706

FEES, COLLECTIONS OF—WATER AND SEWAGE SYSTEMS —MUNICIPAL CORPORATION MAY ACT AS AGENT OF COUNTY IN COLLECTION OF FEES DUE COUNTY—OHIO CONSTITUTION, ART. XVIII, SEC. 4 & 6.

SYLLABUS:

(1) Under the provisions of Sections 4 and 6, Article XVIII, Ohio Constitution, a municipal corporation for the purpose of furnishing of water may enter into an agreement with a county whereby the municipality may act as agent of the county in the collection of fees due the county from county residents.

(2) Under the provisions of Sections 4 and 6, Articlue XVIII, Ohio Constitution, a municipal corporation can collect from county consumers both for water and sewer services, where the municipal corporation supplies only water and the sewerage system is owned by the county and the sewer rentals are based on the amount of water consumed.

Columbus, Ohio, July 21, 1959

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

Dear Sir:

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

"A recent examination of the Village of Bridgeport, Belmont County, by a state examiner, disclosed facts which raise a question as to legality of certain procedures now being followed. I shall outline the pertinent facts for your consideration.

"The village owns and operates a municipal waterworks and water distribution system. The County Commissioners have duly established a sewer district located outside the municipal corporation known as the Belmont County Sewer District No. 1. Pursuant to appropriate authorization by the village council, the village Board of Public Affairs has entered into an agreement with the Board of County Commissioners under which water is supplied by the village to residents of the sewer district in consideration of periodic payments which are made by the county to the village. Under the terms of this agreement, personnel employed by the village in its Waterworks Department regularly perform the following functions with respect to county consumers:

"A. Read all water meters.
"B. Prepare and mail billings.
"C. Collect water rents.
"D. Maintain a separate consumer cash book.
"E. Maintain separate consumer accounts and prepare periodic recaps.
"F. Deposit collections to the credit of the Belmont County Treasurer.

"During the period from July 1, 1957, to March 31, 1959, collections by the village from county consumers which were paid to the county treasurer totaled $86,195.60. Payments made by the county to the village for water used by county consumers are made at a rate based upon the actual cost, incurred by the village in rendering such service to the county consumers, plus 20%.

"Section 6103.02, of the Revised Code, provides for the establishment of county water supply systems and reads, in part, as follows:

"'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 water-works system within its county for any sewer district, * * *. By contract with any municipal corporation * * * the board may provide such supply of water to such district from the water-works of such municipal corporation * * *. The board may make, publish, and enforce rules and regulations for the * * * use of public water supplies in the county outside of municipal corporations * * *.

" 'The Board shall fix reasonable rates to be charged for water when the source of supply or distributing pipes are owned by the county or district * * *. When the source of supply is owned by a municipal corporation * * * the schedule of rates *to be charged by such municipal corporation* * * * shall be ratified by the board at the time any contract is entered for the use of water from such municipal corporation * * *.'

"The language emphasized above in this question appears to imply that an agreement such as that in the instant case may provide for collection from county consumers by a municipal supplier which owns the source of supply. Attorney General's Opinion No. 4705, rendered in 1932, interprets a portion of the quoted language of this section in the first paragraph of the syllabus of that Opinion as follows:

" '1. A board of county commissioners may lawfully appoint an agent for the collection of water rents due to the county, which grow out of the supplying or furnishing of water from a county water supply or county waterworks system.'

"Under this Opinion it appears that the county commissioners have authority to establish an agency, outside the county government, for the collection of water rents which are due the county.

"The concurring opinion in *Hagerman v. Dayton,* 147 O.S. 313, contains language at pages 337 to 339 which indicates that any exercise of power by a municipal corporation must serve to promote some beneficial interest of the residents of the municipal corporation in order to be legal.

"In view of the facts and legal background outlined above, I present for your consideration the following questions:

"1. Does a municipal corporation have the authority to enter an agreement with a county whereby the municipality may act as agent of the county in the collection of fees due the county from county residents?

"2. Would your answer to the first question be the same if the municipality were supplying only water to county

consumers and collecting from them for both water and sewer services, where the sewage system is owned by the county and sewer rentals are based on the amount of water con sumed?

"I believe your answer to these questions are of statewide interest both to county and municipal officials. Your formal opinion is respectfully requested."

The authority of a municipal corporation to acquire, use and operate a public utility such as a water supply either within or without its corporate limits is complete and direct and is derived from the Ohio Constitution, free of limitation. This conclusion is borne out by reference to Sections 4 and 6, Article XVIII, Ohio Constitution, and to the cases decided thereunder by the Supreme Court of Ohio.

The pertinent text of the Constitution reads as follows:

Section 4.

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utilty the products 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 services. 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."

Section 6.

"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."

The Supreme Court of Ohio in the case of *Pfau v. Cincinnati,* 142 Ohio St., 101, clearly set out this municipal power. The first and second paragraphs of the syllabus read as follows:

"1. Under the provisions of Section 4, Article XVIII, of the Constitution of Ohio 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.

"2. These provisions are self-executing, and the powers therein enumerated are not subject to restriction by the General Assembly."

Later in 1948 the court reiterated its stand in reference to this power in the case of *State, ex rel, Indian Hill Acres v. Kellogg et al.,* 149 Ohio St., 461, and because this case went into some detail as to the power to contract in this respect we repeat the entire syllabus reading as follows:

"1. Municipal corporations are authorized by Sections 4 and 6 of Article XVIII of the state Constitution to 'acquire, construct, own, lease and operate * * * any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants' and to 'sell and deliver to others * * * the surplus product of any * * * utility.'

"2. In the sale and delivery of the surplus product of a municipally owned public utility to others, the council of the municipality has full power to determine the policy to be followed in regard thereto, restricted only by pertinent constitutional and statutory limitations.

"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 untility 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 municipality and its inhabitants.

"4. An ordinance of a municipality, effective at the expiration of a contract between the municipality and the commissioners of a county, under which contract the municipality sold and delivered surplus water to residents in sanitary sewer districts outside the municipality, which ordinance recites that due to increasing demands of present consumers of water within the municipality and the probable increase in area and population of the municipality in the future, certain improvements to the existing waterworks system may become necessary and which ordinance authorizes the city manager, for a period of five years from the date of the expiration of the previous contract with the commissioners and in accordance with the terms of such previous contract, to continue to supply such surplus water as the city may have, provided, however, 'that water shall not be furnished to any extension of existing mains outside the city,' the declared purpose

of the council for the enactment thereof being to afford the council time to determine what the demands upon the city waterworks system will be in the future and to give areas outside the city limits opportunity to otherwise secure their future water supply, is a valid exercise of the power conferred upon the municipality by the provisions of Sections 4 and 6 of Article XVIII of the Ohio Constitution.

"5. Such ordinance is not rendered invalid as discriminatory by reason of the provisions thereof that council may authorize the sale of surplus water and the delivery thereof to extensions of existing mains which are outside the city, if the denial thereof would result in great hardship or if denial might result in serious economic or social disadvantage to such community, or authorize the sale thereof to owners of land who sign petitions or other documents indicating their intention to seek annexation of their land to the municipality."

In 1957 the court in the case of *Swank v. Village of Shiloh,* 166 Ohio St., 415, had this question before it. The first paragraph of the syllabus of this case reads as follows:

"1. The power to acquire, construct, own or lease and to operate a utility, the product of which is to be supplied to a municipality or its inhabitants, is derived from Section 4, Article XVIII of the Constitution, and the General Assembly is without authority to impose restrictions or limitations upon that power."

Note that in this case, as in the *Pfau* case, the court approved and followed *District of Columbus v. City of Columbus,* 118 Ohio St., 295.

In February 1958 the court in the case of *State, ex rel. McCann v. City of Defiance,* 167 Ohio St., 313, repeated those powers in the first paragraph of the syllabus as follows:

"1. The General Assembly has no power to enact any statute for the purpose of limiting or restricting by regulation or otherwise the power and authority of a municipality, that owns and operates a public utility for the purpose of supplying the product thereof to such municipality or its inhabitants, to sell and deliver to others the portion of the surplus product of such utility that it is authorized by Sections 4 and 6 of Article XVIII of the Constitution to sell and deliver to such others."

The legislature has enacted several statutes spelling out these powers and reference should be made to Section 735.29, Revised Code, reading as follows:

"The board of trustees of public affairs appointed under section 735.28 of the Revised Code shall manage, conduct, and con-

trol the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity, or gas, *collect all water,* electric, and gas *rents,* and appoint necessary officers, employees, and agents.

* * * * * * * * *"

"The board shall have the same powers and perform the same duties as are provided in *sections 743.01,* 743.05 to 743.07, inclusive, 743.10, 743.11, 743.18, 743.24, and 735.05 to 735.09, inclusive, of the Revised Code, *and all powers and duties relating to water works* in any of such sections shall extend to and include electric light, power, and gas plants, and such other similar public utilities, and such board shall have such other duties as are prescribed by law or ordinance not inconsistent herewith." (Empasis added).

Section 743.03, Revised Code, applying to a director of public service, 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." (Emphasis added).

The foregoing clearly indicates that a municipal corporation may sell its surplus water and can operate its water utility either within or without its corporate limits without restriction, and may collect the rents therefrom.

The medium of contract is used by the municipalities to set the working arrangements of such sale of surplus water to others outside their municipal boundaries. It is generally accepted law that municipalities have the implied power to do all things necessary to carry out an express authority.

Volume 28 Ohio Jurisprudence, Section 58, on municipal corporations reads as follows:

"As hereinbefore noted, municipal corporations possess, by implication, only such powers as are necessary to carry into effect powers which have been expressly granted. Conversely, or to state the rule affirmatively, when certain powers have been specifically conferred upon a municipal corporation, the corporation also possesses, by implication, such incidental powers as are necessary to carry into effect those expressly granted. The application of the doctrine of implied powers in particular instances, or with respect to particular matters, is noted in connection with the treatment of such matters in other portions of the article."

This principle is stated by the Supreme Court of Ohio in *Bank of Chillicothe v. Chillicothe,* 7 Ohio, 2nd part of 31, the headnote reading as follows:

> "Where a town corporation is invested with the powers usually conferred upon such bodies, a contract borrowing money for the use of the town is obligatory and binds the corporation for repayment, although no express power to borrow money be given in the law of incorporation."

In the instant problem there is an express grant from the Constitution. Therefore it follows that the municipalities have the implied power to enter into contracts to carry out the sale of their surplus water and in the absence of palpable abuse or fraud the courts will not void said contracts. If such a contract results in the municipality acting as an agent for the county it is not invalid in the absence of some clear abuse or contradiction to the general laws in reference to municipal contracts.

Your reference to the concurring opinion in *Hagerman v. Dayton,* 147 Ohio St., 313, I feel does not have a direct bearing on the question proposed. I do not dispute its language but only its application in the instant problem. The court in the case of *Joslyn v. Akron,* 77 Ohio Law Abs., 370 at page 373, defines the sale of surplus water in the following language:

> "* * * I believe the plaintiffs have lost track of the fact this is not a sale of water to the Chrysler Company primarily, but it is a means that the *City has found to dispose of their surplusage* and therefore such *a transaction is for the public welfare and public use.*" (Emphasis added).

It is my opinion, therefore, that a municipal corporation has the authority to enter an agreement with a county whereby the municipality may act as agent of the county in the collection of fees due the county from county residents for water supply.

This brings us to your second question. As noted above, the extent of the authority of a municipality as to the sale of its surplus water and the operation of its water utility both within and without its corporate boundaries is unlimited, and I am of the opinion that the use of a county sewer system in the plan or arrangement of such sale of water is proper and that the collection of the water fees is authorized. The sewer rental, being based on the amount of water used is therefore an integral part of such water sale, is merely incidental to same, and is in my opinion neces-

sary to the successful conclusion of such sale. Thus, it must logically follow that your second question be answered in the affirmative.

The court, in the case of *Travelers Insurance Co. v. Village of Wadsworth,* 109 Ohio St., 440, held that a city in the sale of its surplus water operated a proprietary function and possessed the powers of a private individual i nthat respect. The syllabus of that case reads as follows:

> "1. The board of trustees of public affairs of a village, which under authority granted by the Constitution and general law operates an electric light and power plant and lines, has power within Sections 4361 and 3961, General Code, to contract for an insurance policy of indemnity against liability for the operation of the said property.
>
> "2. The power to establish, maintain, and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may exercise its power as would an individual or private corporation."

This theory was followed in the case of *State, ex rel. White v. City of Cleveland et al.,* 125 Ohio St., 230, the syllabus of which case reads in part follows:

> "1. A municipality, in so far as it acts in a proprietary capacity, possesses the same rights and powers and is subject to the same restrictions and regulations as other like proprietors."

The case of *Butler v. Karb,* 96 Ohio St., 472, first paragraph of the syllabus in part reads as follows:

> "1. Municipalities of the state are authorized to establish, maintain and operate lighting, power and heating plants and furnish the municipality and the inhabitants thereof light, power and heat. The powers thus conferred are proprietary in their character and in the management and operation of such plant municipal officials are permitted wide discretion. * * *"

Further in the *Butler v. Karb* case, page 483:

> "We think it must be conceded that the city, acting in a proprietary capacity, may exercise its powers as would an individual or private corporation. * * *"

The foregoing case of *Butler v. Karb* was cited with approval in *Zangerle v. Cleveland,* 145 Ohio St., 347.

The Supreme Court in the case of *State, ex rel. McCann v. Defiance* distinguished *Travelers Insurance Co. v. Village of Wadsworth, supra,* in the respect that while the proprietary status of a municipality in the sale of its surplus water was not denied it was held that the cloak of proprietory function did not make such municipalities subject to restriction in selling surplus water.

Therefore, sound reasoning dictates that municipalities are clad with direct Constitutional power, implied powers as are necessary to carry out the power expressed, and the powers incidental to their proprietary functions; and thus so endowed, enjoy very broad powers in the disposition of surplus water.

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

(1) Under the provisions of Sections 4 and 6, Article XVIII, Ohio Constitution, a municipal corporation for the purpose of furnishing of water may enter into an agreement with a county whereby the municipality may act as agent of the county in the collection of fees due the county from county residents.

(2) Under the provisions of Section 4 and 6, Article XVIII, Ohio Constitution, a municipal corporation can collect from county consumers both for water and sewer services, where the municipal corporation supplies only water and the sewerage system is owned by the county and the sewer rentals are based on the amount of water consumed.

Respectfully,
MARK MCELROY
Attorney General