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SEWAGE DISPOSAL — CONSTRUCTION OF WORKS — APPROVAL—FIXING RATES OF SERVICE—PLANS AND SPECIFICATIONS MUST BE APPROVED BY BOARD OF COUNTY COMMISSIONERS BEFORE CONSTRUCTION OF SEWAGE DISPOSAL FACILITIES—NO CONSTRUCTION, INSTALLATION OR OPERATION SHALL BE MADE WITHOUT A CERTIFICATE OF PUBLIC CONVENIENCE FROM PUBLIC UTILITIES COMMISSION—CONSTRUCTION SHALL BE SUPERVISED BY REGISTERED ENGINEER NOTWITHSTANDING §6117.01, R.C.—BOARD OF COUNTY COMMISSIONERS MAY RATIFY, NOT FIX, RATES OF PRIVATE DISPOSAL WORKS—§§3701.18, 4933.25, 6112.01, 6112.04, 6117.01-1.02, R.C.

SYLLABUS:

1. Under Section 6117.01, Revised Code, no sewers or sewage treatment works shall be constructed in any county outside of municipal corporations by any person, firm or corporation until the plans and specifications for the same have been approved by the board of county commissioners, and such approval must be obtained prior to the subimission of such plans to the department of health pursuant to Sections 6112.02 and 6112.03, Revised Code, to be acted upon by the department in accordance with Section 3701.18, Revised Code, and regulations promulgated by the department.

2. Under Section 4933.25, Revised Code, no sewage disposal system company established after the effective date of this section shall construct, install, or operate sewage disposal system facilities until it has been issued a certificate of public convenience and necessity by the public utilities commission, but such certificate need not be issued until after the "general plans" for such construction have been approved by the department of health pursuant to Section 6112.02, Revised Code, provided that no "final plans" shall be approved by the department pursuant to Section 6112.03, Revised Code, before the department has received written notice from the public utilities commission that a certificate of public convenience and necessity has been issued by it authorizing such construction.

3. After approval for the construction of sewage facilities has been given by the board of county commissioners pursuant to Section 6117.01, Revised Code, and by the department of health pursuant to Sections 6112.02, 6112.03 and 3701.18, Revised Code, and by the public utilities commission pursuant to Section 4933.25, Revised Code, the construction of such facilities shall be performed under the supervision of a registered engineer, in a manner acceptable to the department of health, as required by Section 6112.04, Revised Code, notwithstanding the provision in Section 6117.01, Revised Code, that such construction shall be done under the supervision of the county sanitary engineer.

4. Under Section 6117.02, Revised Code, a board of county commissioners has no authority to fix rates for sewerage service when the sewerage treatment or disposal works is owned by any person, firm, or private corporation, but the board has authority to ratify the schedule of rates to be charged by such person, firm, or private corporation; provided the public utilities commission has not acted first with reference to such schedule of rates.

Columbus, Ohio, January 9, 1963

Hon. Ralph A. Hill, Prosecuting Attorney
Clermont County, Batavia, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Board of Commissioners of Clermont County, Ohio under the provisions of Chapter 6117. created a sewer district, coincident with the county boundaries, of the unincorporated areas of the county, and have adopted, pursuant to law, rules and regulations governing the construction and operation of the sewer systems within the district.

"Section 6117.02 of the Revised Code, as interpreted in Opinion No. 3229, on August 24, 1962, provides for uniform rates being fixed by the Board of Commissioners for the use of the sewers or sewer treatment plants within the sewer district.

"Chapter 6112. as effective September 19, 1961 provides for privately owned sewage and disposal systems. Section 6112.05 of that chapter contains provisions for the County Commissioners acquiring a system originally constructed for private ownership under the supervision of the Department of Health and the Public Utilities Commission.

Chapter 6112. and Chapter 6117. as presently in force raises three questions as follows:

> 'No. 1: If A desires to proceed under Chapter 6112. to construct a private sewage disposal system, what is the duty or authority of the Board of Commissioners to make inspection in view of the provision of 6117.01 as follows—'No sewers or sewage treatment works shall be constructed in any county outside of municipal corporations by any person, firm, or corporation until the plans and specifications for the same have been approved by the board, and any such construction shall be done under the supervision of the County Sanitary Engineer?'

"In other words does this provision of this chapter either give the Board of Commissioners authority, or impose a mandatory duty on them to make such inspections on projects undertaken under Chapter 6112. of the Code?

'No. 2: A proceeds with the construction and operation of a privately owned sewage disposal system under the provisions of Chapter 6112. as presently in force. What is the authority or duty of the Board of Commissioners with respect to the fixing of rates and assessments under the provisions of Section 6117.02 of the Revised Code? In other words do the Commissioners have the authority or a mandatory duty to fix the rates, in view of the fact that earlier approval has been given by the Public Utilities Commission?'

'No. 3: Assume that A proceeds under the provisions of Chapter 6117. of the Revised Code, as presently in force, for the construction of a sewage disposal system. Then, before the system is accepted by the County Commissioners for public operation, A decides to make it a privately owned sewage disposal system under the provisions of Chapter 6112. What authority or duty is placed with the Board of Commissioners under Section 6117.02 relative to fixing of rates and assessments for the operation of that private system in view of the apparent approval necessary from the Public Utilities Commission for the operation of a utility.'

"The above questions are based upon an actual situation facing our Board of Commissioners. An individual has started to construct a privately owned sewage system under Chapter 6112. There is some indication now that because of certain delays in Columbus, he will proceed under Chapter 6117. and then attempt to operate under Chapter 6112. and we would appreciate your early reply.

"We feel because of our experience in this situation that other counties may soon be facing the same problems and therefore ask your opinion on these matters."

Section 6117.01, Revised Code, provides, in part, as follows:

"* * * Any such board may employ a competent sanitary engineer for such time and on such terms as it deems best, and may authorize such sanitary engineer to employ necessary assistants upon such terms as are fixed by said board. The board may create and maintain a sanitary engineering department, to be under its supervision and in charge of a competent sanitary engineer, to be appointed by such board, for the purpose of aiding it in the performance of its duties under sections 6117.01 to 6117.45, inclusive, of the Revised Code, or its other duties regarding sanitation provided by law. Said board shall provide suitable rooms for the use of such department and shall provide for and pay the compensation of such sanitary engineer and all necessary expenses of such sanitary engineer and department which are authorized by such board. Any such sanitary engineer in charge of such department, with the approval of the board, may appoint necessary assistants and clerks and the compensation of any such assistants and clerks shall be fixed and paid by such board. The board may make, publish and enforce rules and regulations for the construction, maintenance, protection, and use of sewers and sewer improvements in its county outside of municipal corporations, and of sewers and sewer improvements within municipal corporations in its county wherever such sewers are constructed or operated by such board or discharge into sewers or sewage treatment plants constructed or operated by such board, including the establishment and use of connections. Such rules and regulations shall not be inconsistent with the laws of this state or the rules and regulations of the department of health. No sewers or sewage treatment works shall be constructed in any county outside of municipal corporations by any person, firm, or corporation until the plans and specifications for the same have been approved by the board, and any such construction shall be done under the supervision of the county sanitary engineer. Any person, firm, or corporation proposing or constructing such improvements shall pay to the county all expenses incurred by the board in connection therewith. * * *"

Section 6117.02, Revised Code, reads, in part as follows:

> "The board of county commissioners shall fix reasonable rates to be charged for the use of the sewers or sewerage treatment or disposal works referred to in section 6117.01 of the Revised Code by every person, firm or corporation whose promises 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 may change such rates as it deems advisable. Such rates shall be at least sufficient to pay all the cost of operation and maintenance of improvements for which the resolution declaring the necessity thereof shall be passed after the effective date of this act. When the sewerage treatment or disposal works is owned by a municipal corporation or any person, firm or private corporation the schedule of rates to be charged by such municipal corporation, person, firm or private corporation for the use of such facilities shall be ratified by the board at the time any contract is entered into for such use. * * *"

In Opinion No. 1842, Opinions of the Attorney General for 1960, page 673, I held, among other things, that the public utilities commission of Ohio (P.U.C.O.) did not have any jurisdiction over a sewage company, but that such a company was subject to the jurisdiction of a board of county commissioners under Section 6117.01, *supra.* Less than a year later, and no doubt as a result of Opinion No. 1842, *supra,* the legislature enacted Sections 4933.25, 6112.02, 6112.03, and 6112.04, Revised Code, pertaining to the jurisdiction of the P.U.C.O. and the department of health over sewage companies (1961; 129, Ohio Laws, 501—several other sections were also enacted or amended in this same bill but for the sake of brevity will not be set forth here).

Section 4933.25, Revised Code, reads as follows:

> "No sewage disposal system company established after the effective date of this section shall construct, install, or operate sewage disposal system facilities until it has been issued a certificate of public convenience and necessity by the public utilities commission. The public utilities commission shall adopt rules prescribing requirements and the manner and form in which sewage disposal system companies shall apply for a certificate of public convenience and necessity.
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> "Before the public utilities commission issues a certificate of public convenience and necessity, it may hold a public hearing concerning the issuance of said certificate. Notice of such hearing shall be given to the board of county commissioners of any county

and the chief executive authority of any municipal corporation to be served by a sewage disposal system company."

Section 6112.02, Revised Code, provides:

"For the purpose of preventing, controlling, and abating new or existing pollution of the waters of the state, the department of health, upon application made to the department by any person and determination by the department that such action will be conducive to the public health, safety, convenience, and welfare, may grant approval for general plans to such person for the construction and installation of a disposal system for the disposal of sewage, industrial waste, or other wastes to serve any geographical area in one or more counties, whether or not said geographical area is part of one or more then existing sewer districts established under Chapter 6117. of the Revised Code, provided that said geographical area is not then being served by a disposal system for the disposal of sewage, industrial waste, or other wastes.

"Upon receipt of any application for approval of the department as provided for in this section, the department shall notify the board of county commissioners in any county in which any part of said geographical area is situated that such application has been filed. The board of county commissioners shall certify to the department, within thirty days after receipt of such notice, whether said geographical area is or is not then being served by a disposal system for the disposal of sewage, industrial waste, or other wastes.

"There shall be submitted with such application such data required by the department to establish the need therefor to serve the public health, safety, convenience, and welfare, and such surveys, topographic maps, and profiles as are necessary for the determination of the proper boundaries of such geographical area. Surveys accompanying applications requesting the approval of general plans provided for in this section shall have been made under the supervision of and certified by a registered engineer or surveyor.

Section 6112.03, Revised Code, provides:

"Applications for approval of plans for the construction and installation of such facilities shall be made in manner and form prescribed by the department, shall be accompanied by plans, specifications, and other data as may be required by the department, relative to the facilities for which approval of plans is requested. Thereafter, the application shall be acted upon by the department pursuant to section 3701.18 of the Revised Code and regulations promulgated by the department. No final detailed or construction plans shall be approved by the department before

the department has received written notice from the public utilities commission that a certificate of public convenience and necessity has been issued by it authorizing the construction, installation, and operation of such facilities. Thereafter, any person making application to the public utilities commission to abandon, withdraw, or close for service any main sewer or sewage disposal works serving such district shall, within five days thereafter, notify the department of health of its having filed such application with the public utilities commission.

Section 6112.04, Revised Code, reads as follows:

> "The construction of the facilities for which plans have been approved by the department shall be performed under the supervision of a registered engineer, in a manner acceptable to the department. Such registered engineer shall be employed by the applicant at his own expense."

Although the legislature mentioned the board of county commissioners in Sections 4933.25 and 6112.02, *supra,* and in the latter section specifically referred to Chapter 6117., Revised Code, nevertheless the legislature did not expressly amend or repeal the provisions in said chapter found in Sections 6117.01 and 6117.02, *supra,* relating to the jurisdiction of the board of county commissioners over sewage companies. In view of the legislature's knowledge of the prior legislation (Chapter 6117., *supra)* and its failure to expressly amend or repeal it, I am reluctant to find any implied revocation of the prior legislation. In this regard, it is provided in 50 Ohio Jurisprudence 2d, 78, Statutes, Section 95, as follows:

> "Repeals by implication are not favored and have been declared to be 'abhorred.' Courts will not hold prior legislation to be repealed by implication by the enactment of subsequent legislation unless the later legislation clearly requires such holding, and it will be assumed that the General Assembly had knowledge of the prior legislation when it enacted the subsequent legislation and that had it intended to nullify the specific terms of the prior legislation it would have expressly repealed it. Implied repeal will not be held to result if there is any other reasonable construction of the enactments in question. Only when reconciliation of the enactments cannot be effected by a fair and reasonable construction does repeal by implication result. If they can stand together, or if both can be enforced concurrently, there is no implied repeal."

In accordance with the foregoing principle, I shall attempt to reconcile, if possible, the prior legislation with the new legislation.

Under the new legislation (Sections 6112.02 and 6112.03, *supra)* the application made to the department of health must be accompanied by plans and specifications, but, before the department can approve the plans and specifications, the board of county commissioners must certify to the department that the geographical area in which the sewage system is to be constructed is not then being served by a sewage disposal system. "Thereafter," according to Section 6112.03, *supra,* "the application shall be acted upon by the department pursuant to section 3701.18 of the Revised Code and regulations promulgated by the department." It is interesting to note that Section 3701.18, *supra,* which provides in effect that no person shall install a sewerage treatment works until the plans therefor have been submitted to and approved by the department of health, is older than either the new Chapter 6112. or the old Chapter 6117., Revised Code. Section 3701.18, *supra,* was enacted in 1908 (99, Ohio Laws, 494). One of the regulations promulgated by the department of health in connection with Section 3701.18, *supra,* is Regulation Number 98 (adopted January 20, 1951) reading as follows:

> "The following provisions shall apply to the submission of plans for proposed water supply, swimming pools, *sewerage and sewage and industrial wastes disposal improvements.*
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> "* * * * * * * * *
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> "C. If the improvement relates to the water supply, swimming pool, sewerage, or sewage disposal of an unincorporated community, a county sewer district or part thereof, or of other land in a county outside a municipality, or to the disposal or treatment of an industrial waste from a county owned plant, *the plans therefor shall have received the approval of the board of county commissioners prior to their submission to the department of health* and evidence of such approval shall accompany the plans; provided that the director of health may waive such requirement in case the improvement is to be made by and at the expense of a person."

Thus, the requirement in Section 6117.01, *supra,* that plans must be approved by the board of county commissioners is not inconsistent with the requirement in Section 6112.03, *supra,* that such plans must also be approved by the department of health, because Section 6112.03, *supra,* incorporates by reference Section 3701.18, *supra,* and the regulations promulgated by the department of health. Regulation No. 98, *supra,* reconciles the legislation by providing that such plans shall have received the approval of the board of county commissioners prior to their submission to

the department of health. Although there is no specific statute or regulation providing when the P.U.C.O. should act in these matters, Section 6112.02, *supra,* refers to the department of health granting approval of the "general plans," and then Section 6112.03, *supra,* provides that no "final detailed or construction plans" shall be approved by the department until the P.U.C.O. has issued a certificate of public convenience and necessity. Apparently, therefor, the P.U.C.O. acts some time after the plans have been approved by the board of county commissioners and submitted to the department of health but before the final plans have been approved by the department.

There is one part of the legislation, however, which is difficult to reconcile. After all the plans have been approved, Section 6117.01, *supra,* provides that "construction shall be done under the supervision of the county sanitary engineer." Section 6112.04, *supra,* provides, however, that such construction "shall be performed under the supervision of a registered engineer, in a manner acceptable to the department. Such registered engineer shall be employed by the applicant at his own expense." Obviously, it would be an unnecessary duplication of time and effort, not to mention expense, for two engineers to supervise the same construction. In my opinion, therefore, a registered engineer should supervise the construction in accordance with Section 6112.04, *supra,* and not the county sanitary engineer under Section 6117.01, *supra,* because Section 6112.04, *supra,* is the later enactment.

In answer to your first question, therefore, it is my opinion that a board of county commissioners under Section 6117.01, *supra,* must approve a person's plans and specifications for a sewage treatment works to be constructed in the county outside of municipal corporations before such person may proceed under Chapter 6112., *supra,* to construct said sewage works.

Turning now to your second and third questions regarding the duty of a board of county commissioners to fix sewage rates, you will note that under Section 6117.02, *supra,* the board has the duty to "fix reasonable rates * * * when such sewers or sewerage treatment or disposal works are owned or operated by the county." When the sewerage treatment or disposal works is owned by any person, firm, or private corporation, however, Section 6117.02, *supra,* provides that "the schedule of rates to be charged by such * * * person, firm, or private corporation for the use

of such facilities shall be ratified by the board at the time any contract is entered into for such use." Thus, without even considering the duty of the P.U.C.O. regarding sewage rates, it can be seen that a board of county commissioners has no authority under Section 6117.02, *supra,* to *fix* such rates when the sewage facilities are privately owned. The only duty of a board of county commissioners when sewage facilities are privately owned is to *ratify* the schedule of rates. The verb "to ratify" is defined in Merriam-Webster's New International Dictionary (3rd ed.) as follows: "to approve and sanction." The same definition is found in Black's Law Dictionary (4th ed.). The question, therefore, is whether a board of county commissioners can disapprove a schedule of rates which has previously been filed with the P.U.C.O. See Sections 4905.30 and 4905.32, Revised Code.

In Opinion No. 1842, *supra,* I considered the problem of water rates where both the P.U.C.O. and boards of county commissioners have jurisdiction. Regarding this problem, I cited *Trumbull County Board of Education* v. *The State, ex rel. Van Wye,* 122 Ohio St., 247, in which paragraph one of the syllabus reads as follows:

> "1. Where power is given under the statutes to two different governmental boards to act with reference to the same subject-matter, exclusive authority to act with reference to such subject-matter is vested in the board first acting under the power."

In answer to your second and third questions, therefore, it is my opinion that the P.U.C.O. would have exclusive authority over the schedule of sewage rates when it has acted first with reference to such rates.

Accordingly, it is my opinion and you are advised:

1. Under Section 6117.01, Revised Code, no sewers or sewage treatment works shall be constructed in any county outside of municipal corporations by any person, firm or corporation until the plans and specifications for the same have been approved by the board of county commissioners, and such approval must be obtained prior to the submission of such plans to the department of health pursuant to Sections 6112.02 and 6112.03, Revised Code, to be acted upon by the department in accordance with Section 3701.18, Revised Code, and regulations promulgated by the department.

2. Under Section 4933.25, Revised Code, no sewage disposal system company established after the effective date of this section shall construct, install, or operate sewage disposal system facilities until it has been issued a certificate of public convenience and necessity by the public utilities commission, but such certificate need not be issued until after the "general plans" for such construction have been approved by the department of health pursuant to Section 6112.02, Revised Code; provided that no "final plans" shall be approved by the department pursuant to Section 6112.03, Revised Code, before the department has received written notice from the public utilities commission that a certificate of public convenience and necessity has been issued by it authorizing such construction.

3. After approval for the construction of sewage facilities has been given by the board of county commissioners pursuant to Section 6117.01, Revised Code, and by the department of health pursuant to Sections 6112.02, 6112.03 and 3701.18, Revised Code, and by the public utilities commission pursuant to Section 4933.25, Revised Code, the construction of such facilities shall be performed under the supervision of a registered engineer, in a manner acceptable to the department of health, as required by Section 6112.04, Revised Code, notwithstanding the provision in Section 6117.01, Revised Code, that such construction shall be done under the supervision of the county sanitary engineer.

4. Under Section 6117.02, Revised Code, a board of county commissioners has no authority to fix rates for sewerage service when the sewerage treatment or disposal works is owned by any person, firm, or private corporation, but the board has authority to ratify the schedule of rates to be charged by such person, firm, or private corporation; provided the public utilities commission has not acted first with reference to such schedule of rates.

Respectfully,
MARK MCELROY
Attorney General