SEWERS:
FEDERAL GRANTS:
WATER POLLUTION:
CLEAN WATER COMMISSION:
CITIES, TOWNS AND VILLAGES:

The City of Farmington may impose user charges pursuant to Section 204.026 (18), RSMo Supp. 1973, to cover costs of operation and/or future expansion of a public sewer treatment facility constructed pursuant to a grant of federal funds under 33 U.S.C., Sections 1281-1292, without the necessity of an election as provided in Section 71.715, RSMo 1969.

OPINION NO. 92

March 24, 1975

FILED
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Honorable Ron Bockenkamp
Representative, 128th District
State Capitol Building, Room 236-A
Jefferson City, Missouri 65101

Dear Representative Bockenkamp:

This official opinion is issued in response to your request for a ruling on the following question:

> "May the City of Farmington impose user charges to cover costs of operation and/or future expansion of a public sewer treatment facility without the necessity of an election?"

Your question pertains to a public sewage treatment facility constructed by the City of Farmington pursuant to grants from the federal government and the State of Missouri. These grants were made pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C., Sections 1281-1292. To be eligible for both the federal and the state grants permitted under these statutes, such projects must be approved by the state water pollution control agency (in Missouri's case, the Clean Water Commission), which has significant administrative and supervisory responsibilities in the design, construction and operation of the projects. 33 U.S.C., Sections 1282 (b) (2), 1284 (a) (2), (3) and (4); Sections 204.101-204.121, 204.136, RSMo Supp. 1973.

33 U.S.C., Section 1284 (b) (1), (2) and (3), provides as follows, with respect to sewage treatment projects for which such grants are given:

> "(1) Notwithstanding any other provision of this subchapter, the Administrator shall not approve any grant for any treatment works under section 1281(g) (1) of this title after March 1, 1973, unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; (B) has made provision for the payment to each applicant by the industrial users of the treatment works, of that portion of the cost of construction of such treatment works (as determined by the Administrator) which is allocable to the treatment of such industrial wastes to the extent attributable to the Federal share of the cost of construction; and (C) has legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of treatment works throughout the applicant's jurisdiction, as determined by the Administrator.
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> "(2) The Administrator shall, within one hundred and eighty days after October 18, 1972, and after consultation with appropriate State, interstate, municipal, and intermunicipal agencies, issue guidelines applicable to payment of waste treatment costs by industrial and nonindustrial recipients of waste treatment services which shall establish (A) classes of users of such services, including categories of

> industrial users; (B) criteria against which to determine the adequacy of charges imposed on classes and categories of users reflecting all factors that influence the cost of waste treatment, including strength, volume, and delivery flow rate characteristics of waste; and (C) model systems and rates of user charges typical of various treatment works serving municipal-industrial communities.
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> "(3) The grantee shall retain an amount of the revenues derived from the payment of costs by industrial users of waste treatment services, to the extent costs are attributable to the Federal share of eligible project costs provided pursuant to this subchapter as determined by the Administrator, equal to (A) the amount of the non-Federal cost of such project paid by the grantee plus (B) the amount, determined in accordance with regulations promulgated by the Administrator, necessary for future expansion and reconstruction of the project, except that such retained amount shall not exceed 50 per centum of such revenues from such project. All revenues from such project not retained by the grantee shall be deposited by the Administrator in the Treasury as miscellaneous receipts. That portion of the revenues retained by the grantee attributable to clause (B) of the first sentence of this paragraph, together with any interest thereon shall be used solely for the purposes of future expansion and reconstruction of the project." (Emphasis added.)

The Federal Environmental Protection Agency has promulgated regulations implementing these statutory provisions. Federal Register, Vol. 39, No. 29, February 11, 1974. 40 C.F.R., Section 35.925-11 of these regulations requires that, before awarding grant assistance for any sewage treatment project, the Regional Administrator of the Environmental Protection Agency must determine:

> "That, in the case of grant assistance awarded after March 1, 1973, for a project involving Step 2 or Step 3, an approvable plan and schedule of implementation have been developed for a system of user charges to assure that each recipient of waste treatment services within the applicants service area will pay its proportionate share of the cost of operation and maintenance (including replacement as defined in §35.905-17) of all waste treatment service provided by the applicant and the applicant must agree that such system(s) will be maintained. See Appendix B to this subpart."

Appendix B of these regulations includes the requirement that "the user charge system must be incorporated in one or more municipal legislative enactments or other appropriate authority."

The basic question to be answered in this opinion is whether "appropriate authority" exists to require such user charges without requiring a municipal election on the question. Section 71.715 (1), RSMo 1969, provides as follows:

> "The governing body of any municipality which has provided common sewers may by ordinance establish just and equitable charges or rents for the use of the sewers to be paid by persons who discharge sewage into the common sewers of the municipality. Any ordinance adopted under this section shall become effective upon its approval by a majority of the votes cast thereon at a general or special municipality election called by the governing body of the municipality. The election on the proposal to impose the sewerage charges or rentals shall be advertised and held in the manner provided by law for advertising and holding special elections in the municipality."

However, Section 204.026 (18), RSMo Supp. 1973, enacted subsequently to Section 71.715, provides as follows:

> "The commission shall
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> * * *
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> "(18) Require that all publicly owned treatment works or facilities which receive or have received grants from the state or the federal government for construction or improvement make all charges required by sections 204.006 to 204.141 or any federal water pollution control act for use and recovery of capital costs, and the operating authority for such works or facility is hereby authorized to make any such charges;"

We regard Section 204.026 (18) as a grant of authority to municipalities to impose user charges which is separate from and additional to the grant of authority to impose such charges contained in Section 71.715. If it were not considered a separate grant of authority from that contained in Section 71.715, it would be superfluous, and a familiar maxim of statutory construction is that the legislature will not be charged with having done a useless or superfluous act. Cf. State ex rel. Thompson-Stearns-Roger v. Schaffner, 489 S.W.2d 207 (Mo. 1973).

The procedures required to impose user charges under the authority of Section 71.715 are not explicitly required, however, under Section 204.026 (18); nor could they be, for it would clearly be unreasonable to require a referendum election to approve municipal action mandated (not merely permitted) by a state agency pursuant to the latter statute. The question, then, becomes one of whether the appropriate conditions exist for the exercise of the authority to impose user charges conferred by Section 204.026 (18), i.e. whether the Clean Water Commission has required the City of Farmington, as the operator of the treatment facility, to make charges "for use and recovery of capital costs."

The federal grant agreement into which the City of Farmington entered, to obtain funds for the construction of its sewage treatment facility, was offered May 7, 1974, and accepted May 22, 1974, by the Mayor of Farmington. The grant agreement included the condition that the grantee, the City of Farmington:

> ". . . shall comply with all requirements concerning user charges, industrial cost recovery, and sewer use ordinances as provided in . . . the FWPCA Amendments of 1972 (P.L. 92-500) and 40 CFR Part 35, including regulations published in Federal Register, Volume 39, No. 29, February 11, 1974. . . ."

After the acceptance of this agreement, the Clean Water Commission offered its own (State of Missouri) grant to the City of Farmington on May 29, 1974; the Mayor of Farmington accepted this offer on May 30, 1974.

The very issuance of this state grant made it necessary, pursuant to Section 204.026 (18), for the Clean Water Commission to require the institution of user charges by the operating authority of the Farmington treatment facility. The language of Section 204.026 ("The commission shall . . . [r]equire that all publicly owned treatment works or facilities which receive or have received grants from the state or the federal government . . . make all charges required . . . for use and recovery of capital costs, . . ." (Emphasis added.)) is mandatory. The offer of a state grant necessarily implies the condition that the city, if it accepts such offer, will be required to institute a system of user charges for its treatment facility.

This conclusion is strengthened by Section 204.106, RSMo Supp. 1973, which limits state grants to projects:

> ". . . which qualify for and in conjunction with federal grants as may be received under the provisions of the Federal Water Pollution Control Act, . . ."

The Clean Water Commission will not entertain an application for a grant of state funds unless and until the municipality seeking the grant has obtained a federal grant; and the municipality can only obtain such a federal grant by agreeing to comply with all applicable federal statutes and regulations, including such provisions as require user charges. Thus, the process by which the Clean Water Commission allots state grants necessarily requires the municipality to institute a system of user charges, as authorized by Section 204.026 (18).

The prerequisites to the institution of user charges by the municipality under the provisions of Section 204.026 (18)

have therefore been fulfilled and it is not necessary for the municipality to institute such user charges by the method prescribed in Section 71.715.

CONCLUSION

Therefore, it is the opinion of this office that the City of Farmington may impose user charges pursuant to Section 204.026 (18), RSMo Supp. 1973, to cover costs of operation and/or future expansion of a public sewer treatment facility constructed pursuant to a grant of federal funds under 33 U.S.C., Sections 1281-1292, without the necessity of an election as provided in Section 71.715, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mark D. Mittleman.

Very truly yours,

JOHN C. DANFORTH
Attorney General