SEWERS:
TAXATION FOR
CONSTRUCTION
AND MAINTENANCE:

City of the third or fourth class may levy a tax upon property within its corporate limits to pay for a public sewer system although some of the persons thus taxed do not receive service from the system because sewerage mains have not been laid adjacent to their property.

April 15, 1949

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Mr. Cecil T. Taylor
Representative, Shelby County
Missouri House of Representatives
Capitol Building
Jefferson City, Missouri

Dear Mr. Taylor:

This office is in receipt of your recent letter in which you request an opinion on the following matter:

> "Mr. A. owns property within the corporate limits of a city which has its own municipally owned light and water plant. Several of the residents of the city who reside within the corporate limits have, for a period of several years, asked for sewer and water mains to be laid adjacent to their homes so that they could use said facilities. So far the city has refused to do this, but all this time have been charging these residents the regular water and sewerage rates which they charge others who have had these facilities made available to them."

Following the receipt of this letter this office requested you to clarify the above and in reply you stated further:

> "The city charges Mr. A $15.18 sewer tax per year for two years, to run for twenty years. Water main runs in front of house but no sewer line in front of house. Will not take water until sewer main is laid in front of house.
>
> "When bond issue was voted people were told that both water and sewer mains would be laid in front of homes."

From the above we deduce that your question relates to public sewer systems.

You do not state whether the city to which you refer is one of the third or fourth class. We will, however, consider

the law as it is applicable to both of these classes of cities.

Therefore, the question which you present for our consideration i: Does a municipality have the power to tax a resident of the city to pay for a public sewer system within the city although the resident who is taxed does not receive service from the public sewer system because sewer lines have not yet been laid adjacent to his home?

In answer to the above we direct your attention to Section 6968, Mo. R. S. A., which section relates to sewer systems in cities of the third class. That section reads:

> "The council shall have power to cause a general sewer system to be established, which shall be composed of four classes of sewers, to wit: Public, district, joint 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 council 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 call your further attention in this connection to the case of J. M. Whitsett et al., appellants, v. City of Carthage, 270 Mo. 269. In this case the City of Carthage, a city of the third class, was sued in the circuit court by the plaintiff, Whitsett, to enjoin it from constructing a public sewer within the city. Prior to the filing of this action by Whitsett the defendant city had held an election which decided in favor of the construction of the proposed public sewer. The plaintiff in this case is the owner of about 160 acres of land within the city limits against which the defendant city proposed to issue special tax bills to pay for the construction of this said sewer. There was a showing by plaintiff that sewer service would not be made available to any part of his land following the construction

of the proposed sewer. A part of his complaint was that since this was so he should not be taxed for it. This makes the cited case analogous to the situation you present to us. The court, in this case, states, in part, as follows:

> "It is not denied that the main sewer in question will, by means of district or lateral sewers, drain all of plaintiffs' lands when constructed and connected with it; but the main bone of their contention is that this main sewer will be of no benefit whatever to them until the lateral sewers are constructed and connected therewith, which are not authorized to be constructed by said ordinances, and therefore their lands will be taxed at $36 per acre without any corresponding benefit; it is also contended that even though the lateral sewers were to be constructed, then their construction would cost approximately $190 in addition per acre, making a total cost of about $225 per acre for the construction of the main and lateral sewers.
>
> "For the sake of argument, let us assume these figures to be correct (which is only an assumption, as the lateral sewers have not been ordered constructed, and consequently no plans or specifications therefor have been made, nor have estimates and bids been made of the cost of furnishing the materials and performing the labor necessary for their construction), then it is apparent that from this record there is no present necessity for the lateral sewers and we must presume that the city council will not violate its duty and order their construction in the absence of such necessity; however, should it so do then and not now, would be the proper time to challenge the reasonableness and validity of an ordinance ordering their construction.
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> "Under the foregoing view of the case we have only to do with the construction of the main sewer in question, the only one ordered constructed. It may for argument's sake be conceded that the plaintiff's property will not, at the present, receive as great a relative benefit from this sewer as will the other residences in that part of the city; but that is due to the fact that their property is not so densely populated and consequently that part of their farms and truck patches not used for residence purposes does not need such drainage. But that is not all that is in this case; every person in this State and country holds his property subject to the laws providing for the public health, safety, morals and general welfare,

and, if taken or damages for any one or more of those purposes, then he is entitled to just compensation therefor; likewise, his property must bear its just portion of the cost and expense of securing that protection. Both of those propositions are elementary; and it cannot be disputed that the main sewer in question is of great necessity for the preservation of the public health of the entire western portion of the city; not only that part of it densely populated is benefited, but also that part occupied by the plaintiffs. No one could seriously contend that the deposit of the refuse of that part of the city into vaults or the discharge of it upon the surface of the ground, so as to find its way to Spring River through or along the natural draws or depressions before mentioned, would be, and, as the evidence shows, is, a continuing menance to the public health, especially to all that part of the city including the plaintiffs. The public health is menaced and endangered by the aggregation of filth and refuse of the entire district, and is not limited to accumulations thereof upon or about each separate lot or tract of ground located therein. We know from the laws of gravity, observation and experience, if not removed and cared for, will seep through the earth and drain down hill to the lower levels, and there become more poisonous, sickly and deathly than upon the higher grounds; this is true for the reason that the rains, snows and seepage will dispose of and carry much of it to the low places; so from a sanitary point of view, the disposition of the sewage of that part of the city lying higher up the slope than the property of the plaintiffs, then it is for the people residing above them. The chief purpose of a sewer system is the protection of the public health, and as we have seen, the plaintiffs' property will be equally protected in that regard by the sewer in question; and it is not therefore true, as contended for by counsel, that they are not benefited thereby, or that they are not equally protected with the other residents of that part of the city.

"Counsel for plaintiffs seem to think that the benefits to real estate only can be considered in the construction of sewers. While in a technical sense that may

be true, but in a practical sense, it is only indirectly true; in a primary sense, the benefits are conferred upon the entire people of the district, and secondarily upon the real estate, by virtue of its being thereby made more desirable for business and residential purposes, which correspondingly increases the value of the land--presumably equal to the cost of construction, but perhaps not exactly in all cases.

"The lateral sewers, as previously shown, will receive the refuse of the upper part of the city, and discharge it into the main sewer, and thereby prevent the same from being discharged into natural and open drains running through or near plaintiff's property, and thereby prevent it from seeping through the ground and otherwise flowing upon plaintiffs' property, which, if not thus prevented, would render their section of the city unsanitary; and in that way the plaintiffs will receive as much or more indirect benefit from said lateral sewers as the densely populated part of the district will from that part of the main sewer which runs through or near plaintiffs' property; and if it is a hardship upon the plaintiffs to have to contribute to the payment of the main sewer before they connect their lateral sewers with it, then they are more than compensated therefor by receiving the benefits of the lateral sewers located above, as previously mentioned. The cost of the construction of the latter, according to plaintiffs' own figures, is far in excess of the cost of the construction of the main sewer; this throws some light upon the relative benefits received by each section of the district. In that way plaintiffs receive the benefits of the main and lateral sewers located above them, without paying one penny therefor, and when they construct their lateral sewers and connect them with the main sewer in question, then the entire district will be completely drained with equal benefits and equal cost; if any difference in cost, it is in favor of the plaintiffs, because they will not be required to construct their part of the lateral sewers until the necessity of that section of the district demands it.

"The law does not require all of the lateral sewers of a drainage district to be constructed at the same time; they may be constructed as the necessities therefor may demand. (City of St. Joseph to use of Gibson v. Owen, 110 Mo. 445.)"

We call your further attention to Section 7181, Mo. R.S.A. which section has reference to cities of the fourth class. This section states:

> "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. R.S. 1929, par. 7031."

In the case of Union Trust Co. v. Pagenstecher, 221 Mo. 121, the court held that a general municipal tax could be levied upon all persons and property within the city limits to pay for a public sewer system. In this case there was no issue as to whether or not the property of the plaintiff would receive service from said sewer system and there was no showing as to whether it would or would not. The significant thing about this case is its holding that such a general tax could be levied for the erection of a public sewer system. In this connection the court said:

> "So that when the three sections above mentioned, viz., sections 5969, 5970 and 5971, are read together, it is apparent that the 'special public sewer tax' referred to in section 5969, is a general municipal tax, and in no sense a special assessment. We do not therefore have to depend upon other <u>indicia</u> of a general tax, but find evidence of the character of this tax in the face of the law itself. The ordinance we have before us conforms to the statute, and we hold that it provides for a general municipal tax, although such tax is set apart for a special municipal purpose. This tax thus appears to be general in the sense of being levied upon all property alike within the domain

"of the taxing authority, but special in the sense only that it is levied for a special purpose or fund. * * * * * * * "

CONCLUSION

In view of the above it is the opinion of this office that a city of the third or fourth class can levy and collect sewer taxes to pay for a public sewer from persons within the corporate limits of the city although sewer mains have not been so constructed as to make sewer service available to the persons thus taxed.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General