

OPINION NO. 79-107**Syllabus:**

1. R.C. 6103.02 authorizes a board of county commissioners to make, publish, and enforce rules and regulations for the construction, maintenance, protection, and use of a public water supply by a private enterprise in an unincorporated area of a county, provided that such rules and regulations are consistent with other statutes and with the rules and regulations of the Ohio Environmental Protection Agency.
2. Unless the purpose of construction is to supply a municipality with water, R.C. 6103.02 requires that a board of county commissioners approve plans and specifications for water lines prior to their construction in an unincorporated portion of a county by any person, firm, or corporation.
3. Any proposed construction of water lines by any person, firm, or corporation in an unincorporated portion of a county must be done under the supervision of the county sanitary engineer, unless the purpose of the project is to supply water to a municipality.
4. Under R.C. 6103.02, a board of county commissioners has no authority over water rates charged by a municipality to a private party located outside the municipality if the county does not own or operate the system outside the municipality, unless the county contracts with the municipality for the provision of a water supply to a sewer district within which the private party is located. (1960 Op. Att'y Gen. No. 1842, p. 673, limited.)

To: Michael DeWine, Greene County Pros. Atty., Xenia, Ohio
By: William J. Brown, Attorney General, December 26, 1979

I have before me your request for my opinion regarding the provision of water by a municipality outside the city limits. Your request states the facts and issues as follows:

The City of Fairborn in Greene County, Ohio, has contracted with a private property owner in Bath Township whereby the property owner has agreed to install water mains on his property and the City has agreed to supply the water to such mains outside the City, and [charge] a rate similar to the rate charged to the citizens of the City of Fairborn plus a surcharge.

This office requests that you consider and answer the following questions which pertain to the above situation:

1. Does Ohio Revised Code Section 6103.02 authorize the Board of County Commissioners to make, publish, and enforce rules and regulations for the construction, maintenance, protection and use of a water supply to be established pursuant to said agreement as above stated?
2. In the above situation, must the plan, and specifications be

approved by the Board of County Commissioners prior to the extension of the line outside the City, and must the construction be done under the supervision of Greene County Sanitary Engineer?

3. When the County does not own or operate the water system, and the City supplies the water to the private property, does the Board of Greene County Commissioners have the authority under Ohio Revised Code Section 6103.02 to ratify the schedule of rates to be charged to the property owner by the City?

4. If your answer to the foregoing questions is that the Board of Greene County Commissioners must ratify the water rates charged to the property owner by the City, what is the nature and extent of such authority to ratify the rates? Can it limit the amount charged by a City in view of the powers of the City under Article XVIII, Sections 4 and 6 of the Ohio Constitution? If the Board disagrees with the rates sought by the City, can it arbitrarily refuse to ratify the rates?

Additional facts were subsequently supplied by the Greene County Sanitary Engineer. He informed me that the private property in this situation is a commercial park of about 1,000 acres which houses many independent businesses. Distributing mains are necessary to service the area. The park is currently in an unincorporated portion of the county which is part of a sewer district created by the Greene County Board of County Commissioners pursuant to Chapter 6117 of the Revised Code.

Your first two questions will be considered together since the conclusions entail similar statutory analysis. The pertinent parts of R.C. 307.73 read:

The board of county commissioners for any unincorporated portion of the county, upon application by any individual, organization, or agency of private enterprise, may grant permission by resolution to such individual, organization, or agency to construct water or sewer lines, or both, under the supervision of the board. (Emphasis added.)

The relevant portions of R.C. 6103.02 state:

The board may make, publish, and enforce rules and regulations for the construction, maintenance, protection, and use of public water supplies in the county outside of municipal corporations. . . . Such rules and regulations shall not be inconsistent with the laws of the state or the rules and regulations of the environmental protection agency. No public water supplies or water pipes or mains shall be constructed in any county outside of municipal corporations by any person, firm, or corporation except for the purpose of supplying water to such municipal corporations, until the plans and specifications for the same have been approved by the board. Any such construction shall be done under the supervision of the sanitary engineer.

"Public water supply" is defined in R.C. 6103.01:

As used in sections 6103.02 to 6103.30, inclusive, of the Revised Code, "public water supply" means wells, springs, streams, or other sources of water supply, pumping equipment, treatment or purification plants, distributing mains, cisterns, reservoirs, necessary equipment for fire protection, other equipment, and lands, rights of way, and easements, necessary for the proper development and distribution of the supply. (Emphasis added.)

R.C. 307.73 and 6103.02 constitute grants of power to counties, made pursuant to the General Assembly's authority to delegate powers which relate to the health of Ohio citizens, such as the regulation of water supplies. See Canton v. Whitman, 44

Ohio St. 2d 62 (1975); Blacker v. Wiethe, 16 Ohio St. 2d 65 (1965); 1964 Op. Att'y Gen. No. 978, p. 2-142; 1960 Op. Att'y Gen. No. 1842, p. 673.

In applying the statutes quoted above to the facts which you have presented, it is apparent that the board of county commissioners has control over the construction of water lines by private persons in unincorporated areas of the county. R.C. 307.73 bestows on the board of county commissioners supervisory power over the construction of water lines in unincorporated portions of the county by any individual, organization, or agency of private enterprise. In addition, R.C. 6103.02 specifically empowers the board to "make, publish, and enforce rules and regulations for the construction, maintenance, protection, and use of public water supplies in the county outside of municipal corporations" (emphasis added). The definition of "public water supply" set forth in R.C. 6103.01 clearly includes the installation of distributing mains contemplated in your question. Thus, when a private enterprise plans to install water lines in an unincorporated area of a county, it is subject to the supervision, and to the rules and regulations, of the board of county commissioners.

Addressing your second question, again R.C. 307.73 and R.C. 6103.02 are determinative. R.C. 307.73 requires application by a private person to the board for permission to install water lines in unincorporated areas of the county. R.C. 6103.02 prohibits the construction of mains in unincorporated areas, except for the purpose of supplying water to municipal corporations, until the plans and specifications for the mains have been approved by the board. Consequently, no installation which is an extension of municipal lines, but which is not intended to supply water to the municipality, may be begun in an unincorporated portion of the county until an application is granted and plans and specifications for the project are approved. R.C. 6103.02 also clearly requires that the county sanitary engineer supervise the construction of a project for which plans and specifications have been approved by the board.¹ These conclusions are consistent with the opinions of two of my predecessors: 1964 Op. Att'y Gen. No. 978, p. 2-142, and 1960 Op. Att'y Gen. No. 1842, p. 673.²

Your third question is whether a board of county commissioners has any authority regarding the ratification of water rates charged by a municipality. The pertinent parts of R.C. 6103.02 read:

For the purpose of preserving and promoting the public health and welfare, and providing fire protection, any board of county commissioners may by resolution acquire, construct, maintain, and operate any public water supply or waterworks system within its county for any sewer district, and may provide for the protection thereof and prevent the pollution and unnecessary waste thereof. By contract with any municipal corporation, or any person, firm, or private corporation furnishing a public water supply within or without its county, the board may provide such supply of water to such district from the water-works of such municipal corporation, person, firm, or private corporation. . . .

The board shall fix reasonable rates to be charged for water supplied when the source of supply or distributing pipes are owned or

¹If the project is one to supply water to the municipality from which the lines are extended, neither prior approval by the board nor supervision by the sanitary engineer is required under R.C. 6103.02. You have not asked, and I do not consider, what powers a board of county commissioners has under R.C. 307.73 and 6103.02 over water lines which supply water to a municipality.

²This opinion limits 1960 Op. Att'y Gen. No. 1842, p. 673 on other grounds. See note 3 and accompanying text, infra.

operated by the county which shall be at least sufficient to pay for all the cost of operation and maintenance of improvements for which the resolution declaring the necessity thereof shall be passed after July 1, 1958. When the source of supply 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 shall be ratified by the board at the time any contract is entered into for the use of water from such municipal corporation, person, firm, or private corporation. (Emphasis added.)

The first paragraph of the above statute authorizes the county to provide water to a sewer district either by acquiring or constructing and operating a public water supply or by contracting for such a water supply. The second paragraph then provides that if the county has in fact acquired or constructed and operated the source of supply or the distribution system, the county shall fix reasonable rates to be charged for the water supply. If, on the other hand, the county has contracted for the water supply, the county must ratify the rates charged by the supplier at the time the contract is entered into.

Pursuant to the above-quoted provisions, the duty of the board to ratify water rates to be charged by a municipal corporation, person, firm, or private corporation arises "at the time any contract is entered into for the use of water from such municipal corporation, person, firm, or private corporation." The statute does not state expressly who the other party to the contract must be; however, it is evident from the remainder of the statute that this provision refers to the earlier language authorizing the county commissioners to enter into a contract for the supply of water to a sewer district. Hence, when read as a whole, R.C. 6103.02 requires a board of county commissioners to ratify water rates set by a municipality, or other entity, only when the board is contracting with the municipality, or other entity, for the supply of water to a sewer district; the board has no duty to ratify rates charged by a municipality when the municipality contracts to provide water to private parties within or without municipal limits. In accord with this conclusion is 1956 Op. Att'y Gen. No. 6202, p.62.³ In that opinion, however, the third paragraph of the syllabus implies that a county board has the power to ratify rates when the county is in no way involved in the contract for water supply. To the extent that that opinion is inconsistent with the conclusions reached herein, it is hereby limited. It might be noted that, although the county board has no control over the rates the municipality charges in the instant case, the Ohio Constitution prohibits a municipality from charging rates which constitute an impermissible tax. Ohio Const. art. XVIII, §13. See also *City of Franklin v. Harrison*, 171 Ohio St. 329 (1960). Thus, the rates may be challenged in a private suit by those affected by the charges.

Since your third question was answered in the negative, the points raised in your last question need not be addressed.

In conclusion, it is my opinion, and you are advised, that:

1. R.C. 6103.02 authorizes a board of county commissioners to make, publish, and enforce rules and regulations for the construction, maintenance, protection, and use of a public water supply by a private enterprise in an unincorporated area of a county, provided that such rules and regulations are consistent with other statutes and with the rules and regulations of the Ohio Environmental Protection Agency.

³My predecessor used the same analysis as above, in a different fact situation. In that case, the county owned the water lines and contracted with the municipality for water supply. The opinion concluded that R.C. 6103.02 gave the board authority to enter into the contract and to fix the rates under that contract.

2. Unless the purpose of construction is to supply a municipality with water, R.C. 6103.02 requires that a board of county commissioners approve plans and specifications of water lines prior to their construction in an unincorporated portion of a county by any person, firm, or corporation.
3. Any proposed construction of water lines by any person, firm, or corporation in an unincorporated portion of a county must be done under the supervision of the county sanitary engineer, unless the purpose of the project is to supply water to a municipality.
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