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1. SEWER DISTRICT—ESTABLISHED BY COUNTY—PORTION OF DISTRICT NOT SUPPLIED BY WATER SUPPLY—COUNTY MAY PURCHASE WATER LINES LAID BY PRIVATE CORPORATION OR INDIVIDUAL—BONDS OR CERTIFICATES OF INDEBTEDNESS MAY BE ISSUED TO PURCHASE AND MAINTAIN LINES—SECTION 6103.20 RC.
2. COUNTY COMMISSIONERS—WATER SUPPLIED TO TERRITORY WITHIN SEWER DISTRICT, NOT WITHIN ALLOTMENT—COST MAY BE ASSESSED ON BENEFITED PROPERTY IN DISTRICT IN SAME MANNER AS CONSTRUCTION OF ORIGINAL WATER SUPPLY LINE—SECTION 6103.02 ET SEQ., RC.

SYLLABUS:

1. Under the provisions of Section 6103.20, of the Revised Code, a county having established a sewer district may for the purpose of providing a water supply to a portion of that district not otherwise supplied, purchase water lines which have been laid by a private corporation or individual, and may for the purpose of paying the cost of purchasing and maintaining such lines, issue bonds or certificates of indebtedness.

2. Where the commissioners of a county, for the purpose of supplying water to a territory within a sewer district but not within the allotment, subdivision, development or other enterprise for which such line was constructed, have pursuant to the provisions of Section 6103.20, Revised Code, purchased a water supply line, constructed by a corporation or individual at its own expense, said commissioners may assess the cost of the lines so purchased, on the benefited property in such district, in the same manner as is provided in Section 6103.02 et seq., of the Revised Code, relative to the construction of an original water supply line.

Columbus, Ohio, April 29, 1954

Hon. Mathias H. Heck, Prosecuting Attorney
Montgomery County, Dayton, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

“Your opinion is respectfully requested concerning the question of the county acquiring a privately constructed water line in the county, issuing bonds therefor, and assessing the costs of

abutting property owners, particularly in the light of Section 6103.20, Revised Code, formerly Section 6602-32, General Code, and Sections 6103.01 and 6103.02, Revised Code, as derived from Section 6602-17, General Code.

“Section 6103.20 of the Revised Code, among other things, empowers the county commissioners to acquire water lines built by outsiders whenever ‘it is deemed expedient to acquire said water line for the purpose of supplying water to territory outside the area for which such line was constructed, and whenever such additional territory is within a district.’

“The above section is not exactly on point for the reason that it is the intention of the county to acquire the line not as a means of serving further outlying areas but primarily for the purpose of taking title to existing facilities. The above quoted section further goes on to place a limit on the purchase price which may be paid by the county in acquiring such a line. Sections 6103.01 and 6103.02 of the Revised Code authorize construction of ‘public water supplies’ by individuals, when ‘the plans and specifications for the same have been approved by the Board.’ The first sentence of Section 6103.02, Revised Code, provides for the acquisition of ‘any public water supply’ which is defined in Section 6103.01, Revised Code, to include ‘distributing mains,’ upon resolution of the board. Section 6103.05 sets forth the procedure for assessing the cost of an improvement against specially benefited owners. There is no reference in any of these sections to improvements to be acquired as contrasted with those to be constructed.

“Throughout, they contemplate the construction of new works. This statutory scheme is consistent with the pattern of assessment proceedings for municipalities (Sections 727.01 et seq. R. C., Section 3812 et seq. G. C.) wherein there is completely lacking any authority for assessment of the cost of purchased public improvements against property owners.

“This situation is complicated by the case of *Frisbie Company vs. City of East Cleveland*, 98 O.S., 266, wherein a subdivider was denied recovery on a contract with the municipality, which contract provided for the construction of water mains by plaintiff and the municipality’s promise to buy the mains at the plaintiff’s costs. The contract was held invalid as not having complied with statutory requirements, including the requirements that contracts be let on competitive bidding. See also 38 Ohio Law Abstract, 176.

“In view of the above, the question which we present is, may Montgomery County acquire by purchase, a privately constructed water line in the county and, thereupon, issue bonds and assess the cost on abutting property owners?”

Chapter 6103 Revised Code, comprising Sections 6103.01 to 6103.99, inclusive, Revised Code, deals with county water supply systems. Section 6103.01 defines "public water supply" as follows:

"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."

Section 6103.02 sets forth the general powers of the county commissioners. It provides in part:

"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 * * *"

(Emphasis added.)

This section also authorizes the commissioners to procure such water supply by contract with a municipality or private corporation. It further authorizes the commissioners to fix rates for supplying water. The sections which follow set out the procedure whereby the cost or a designated portion thereof shall be assessed upon the benefited properties in the portion of the district which is to be served.

Section 6103.07 authorizes the issuance of bonds to pay the cost of installing such public water supply system.

Section 6103.20 appears to bear directly upon the questions which you present. I quote from that section:

"Whenever a water supply line has been constructed by a corporation, individual, or public institution at its own expense for the purpose of supplying water to any institution, and it is deemed expedient by the board to acquire said water supply line or any part thereof for the purpose of supplying water to territory *outside the allotment*, subdivision, development, or other such enterprise *for which such line was constructed*, and such additional territory *is within a district*, the county sanitary engineer shall examine it and if he finds the same properly designed and constructed, he shall make an appraisal of its present value to the district as a means of supplying water to territory *outside the allotment, subdivision, development, or similar enterprise for*

which it was originally constructed and shall certify such value to the board. In such appraisal no allowance shall be made for the value of such water supply line to the territory for the service of which it was originally constructed.

“The board, by resolution, may determine to purchase said water supply line at a cost not to exceed its present value as certified by the sanitary engineer. For the purpose of paying for the water supply line and the maintenance thereof, the board may issue bonds or certificates of indebtedness and assess the cost against the benefited property in the same manner as provided by law for the construction of an original water supply line.”

(Emphasis added.)

Here, it will be observed, is express authority for the purchase of a water supply line which has been constructed by private parties or any public institution, when it is “deemed expedient by the board to acquire said water line or any part thereof for the purpose of supplying water to territory outside the allotment, subdivision, development or other such enterprise for which such line was constructed.”

The last paragraph of the above quoted section provides that for the purpose of paying for the water supply line so purchased, and the maintenance thereof, the board may issue bonds or certificates of indebtedness. In the same sentence, the board of county commissioners is authorized to “assess the cost against the benefited property in the same manner as provided by law for the construction of an original water supply line.” It appears to me that the authority thus conferred is very clear and explicit.

What has been said above, indicates the procedure which in my opinion is contemplated by the statutes for such a territory as is described in your letter, and appears to me to furnish a direct answer to the question embodied in the final paragraph of your communication, to wit, “May Montgomery County acquire by purchase, a privately constructed water line in the county and thereupon issue bonds and assess the cost on abutting property owners?” However, in a supplemental letter you have indicated that it is desired to follow a plan differing somewhat from the procedure outlined in the statutes above referred to. As stated in the letter from your sanitary engineer, the proposed plan is as follows:

“Taking a hypothetical case of a block four hundred and eighty (480') long with six abutting properties on either side of the street with only five houses built in the block, if these five home owners built the water line at their expense, and it cost four dollars (\$4.00) per foot to build the line, each one will pay ap-

proximately three hundred and eighty-four dollars (\$384.00) each. The proportionate share if everyone was tapped into the line would be one hundred and sixty dollars (\$160.00) each. As each new home owner taps into the line, he becomes an equal shareholder in the line, thus, the next owner would carry a 1/6 interest in the line, the following 1/7th and on up until each one would pay 1/12th of the construction cost.

“It is proposed that when the block is built up sufficiently, and everyone is desirous of the water, but some are unable to pay cash for their share, that the county purchase the line at a fair appraisal price, reimburse the owners who installed the line, and then assess everyone their proportionate share of the cost. In this way the owner who cannot afford to pay his proportionate share of the cost in cash will have the benefit of having the cost certified to the Auditor for collection over a period of years on his tax duplicate.”

It appears to me that the plan suggested by the first paragraph above quoted would be quite reasonable and practicable if carried out between private parties. The property owners who have built this line could, of course, make any contract they please with other persons who might desire to tap into it, and if they were willing to grant permission to tap when a property owner decides to build and use the water, and allow him to pay the agreed price in installments running over a number of years, there could be no objection to that plan, but I find no authority in the law for the county to enter into such an arrangement.

However, as I understand your proposal as embodied in the second paragraph quoted you would have the county issue bonds and buy this entire line outright, refunding to the builders of the same the amount of their original cost, and then reassess them along with other property owners who may be benefited by the water line.

The plan there proposed appears to me to be in accord with the procedure outlined in Section 6103.20, supra, except in so far as it is proposed to “reimburse the owners who installed the line, and then assess everyone their proportionate share of the cost.” It will be noted that the statute, in authorizing the purchase of a line which has been constructed by private parties, only authorizes such purchase for the purpose of “supplying water to territory outside of the allotment, subdivision, development or similar enterprise for which it was originally constructed.” It is further provided that the appraisal upon the basis of which the board may

determine to purchase said water supply line is not to include any allowance "for the value of such water supply to the territory for the service for which it was originally constructed." Accordingly, it seems clear that the board would have no authority to reimburse the original builders of this line for their entire investment and then assess their share of the cost back upon them.

I also gather from a reading of both your communications, that what you really want to do is to acquire the line, and if and when a property owner having a lot abutting thereon concludes to build, and applies for a water connection, then, and then only he should be *assessed*, and such "assessment" would be spread over a period of ten years, and certified to the county auditor. This in my opinion, would not be such an assessment as is contemplated by the law. Where property is assessed by a county or by a municipal corporation for a permanent improvement which will benefit the property, the matter of present use is not taken into consideration, and the levying of an assessment is not to be postponed until such time as the property owner concludes to improve his property by building. In the case of *Ford v. Toledo*, 64 Ohio St., 92, it was held :

"Where the lot or land is in need of local drainage, it is not exempt because it is entirely unimproved, and there is no immediate need for such drainage. Vacant lots and lands may, and usually do receive a present special appreciable benefit from the construction of a sewer in proximity with, and accessible by them for sewerage purposes, sufficient to sustain an assessment made on the basis of benefits."

That holding was cited with approval in *Cincinnati v. Polster*, 96 Ohio St., 161, and *Ross v. Coal Company*, 117 Ohio St., 605.

An assessment such as you appear to have in mind would not be in fact an assessment but would be simply a tapping charge, payable by individual contract over an extended period of years.

Irrespective of the right of a county to make such a charge payable in that manner, I am clear that there is no authority in the law for financing an improvement to be used and paid for in that manner by the issuance of bonds.

If it is the actual intention of your county to assess the cost outright to these property owners whose property will be benefited, and who may in the future be users of the water then it appears that Section 5103.20, *supra*, covers the complete procedure.

Your letter refers to the case of *Frisbie v. City of East Cleveland*, 98 Ohio St., 266, as having a bearing on the problem which you have submitted. On examination of that case, I find that it arose over the attempt of the plaintiff company to recover from the city a sum which it claimed by virtue of certain contracts entered into by the company with the board of waterworks trustees of the then village of East Cleveland, and that the company failed in its attempt to collect on said contracts for the sole reason that the contracts had been entered into without compliance with the law requiring advertisement by the village for bids. I cannot see that this case could have any bearing on the problem which you submit.

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Respectfully,

C. WILLIAM O'NEILL

Attorney General