

CITIES: May, by ordinance impose reasonable monthly service charge for sewer service connections.

February 23, 1939

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Mr. R. J. Newport
City Clerk
Malden, Missouri

Dear Sir:

We wish to acknowledge your letter of February 13th, wherein you state in part as follows:

"We want to ask your advise on whether or not it will be permissible for the City to make a monthly service charge for Sewer Service connections in the City of Malden.

"Will you please give us this information at your earliest convenience and oblige."

Section 7031, R. S. Missouri, 1929, provides for the establishment of sewer systems in fourth class cities, which you advised recently includes the city of Malden.

"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."

We have been unable to find any statute which would prohibit the city of Malden from making a monthly service charge for sewer service connections.

44 C. J., section 230, page 173, in discussing the question of sewers, points out that:

"General power to construct sewers may carry with it by implication the power to do those things necessary to make such system effective and complete * * * * *"

It might well be said that a monthly service charge by a city for sewer service connection is necessary to maintain the system, where the operation of the sewer was a heavy drain on the city finances.

There can be no doubt that the imposition of a monthly service charge is a municipal, as distinguished from a state matter, in view of the statement in 46 A.L.R., page 676 as follows:

"The distinction between state and local purposes was thus stated by Dillon, J.: The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas works, of waterworks, the construction of sewers, and the like, are matters which pertain to the municipality, as distinguished from the state at large. 1 Dill. Mun. Corp. Sec. 58."

And the same authority on page 704 as follows:

"The courts are fairly uniform in the opinion that furnishing water for domestic, city, and industrial purposes is a corporate purpose of taxation, and the matter of sewage disposal, being closely related, is also held to be a matter to be left to the municipalities themselves."

We have also been unable to find any express statement or authority holding that a city may make a monthly service charge for sewer service connections, but we have found statements in analogous cases which throw light on the question presented.

Thus, in the case of *Brewing Association v. St. Louis*, 140 Mo. 419, 1. c. 429, the court said:

"Judge Dillon says: 'A city may be expressly authorized in its discretion to erect a public wharf and charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense such powers are public in their nature, because conferred for the public advantage. In another sense they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large.' 1 Dill. Mun. Corp., sec. 27."

We can see no distinction between a sewer as a public utility operated by a municipality from that of water, gas and electricity. The same public necessity exists for the former as it does for the latter.

In the case of *Moore v. Logan*, 10 S. W. (2d) (Tex.) 428 1. c. 434, the court, in defining a public utility, pointed out that it has been declared to include such public convenience as a sewer said:

"There is no set definition of what

constitutes a 'public utility,' and in fact it would be difficult to construct one that would fit every conceivable case. 'Utility' means the state or quality of being useful, hence the expression 'public utility' means the state or quality of being useful to the public, generally used in the sense of 'public use,' carrying with it the duty to serve the public and treat all alike, and precludes the idea of service which is private in its nature. The adjudicated cases show that 'public utilities' have been held to include such public conveniences as sewers, water-works, gas plants, public parks, a convention hall (owned, controlled, and used exclusively by the city), power stations and equipment, street cleaning equipment, electric light plants, street railways, city cemeteries (used exclusively for burial purposes and open to the public at large), auditoriums, bathing pools, wharves, and golf links (considered within the meaning of a city charter authorizing the municipality to acquire public utilities). McQuillan on Municipal Corporations, vol. 4, sec. 1618; Denton v. City of Sapulpa, 78 Okl. 178, 189 P. 532, 9 A. L. R. 1031 (1034); Capen v. City of Portland, 112 Or. 14, 228 P. 105, 35 A. L. R. 589; City of Belton v. Ellis (Tex. Civ. App.) 254 S. W. 1023(writ refused); 3 Bouv. Law Dict. 2767; 4 Words and Phrases, Second Series, 49. The term 'public utility' has a broader meaning than that of mere physical equipment. The term 'public utility,' as operated by a municipality, refers to the entire business, including both the plants and its operation. The collection and disposal of garbage in a city is a very important service, as much so as the furnishing of pure and wholesome water or an efficient sewerage system. "

In the case of Jolly v. Monaca Borough et al., 65 Atlantic (Pa.) 809, the Borough erected a water-works and for some ten years the cost of maintaining same was paid out of the general and special taxes assessed on the taxpayers of the Borough. Afterwards the Borough passed an ordinance requiring all consumers within the Borough to pay certain rates for the use of the water. In pursuance of the terms of the ordinance all consumers of water were notified to comply therewith or the water would be shut off. Plaintiffs, being taxpayers and consumers of water within the Borough, filed a bill in equity to restrain the Borough officials from shutting off the water, alleging that the ordinance was illegal because the Borough was without authority to enact it. The court in holding that same was legal and that the Borough could make a reasonable charge for supplying water to its residents, said:

"The same principle is thus succinctly stated by Judge Orlady, in Penn Iron Co. v. Lancaster, 25 Pa. Super. Ct. 478: 'While it is no part of the ordinary and necessary duties of the municipal corporation to supply its citizens with gas and water, it is nevertheless true that it may lawfully do so. Such contracts are not made by a municipal corporation by virtue of incorporation. The supply of gas and water may be accomplished through the agency of individual or private corporations, and in many instances it is accomplished by such means. If this power is granted to a borough or city, it is a special, private franchise, and may be for emolument and advantage of the city and for the public good; but, when such a corporation engages in things not public in their nature, it acts as a private individual, no longer legislates, but contracts, and is as much bound by its engagements as a natural person.

"If, then, the borough, when furnishing a supply of water, stands upon the same footing as a private corporation, it

is entitled to the same privilege of receiving payment for the service rendered. It would be a strange place to draw the line, to hold that service must be rendered, and water supplied by the borough, without any compensation being made therefor. Water rates are paid as the compensation or equivalent, by those who choose to receive and use the water, as a commodity furnished by the borough. No one is compelled to receive or use the water, and, when any one does so with knowledge of the rates charged, he by implication agrees to pay those rates, and his obligation rests upon contract."

The collection of a monthly service charge for sewer service connections should not be confused with the power of taxation.

Thus, in the Jolly case, supra, at page 811, the state said:

"The collection of water rates should not be in any way confused with the exercise of the power of taxation. In 30 Am. & Eng. Ency. of Law (2d Ed.), 422, the cases are thus summed up: 'Water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity. The obligation to pay for the use of water rests either on express or implied contract on the part of the consumer to make compensation for water which he has applied for and received, on the terms and conditions made public.

"We are of opinion that the borough of Monaca has the right to impose by ordinance reasonable rates and charges for the supply of water, furnished by it."

And in Volume 1, Cooley on Taxation, 4th Edition, section 36, page 115, the court in pointing out the difference between charge for services or conveniences, as distinguished from a tax said:

"There are impositions which, though having some of the characteristics of taxes, are, nevertheless, distinguishable from those burdens because laid for different purposes and not necessarily governed by the same rules. Charges for services rendered, or for conveniences furnished, are in no sense taxes."

CONCLUSION

From the foregoing we are of the opinion that the city of Malden has the right to impose by ordinance a reasonable monthly service charge for sewer service connections.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

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APPROVED:

J. W. BUFFINGTON
(Acting) Attorney-General.