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MUNICIPAL CORPORATION — WATERWORKS SYSTEM

1. SALE OF WATER OUTSIDE CORPORATION LIMITS: POWER VESTED IN MUNICIPAL LEGISLATIVE AUTHORITY, *NOT* DIRECTOR OF PUBLIC SERVICE OF A CITY OR BOARD OF PUBLIC AFFAIRS OF A VILLAGE — ART. XVIII, SEC. 6, OHIO CONSTITUTION; §§ 743.12, .13, .18 RC.

2. WATER SERVICE TO LAND PARTLY IN AND PARTLY OUT OF CORPORATION LIMITS — LANDOWNERS WITHOUT AUTHORITY TO EXTEND WATER OR SEWER SERVICE TO UNINCORPORATED AREA.

3. WATER SERVICE TO PROPERTY ABUTTING WATER LINE OUTSIDE MUNICIPAL CORPORATION; NO DUTY IN ABSENCE OF EASEMENT RIGHTS; CONTRACT DUTY TO SUPPLY MAY ARISE, WHEN

SYLLABUS:

1. Where a municipal corporation owns and operates a water works system, the power to determine whether or not to sell a portion of the water from such system outside the corporation limit, pursuant to Article XVIII, Section 6, Ohio Constitution, Section 743.12, Section 743.13, and Section 743.18, Revised Code, is vested in the legislative authority of the municipality and not in the director of public service of a city nor in the board of trustees of public affairs of a village.

2. An owner of real property which is so situated that it lies partly inside and partly outside the corporate limits of a municipality has no power in law to extend, in the absence of proper authority from the municipal corporation, water or sewer service to that portion of his real property which is located outside the municipal corporation, and any such authorization which may be received must be secured from or approved by the legislative authority of the municipal corporation.

3. A municipality which has extended a water line along the right of way of a public highway in an unincorporated area outside the city for the purpose either of selling surplus water for manufacturing or other purposes or connecting the city water system to a city-owned reservoir has no duty to serve all abutting property, in the absence of easement rights, but such city may by contract place itself in such a position that it has assumed the duty to supply such service without discrimination.

Columbus, Ohio, June 3, 1957

Hon. James A. Rhodes, State Auditor
State House, Columbus, Ohio

Dear Sir:

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

> "In connection with the operation of a municipal waterworks in a city in northern Ohio, several questions have arisen which I believe to be of such a nature as to have statewide application in view of expanding industrial and residential areas surrounding many municipalities in Ohio.
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> "In the municipality in questoin, a municipally owned and operated waterworks is located which produces or has the capacity to produce surplus water. In connection with that situation, the following questions are submitted for your study and opinion.
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> "1. In a municipality which owns and operates a water utility, is the authority to sell surplus water outside the corporation limits vested in the Director of Public Service or in the City Council or if both have jurisdiction over this subject, how is the authority delegated between the Director of Public Service and City Council?
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> "2. If a City extends a water line outside the corporation limits along the right of way of a public highway in an unincorporated area for the following purposes:
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> "a. The sale of surplus water for industrial purposes;
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> "b. A line extension to a reservoir that was constructed by, is owned and operated by the City,
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> is it mandatory for the City to serve all abutting property owners along the public highway in the absence of specific easement rights?
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> "3. When a person or persons own property within a City and own property contiguous to the City-owned property within a village or township, all property being under single ownership, can water and/or sewer service be extended to that portion of the property outside the corporation limits without authorization of the municipality? Who in the municipality has the authority to grant such extension?"

Your inquiry relates, in part, to a determination of the extent of the authority vested in a director of public service as opposed to that vested in the legislative authority of a municipal corporation. It should, then, be noted that only municipalities which are cities within the defini-

tions in Article XVIII, Section 1, Ohio Constitution, and Section 703.01, Revised Code, are required by Chapter 735., Revised Code, to have a department of public service in charge of a director; in villages, duties which are similar to those of a director of public service are by Section 735.28, *et seq.,* Revised Code, vested in a board of trustees of public affairs.

Municipalities are expressly granted the authority to sell to persons outside the limits of the corporation a part of the product of a municipally owned utility.

Article XVIII, Section 6, Ohio Constitution, reads:

> "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 centum of the total service or product supplied by such utility within the municipality."

Chapter 743., Revised Code, defines in some detail the purposes for which water from a municipally owned water system may be sold outside the corporation limits.

Section 743.12, Revised Code, provides:

> "On the written request of any number of citizens living outside the limits of a municipal corporation, the municipal corporation may extend, construct, lay down, and maintain aqueduct and water pipes, and electric light and power lines outside the municipal corporation, and for such purpose may make use of such of the public streets, roads, alleys, and public grounds as are necessary therefor."

Section 743.13, Revised Code, reads:

> "When any person at his own expense has laid down and extended mains and water pipes or electric light and power lines beyond the limits of a municipal corporation, *and the legislative authority thereof, by resolution, has authorized the proper officer of the water works to superintend or supervise such laying and extension,* the municipal corporation shall furnish water or electricity to the residents and property holders on the line of such facilities. The same rules and regulations which govern the furnishing of water or electricity to its own citizens shall apply in such cases, except that the rates charged therefor shall not exceed those within the municipal corporation by more than one tenth."
> (Emphasis added.)

Section 743.18, Revised Code, provides in part:

> "A municipal corporation which has water works or electric works may contract with any other municipal corporation to supply it or its inhabitants with water or electricity upon such terms as are agreed upon by their respective legislative authorities. A municipal corporation which has a water works may dispose of surplus water, for manufacturing or other purposes, by lease or otherwise, *upon such terms as are agreed upon by the director of public service of a city* or the board of trustees of public affairs of a village *and approved by the legislative authority thereof.* Moneys received for such surplus water in either case shall be applied to the payment of the principal and interest of the bonds issued for the construction of such water works, or for other expenses incident to the maintenance thereof, but no lease shall be made for a longer term than twenty years."
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> (Emphasis added.)

It is quite apparent that where a municipality is proceeding under Section 743.13, Revised Code, it is the legislative authority of the municipal corporation which authorizes the required supervision or superintending of the placing of water mains and pipes which in turn places upon the city the duty to furnish water to the residents and property holders on the line of such facilities. Section 743.18, Revised Code, quite clearly states that the legislative authority of a municipality must approve any agreement entered into either to furnish water to another municipality or to dispose of surplus water for manufacturing or other purposes.

Section 743.12, Revised Code, which authorizes a municipality to proceed in response to the written request of citizens living outside the corporate limits, contains no language demonstrating upon whom is placed the power or duty to determine whether or not the municipality shall so proceed. Examination of the pertinent sections of Chapter 743., Revised Code, makes it apparent that the management of a municipal water works owned by a city devolves upon the director of public service; Section 743.02, Revised Code, for example, empowers the director of public service to make the by-laws and regulations he deems necessary for the "safe, economical, and efficient management and protection of the water works of a municipal corporation." Section 743.03, Revised Code, reads as follows:

> "The director of public service shall manage, conduct, and control the water works of a municipal corporation, furnish supplies of water, collect water rents, and appoint any necessary officers and agents."

The director of public service may assess and collect a water rent as directed in Section 743.04, Revised Code; Section 743.07, Revised Code, provides that subject to Title VII of the Revised Code he may enter into and make contracts.

At first blush it might appear that by these sections the director of public service is given such broad powers in connection with the management of a municipally owned water utility that he and he alone would determine whether the service supplied by such utility should be extended beyond the corporate limits where a written request has been filed pursuant to Section 743.12, Revised Code. Further reflection demonstrates that such a conclusion is not warranted.

It is the municipal corporation which may sell surplus water outside the limits of the corporation as shown by Article XVIII, Section 6, Ohio Constitution, Section 743.12 and Section 743.18, Revised Code. The legislative power of a municipality is by Section 731.01, Revised Code, vested in the legislative authority of a municipality. Section 731.47, Revised Code, provides that, except as otherwise provided by law, the legislative authority of a municipality shall have control of the finances and property of the municipal corporation.

In Miller v. Village of Orrville, 48 Ohio App., 87, it was pointed out that a village has constitutional power to extend its electric service lines beyond the corporation limits and to furnish electricity outside the village. There was a claim that the board of trustees of public affairs of the village, a board with duties similar to those of the service director of a city, had acted illegally in entering into contracts, without prior authorization of the council of the village, with persons residing outside the corporation. The court found that the council had appropriated the funds with which to make such extensions, and then said this at page 95:

> "*** and we are of the opinion that said board, by virtue of the statutes of Ohio, had authority to agree to make such extensions without authorization of the council *other than the appropriation therefor made by the council,* such extensions being made from such rental funds." (Emphasis added.)

In State, *ex rel.* Indian Hill Acres, Inc., v. Kellogg, 149 Ohio St., 461, there is language which is pertinent here. It was claimed in that case that the city manager and the superintendent of the water works had a duty to permit certain water main extensions to be connected with an existing main and to authorize such extensions to be served with water. The language appropriate here appears on page 474:

> "There can be no doubt, and indeed it is conceded, that the council of the city of Cincinnati had the sole authority to decide whether the city would continue to furnish its surplus water to surrounding territories. At the termination of the original contract made with the county commissioners, a further determination of the council's future legislative policy was authorized and essential. It cannot be concluded that the city council was committed to the continuation of its previous policy and was without power to change or modify the course of conduct. Rather, it is axiomatic that in legislative matters the council has full power to act, restricted only by pertinent constitutional and statutory limitations. * * *"

I conclude, therefore, that while the director of public service of a city has wide powers granted to him by the pertinent sections of the Revised Code to manage, conduct and control the municipal water works and to enter into contracts pursuant to Section 743.07, Revised Code, as limited by Section 735.05, Revised Code, the director of public service can not independently and without the approval of the legislative authority of the city contract or agree to sell outside the municipal corporation surplus water from a municipally owned water works system.

The third question which you have presented for my opinion will be considered at this time, as the discussion of that question will be, in part at least, closely related to the foregoing. You have asked whether the owner or owners of real property which is so situated that it lies partly within and partly outside the limits of a municipal corporation may without the authorization of the municipality extend water and sewer service to the entire tract of real property. Such a power, if it were found to exist, would, in my opinion tend to divest a municipal corporation of control over a municipally owned waterworks or sewerage system. To conclude that an individual or group of individuals have such a right would seem to be completely at variance with Chapter 743., Revised Code, which has been referred to and discussed hereinbefore, Section 727.01, Revised Code, and Section 729.31 *et seq.,* Revised Code. Examination of Section 727.01, Revised Code, and Section 729.31 *et seq.,* Revised Code, makes it clear that it is the legislative authority of a municipality which may assess upon certain lands the cost of improvements, including sewers and sewage disposal works, and which may provide for a sewerage system under the municipal sewer district method.

Section 743.13, Revised Code, clearly provides that where a person at his own expense lays down or extends mains and water pipes beyond

the limits of a municipal corporation, the approval of the legislative authority of the municipality must be evidenced by a proper resolution in order that water shall be furnished by the said municipality. You make no inquiry and I express no opinion on the point of whether the sale of water thus delivered inside the municipal limits and carried outside such limits in a privately constructed water line is subject to the fifty per centum limitation in Article XVIII, Section 6, Ohio Constitution.

I find no direct statutory provisions directing the manner in which a municipal corporation may extend sewers beyond the corporate limits for the purpose of serving property in an unincorporated area. Assuming, however, without deciding, that a municipal corporation may so proceed under its general constitutional powers, the authority to determine to follow such course must by necessary implication be vested in the legislative authority of such municipal corporation. It is true that the director of public service of a city is by Section 735.02, Revised Code, charged with the duties of supervision of improvement and repair of sewers and management of a sewage disposal plant, yet, as pointed out hereinbefore, it is the legislative authority which determines the policy of a municipality as to the construction and maintenance of such system.

The second question in your inquiry may be stated in this way: Where a municipality has constructed a water line outside the municipality along a public highway in an unincorporated area either for the purpose of supplying water for industrial purposes or to connect the municipal water works with a city-owned reservoir which is located outside of the city, must all abutting property be served with water, in the absence of specific easement rights?

This discussion will be confined to those situations in which a municipality is acting under authority of Article XVIII, Sec. 4, Constitution of Ohio, in acquiring, constructing, owning, leasing and operating a public utility within or without its corporate limits or under Section 743.18, Revised Code, in supplying water for industrial purposes. It is assumed that the municipality proceeded under the proper authority in placing the water line along the right of way of a public highway and that the municipality did not enter into contracts which placed upon it duties other or greater than those placed upon it by law.

I find no authority in the law which expressly or by implication places upon a municipality the duty to furnish with water or sewer service prop-

erty which lies outside a municipal corporation but which abuts on a public highway along which a municipally owned water line or sewer is placed. Neither do I find authority in the law which vests in the owners of such property a right to water or sewer service.

It would be well, however, for any municipality contemplating any contracts or agreements for service of some, but not all, of such abutting property to avoid placing itself in a position where it is discriminating against some members of the public toward whom a duty may have been assumed. The case of Western Reserve Steel Co. v. Village of Cuyahoga Heights, 118 Ohio St., 544, involved a contract between the City of Cleveland and the Village of Cuyahoga Heights, but the following part of the opinion of the Supreme Court of Ohio, which appears at page 552, expresses an admonition which a municipality might well observe where it is contemplating entering into contracts for the sale of surplus water:

> "* * * At the same time, because of its having entered the field of public utilities, there devolved upon the city of Cleveland certain duties toward the public of the territory it had undertaken to serve that were cast upon it, not by the contract, but because of the contract, among which was the duty to serve the utility to the public of the designated territory without discrimination, from the performance of which duty it could not absolve itself except by contract with the person to whom it owed the duty."

The third paragraph of the syllabus in State, *ex rel.* Indian Hill Acres, Inc. v. Kellogg, 149 Ohio St., 461, reads as follows:

> "3. In the sale and delivery of surplus products of a municipal utility to others than the municipality and its inhabitants, the municipality is authorized to bind itself by a contract whereby it dedicates itself to the public served and assumes the duty to supply such product without discrimination. In the absence of contract, the municipality, in selling and delivering any surplus product to others than the inhabitants thereof, does not become such a public utility as to be bound to serve indiscriminately all who may demand such service, but the municipality may sell and dispose of its surplus products in such quantities and in such manner as the council thereof determines to be in the best interest of the municipalityy and its inhabitants. (*Western Reserve Steel Co.* v. *Village of Cuyahoga Heights,* 118 Ohio St., 544, distinguished.)"

It is, therefore, my opinion and you are advised:

1. Where a municipal corporation owns and operates a water works system, the power to determine whether or not to sell a portion of the

water from such system outside the corporation limit, pursuant to Article XVIII, Section 6, Ohio Constitution, Section 743.12, Section 743.13, and Section 743.18, Revised Code, is vested in the legislative authority of the municipality and not in the director of public service of a city nor in the board of trustees of public affiairs of a village.

2. An owner of real property which is so situated that it lies partly inside and partly outside the corporate limits of a municipality has no power in law to extend, in the absence of proper authority from the municipal corporation, water or sewer service to that portion of his real property which is located outside the municipal corporation, and any such authorization which may be received must be secured from or approved by the legislative authority of the municipal corporation.

3. A municipality which has extended a water line along the right of way of a public highway in an unincorporated area outside the city for the purpose either of selling surplus water for manufacturing or other purposes or connecting the city water system to a city-owned reservoir has no duty to serve all abutting property, in the absence of easement rights, but such city may by contract place itself in such a position that it has assumed the duty to supply such service without discrimination.

Respectfully,
WILLIAM SAXBE
Attorney General