

CITIES, FOURTH CLASS: May charge reasonable fee for use of sewers.

October 14, 1943

10-19



Dr. James Stewart
State Health Commissioner
State Office Building
Jefferson City, Missouri

Dear Dr. Stewart:

Under date of August 23, 1943, you wrote this office requesting an opinion as follows:

"There are many cities in this State having a population of less than one thousand that have been hampered in the proper operation and maintenance of their sewage treatment works by a lack of adequate funds. This is largely the result of a constitutional limitation on taxes for general purposes of twenty-five cents on the one hundred dollar valuation for cities of less than one thousand population as compared with fifty cents for cities of from one to ten thousand.

"In view of this difficulty and the desire for many cities to collect a 'sewer rental' or service charge to defray the cost of operating and maintaining their sewerage system and sewage treatment plant we should like to direct your attention to Chapter 38, Article 2, Section 6602, and Article 13, Section 7429, Revised Statutes of Missouri, 1939, and would appreciate your opinion as to the following points:

"1. Under the above or any other statutes would it be legal for a city of the first, second, third, or fourth class to collect a service charge from all residents connected

to and using the city sewers and/or sewage disposal plant for such service? Would any monies thus collected be paid into the general revenue fund or handled separately? Could an existing Board of Public Works handle such funds in a manner similar to the revenue from other utilities? Could a Board of Public Works be established under any existing statute for the purpose of managing and operating a sewerage system and/or sewage disposal plant or an incinerator?

"2. Could a portion of any funds collected as a service charge as indicated above, be set aside in a sinking fund for the repair or replacement of such works? Could such funds be used toward the retirement of general revenue bonds, or applied toward the annual payment for the purchase of sewage disposal plants, sewer systems or garbage incinerators?

"3. Could equipment or additional units for an existing sewage disposal plant be legally financed under the above statutes without the necessity of passing a bond issue? "

Later and after conference with Mr. Kerr of your office, under date of October 6th, it was requested that the opinion be limited to a discussion of the question with reference to cities of the fourth class.

In considering your questions, there are certain fundamental rules of law which must be borne in mind. Foremost of these is, that cities have none of the elements of sovereignty and cannot go beyond the powers granted them, and they must exercise the granted powers in a reasonable manner. City of St. Louis v. Weber, 44 Mo. 547, 1. c. 550.

Another of these fundamental rules is that cities have only such powers as are expressly granted to them, those powers which are necessarily implied as incident to the carrying out of the powers expressly granted, and those powers which are necessary to the carrying out of the objects and purposes of the

corporation. City of Neosho ex rel. v. Kelly, 52 S. W. (2d) 65; Ex parte Williams, 139 S. W. (2d) 485.

With these rules in mind we must consider the statutes which confer upon cities of the fourth class the power to construct sewerage systems and to establish boards of public works.

Section 7181, Article 9, Chapter 38, R. S. Mo. 1939, authorizes the construction of public sewer systems. Said section provides as follows:

"The board of aldermen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to wit: Public, district and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed, or entirely new throughout, as may be deemed expedient. The board of aldermen may levy a tax on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work, which tax shall be called 'special public sewer tax,' and shall be such amount as may be required for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer."

Section 7182 of the same article and chapter, treats of district sewers, the construction of them and the manner of paying for them.

Section 7183 of the same article and chapter provides for the construction of private sewers at private expense.

In addition to these sections there is also Section 7429, Article 13, Chapter 38, referred to in your letter, which section provides as follows:

"In addition to all powers now possessed by cities of the second, third and fourth classes in this state for the protection of the public health, each city of the second, third, or fourth class of this state is hereby authorized and empowered to provide for the gathering, handling and disposition, either by itself, or by contract with others, for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities, and to pay for the same out of general revenues or by collection of charges for such service, and to do such other and further acts as may be deemed expedient for the protection and preservation of the public health, as such public health may be affected by the accumulation of trash, cinders, garbage, refuse matter and municipal waste; to acquire by purchase, construction, lease, gift or otherwise, within or without the corporate limits of such cities an incinerator or incinerators for the destruction of such garbage, trash, cinders, refuse matter and municipal waste; to acquire by any of such means all equipment necessary or expedient for use in the collection, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste; to acquire by any of such means a purification plant or plants or sewage disposal plant for the purification of all sewage accumulating in such cities. Such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, may be acquired by such cities with funds derived from the issue and sale of bonds in the manner provided by law for the issue and sale of bonds for other public purposes; or such may enter into contract for the construction or purchase of such incinerator or incinerators, equipment or purification plant or plants or sewage disposal plant to be paid for out of the general revenues of such cities in annual installments: Provided, however,

that the period of payment for any such incinerator or incinerators, equipment, purification plant or plants or sewage disposal plant, or any contract for the construction, purchase or lease thereof out of the general revenues of such cities shall not extend over a longer period of time than ten (10) years." (Underscoring ours.)

This section applies to cities of the second, third and fourth classes alike.

While Section 7429 does not treat solely with sewers and sewerage, it has provisions relating to these matters and these provisions must be considered along with other sections of the statute treating with the construction and maintenance of sewers, as all statutes must be considered together and meaning given to all of them and to each word of them.

In statutory construction the cardinal rule is to determine the legislative intent which caused the enactment of the law.

The foregoing are the statutes pertaining to sewers in cities of the fourth class.

Cities of the fourth class are authorized to establish boards of public works by Section 7796, Article 31, Chapter 38, R. S. Mo. 1939, and the powers and duties of such boards when they are established are set out in Sections 7799 and 7800 of the same article and chapter, which sections provide as follows:

(Sec. 7799)

"Whenever any such city mentioned in section 7796 shall have by ordinance established a board of public works, as herein provided, such board so established in such city, town or village shall, during the existence of such board, have the power, and it shall be its duty, to take charge of and exercise control over any water-works, gas works, electric light and power plant, steam heating plant or any other device or plant for furnishing

light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system or any other public utility whatever which may be owned by such city, town or village at the time such board is so established, or which may be thereafter established or acquired by such city, town or village, by purchase or otherwise, and all appurtenances thereto belonging, and shall enforce the performance of all contracts and work, and have charge and custody of all books, property and assets belonging or appertaining to such plant or plants."

(Sec. 7800)

"Said board shall also exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said board shall make all necessary regulations for the government of the department not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof."

In the foregoing sections of the statutes the only express grant of power which would seem to authorize the charging for the use of sewers or sewerage disposal plants, is the underscored portion of Section 7429, supra. In considering this language to determine the intention of the Legislature, attention is directed to the following clause of Section 655, R. S. Mo., 1939:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a

peculiar and appropriate meaning in law shall be understood according to their technical import; * * *"

There are no technical words or phrases having a peculiar meaning in the underscored clauses. The first one is,

"and to pay for the same out of general revenues or by collection of charges for such service,"

The second one is,

"to acquire by any of such means a purification plant or plants or sewage disposal plant for the purification of all sewage accumulating in such cities."

These two clauses are contained in the same sentence. The first clause follows immediately after the words which authorize cities to provide for the handling and disposition of garbage, trash, cinders, refuse matter and municipal waste, and unquestionably relates to the matter of paying for those services. Upon a casual reading of the first part of this statute, it might appear that the words "refuse matter and municipal waste," would include sewage and that this would answer your first question as its terms are very broad and might be construed to include sewage and the disposal of sewage. However, inasmuch as later in the same sentence is found a clause relating to the disposition of sewage, it must not have been the intention of the Legislature that sewage should be included in the terms "refuse matter and municipal waste."

At this point it is considered advisable to call to your attention some definitions of the words "sewage" and "waste." In Vol. 39 of Words & Phrases (Per. Ed.) pp. 76, 77, we find the following definitions:

"'Sewage' is the general drainage of a city or town by means of sewers. City of Valparaiso v. Parker, 47 N. E. 330, 331, 148 Ind. 379.

* * * * *

"The word 'sewage,' in its secondary sense of usual character of contents of

sewer, signifies the refuse and foul matter, solid or liquid, carried off by sewer. Borough of Wilkinsburg v. School Dist. of Borough of Wilkinsburg, 148 A. 77, 80, 298 Pa. 193.

* * * * *

"'Sewage system' is for drainage of foul waters of community, and term 'sewerage' is often used to indicate anything pertaining to sewers. Pioneer Real Estate Co. v. City of Portland, 247 P. 319, 321, 119 Or. 1.

* * * * *

"Garbage, bones, parts of dead animals and other solid matter are not 'sewage' so as to authorize meat packing companies to turn such matters into channel of sanitary district of Chicago, but other trade wastes which are liquid or which may be diluted and oxidized by waters flowing in channel are properly designated as 'sewage' which may be turned into channel. Act of 1889, Secs. 7, 20, Smith-Hurd Stats. c. 42, Secs. 326, 341. Sanitary Dist. of Chicago v. Chicago Meat Packing Co., 241 Ill. App. 288."

And in Vol. 44 of Words & Phrases (Per. Ed.) p. 713, are found definitions as follows:

"'Refuse' is worthless matter, rubbish, scum, leavings, and the 'waste' of municipalities usually includes all wastes except garbage and ashes. Stern Holding Co. v. O'Connor, 196 A. 432, 119 N. J. L. 291.

"Standard lexicographers use 'refuse' as synonymous with 'waste.' Thus, Worcester: 'Refuse; (a) Left as worthless when the rest is taken; worthless; waste.' And one of the meanings given by him of 'waste' is 'refuse.' State v. Howard, 72 Me. 459, 465."

Under these definitions and because of the fact that the section makes separate and specific mention of sewage disposal, it is felt that the words "refuse matter and municipal waste" could not possibly be construed to include sewage. The clause of the sentence relating to purification plants or sewage disposal plants, contains the words, "to acquire by any of such means * * *," the only means previously mentioned in the sentence are, "out of general revenues or by collection of charges."

This would provide express authority for a charge for the use of sewage disposal plants, the disposal plants would only be used by the discharge of the contents of the sewage into them, which would make the charge in effect a charge for the use of the sewers. But it would not authorize a charge for the use of the sewers except for the purpose of acquiring and maintaining disposal plants.

This brings us to a consideration of Section 7181, R. S. No. 1939. The language of the statute is,

"* * * Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, * * *"

This language expressly authorizes the construction of sewers and the city, of course, under this express authorization, would have the implied power to maintain them and to make reasonable regulations regarding the use of its sewers.

In the case of Hill v. St. Louis, 159 Mo. 159, a case involving a fee fixed by ordinance for connection with the district sewer, where the property owner had not paid the special tax bill for the construction of a sewer, the Supreme Court held the fee could be collected. In this instance the city had been given express authority to regulate the use of sewers.

As a city of the fourth class has the implied power to maintain its sewers and to regulate the use of them, it would have the power to do the things necessary to maintain them and control the use of them. Under this power the city might then have power to fix a reasonable charge for the use of sewers.

Opposed to this view, it might be urged the charging of a fee for the use of something which had been constructed with

Oct. 14, 1943

money raised by taxation, would be in the nature of double taxation. But the charge would not be for the construction but would be for an entirely different purpose - for the use of the sewers.

In regard to the disposition of any moneys that might be realized by a charge for the use of sewers, there is no statutory provision which would require such moneys to be segregated and used only for the purpose of maintaining the sewer system. Fees of this nature would be similar to fees received for electricity and water in towns operating municipal water or light plants and paid into the general revenue fund. The city might, of course, enact an ordinance segregating any such fees collected, to be used in maintaining the sewers. But if such an ordinance was enacted it could be repealed at any time and throw the funds into the general revenue fund.

A board of public works could have only such powers as might be given to it by the ordinance creating it and in accordance with Sections 7799 and 7800, R. S. Mo. 1939, heretofore set out, which sections authorize the creation of such boards and define the limits of the power which may be given to them.

In the foregoing no attempt has been made to treat fully and in detail the matters discussed, as it is thought that a treatment of matters of this kind in detail properly belongs to the cities, and this department has no desire to infringe upon the powers and duties of the legal departments of the various cities. Should the foregoing general discussion of this matter be inadequate, this office will be glad to go fully into the details of any problem which may confront your office.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

WOJ:EG