a condition of such service. In State ex rel. McCann v. Defiance, 167 Ohio St. 313 (1958), the Court held in the second branch of the syllabus as follows:

> To the extent that Section 743.13, Revised Code, requires a municipality to fur-

> nish water to noninhabitants of such municipality or limits the price which such municipality may charge for such water, such statute is unconstitutional and void.

It is true that municipalities, under the "home-rule" amendment, may enact only such regulations "as are not in conflict with general laws." But that proviso only applies to Section 3, and not to Sections 4 or 6 of Article XVIII, Ohio Constitution. In Opinion No. 1533, Opinions of the Attorney General for 1952, my predecessor advised in the first branch of the syllabus as follows:

> A municipality derives the right to acquire, construct and operate any utility, the product of which is to be supplied to the municipality or its inhabitants, from Section 4 of Article XVIII of the Constitution, and the legislature is without power to impose restrictions and limitations upon that right.

He reasoned as follows:

> Something should be said in reference to the doctrine of "home rule" for municipalities as conferred by Article XVIII of the Constitution, adopted in 1912. While those sections of that article which deal with local government are hedged about with certain powers reserved to the general assembly, there are no such reservations in those sections which deal with the acquisition and operation by municipalities of public utilities. As to these, the power granted by the 18th Amendment is plenary and wholly beyond legislative interference. Dravo Doyle v. Orville, 93 Ohio St., 236; Power Co. v. Steubenville, 99 Ohio St., 421; State ex rel. v. Weiler, 101 Ohio St., 123; Euclid v. Camp Wise Assn., 102 Ohio St., 207; Board of Education v. Columbus, 118 Ohio St., 295; Pfau v. Cincinnati, 142 Ohio St., 101.

Thus, municipality and suburb must decide the question of annexation themselves, with no interference by the legislature. See generally, James W. Farrell, Jr., Municipal Public Utility Powers, 21 Ohio St. L.J. 390 (1960).

However, your question introduces an element not present in the cases mentioned above: the state's power to protect its citizens and prevent disease by abating nuisances and eliminating health hazards. If municipal control over utilities is a broad power, so is this power of the state. One of my predecessors stated in Opinion No. 4292, Opinions of the Attorney General for 1935, as follows:

> The power delegated to boards of health to provide measures for the protection of the public health is very broad. It is practically co-extensive with the necessities that may

> arise for the purpose indicated. The authority for the exercise of such power is referable to the police power inherent in the state.

The Supreme Court has had no trouble upholding the legislature's regulation of municipal sewers, for health purposes. My predecessor discussed a leading case, State Board of Health v. Greenville, 86 Ohio St. 1 (1912), in Opinion No. 7436, Opinions of the Attorney General for 1956, as follows:

> In the Greenville case supra, the issue was the constitutionality of a statute authorizing the state board of health to force a municipality to install a sewage disposal plant. The court in sustaining the law said at page 30 of the opinion:
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> > "* * * The sanitary condition existing in any one city of the state is of vast importance to all the people of the state, for if one city is permitted to maintain unsanitary conditions that will breed contagious and infectious diseases, its business and social relation with all other parts of the state will necessarily expose other citizens to the same diseases. With the wisdom or folly of withholding from the local authorities final discretion over these matters, we are not concerned. It is beyond question the right of the general assembly to do so, and the court need not, and ought not to, inquire what motives moved it in withholding such power." (Emphasis added.)
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> The powers of district boards of health emanate from the state in like manner, and are based upon the same consideration, viz., the health of the people of the state. * * *

R.C. Chapter 6117 is an extensive regulation of all the sanitary sewers in the state. I must conclude, then, that the constitutional issue is not dispositive of your question. The legislature has the power to regulate a municipality's use of its sewers, despite Sections 4 and 6 of Article XVIII, because of the inherent power of the state to protect the health of its citizens. The remaining question, then, is whether it has exercised this power in such a way as to enable a board of health to make the order which your question contemplates.

Boards of health are, of course, creatures of statute, and therefore have only such powers as are expressly granted by statute, or necessarily implied by those powers. Their power to prevent, remove, and abate nuisances is granted by R.C. 3707.01, 3709.21, and 3709.22, which read as follows:

R.C. 3707.01

> The board of health of a city or general health district shall abate and remove all nuisances within its jurisdiction. It may, by order, compel the owners, agents, assignees, occupants, or tenants of any lot, property,

building, or structure to abate and remove any nuisance therein, and prosecute such persons for neglect or refusal to obey such orders. Except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings, the board may regulate the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains. In cities having such departments or exercising such power, the legislative authority, by ordinance, shall prescribe such rules and regulations as are approved by the board and shall provide for their enforcement.

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When a building, erection, excavation, premises, business, pursuit, matter, or thing, or the sewage, drainage, plumbing, or ventilation thereof is, in the opinion of the board, in a condition dangerous to life or health, and when a building or structure is occupied or rented for living or business purposes and sanitary plumbing and sewage are feasible and necessary, but neglected or refused, the board may declare it a public nuisance and order it to be removed, abated, suspended, altered, or otherwise improved or purified by the owner, agent, or other person having control thereof or responsible for such condition, and may prosecute him for the refusal or neglect to obey such order. The board may, by its officers and employees, remove, abate, suspend, alter, or otherwise improve or purify such nuisance and certify the costs and expense thereof to the county auditor, to be assessed against the property and thereby made a lien upon it and collected as other taxes.

R.C. 3709.21

The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances.

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R.C. 3709.22

Each board of health of a city or general health district * * * may also provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease.

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Each of these Sections contains a broad grant of power to protect

the public health by abating nuisances. But R.C. 3707.01 goes on to list two procedures which are aimed at the owner, occupant, etc., of a building or property which is creating a health hazard. In the question you pose, the potential nuisance is created by the housing development, not by the city to which the order would have to be directed. It has been held, in State, ex rel. Pansing v. Lightner, 32 Ohio N.P. (n.s.) 376 (1934), that boards of health are not restricted to the two methods of procedure specified by R.C. 3707.01. That decision, however, granted an injunction directed to the owner of a farm who was creating a nuisance by feeding large quantities of garbage to his hogs. Hence, it is not authority for an order directed to a city which is not creating a nuisance, but allegedly has the means to enable a suburb to prevent a nuisance.

In Opinion No. 7436, Opinions of the Attorney General for 1956, my predecessor advised that a board of health may direct its orders to properties owned by the county or a city situated within its jurisdiction, as well as to private individuals and corporations. Hence, the board could order the municipality to abate any nuisance it created. But my research has disclosed no court decision or Attorney General's Opinion which construes the statutory powers of a board of health broadly enough to authorize an order of the type your question contemplates.

In a somewhat analogous fact situation, the Ohio Supreme Court said in Wetterer v. Bd. of Health, 167 Ohio St. 127 (1947):

> A board of health of a general health district has neither expressed nor implied power under Sections 3707.01, 3708.21 and 3709.36, Revised Code, to enact rules and regulations to provide for the licensing of plumbers in such general health district.

Municipalities have express statutory authority to license plumbers (R.C. 715.27 (C)), and since the legislature had not granted such a power to general district boards of health, the court refused to imply it from their general powers. 167 Ohio St. at 138-139. Similarly, in the instant fact situation, municipalities have full control of their utilities, except insofar as the legislature regulates them to protect the public health. Absent a clear grant of authority to boards of health to require municipalities to dispose of their surplus utility services in a particular way, I will not imply such a grant. The Supreme Court has ruled that a city may require annexation of a suburb as a condition to the furnishing of utility services (State, ex rel. Indian Hills Acres, Inc. v. Kellogg, supra), and there is no express grant or clear implication of power in a board of health to modify this rule under its power to abate nuisances.

It should be noted that this ruling does not conflict with that in Opinion No. 72-088, Opinions of the Attorney General for 1972, which discussed the power of a board of health to regulate "the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains", pursuant to R.C. 3707.01. This list does not include sewers, and is apparently concerned only with regulation of the erection of buildings. Hence, it does not impliedly grant to boards of health any powers not conferred by the specific authority discussed in this Opinion.

In specific answer to your question it is my opinion, and

you are so advised, that the board of health of a general health district does not have power to require a municipality within its jurisdiction to permit tap-in of its sanitary sewers from lots outside the municipality but abutting upon the existing sewers.