

**Opinion No. [29-52]**

September 25, 1929

**BY:** J. A. MILLER, Assistant Attorney General

**TO:** Mr. E. M. Fisher, Clerk, Lordsburg, New Mexico.

MUNICIPAL CORPORATIONS -- Village may impose charges for special benefit from use of sewer.

**OPINION**

Reference is made to your letter of the 17th inst. in re section 6, Ordinance 33 of the Village of Lordsburg, with which letter you enclosed a copy of the ordinance.

You state that the sewer system of Lordsburg was constructed with funds obtained by a bond issue, is municipally owned and operated and that the interest on bonds and the sinking fund are raised by assessment against property owners of the town and you ask specifically for an opinion from this office as to the legality of Section VI of the ordinance, which section is as follows:

"Sec. 6. That every person, firm or corporation, whether owner, agent or occupant of any building or buildings containing openings or inlets for the purpose of discharging waste water or other refuse liquids to the said sewer system shall pay therefor to the Village of Lordsburg as hereinafter provided the annual rentals designated in the following schedule according to the number of inlets and the class of place or building where the same are situated:

For the county court house, high such public places or institutions, school, public school and all other convents, hospitals, sanitariums, and also all hotels, barber shops, laundries, livery stables, restaurants and soft drink stands, the sum of one dollar per annum for each sink, bath tub, basin, water closet, slop hopper, wash tray or other inlet;

For all places of business not hereinbefore designated seventy-five cents per annum for each sink, bath tub, basin, water closet, slop hopper, wash tray or other inlet.

For private residences fifty cents per annum for each sink, bath tub, basin, water closet, slop hopper, wash tray or other inlet.

All fees shall be paid annually in advance upon the first day of each calendar year, except the first payment which shall be made as provided in Section V of this ordinance."

In section VI the annual charges imposed for the use of the sewer system based on the number of openings or inlets and the classification provided in the ordinance is denominated "rental".

In construing a statute or ordinance, however, it is the substance rather than the language employed which determines the legal effect which in this instance appears to be an attempt on the part of the Board of Trustees of the village to impose special benefit tax upon users of the sewer system, the amount of such tax being determined by the classification and the number of outlets employed by each for the discharge of water or waste to the sewer.

The power of taxation in any of its forms whether poll taxes, property taxes, or excises, is a legislative power without limitation except as imposed by constitutional provisions and except in so far as expressly or impliedly limited by the constitution, the legislature may delegate to municipal corporations, counties, villages, or towns the power of requiring licenses and imposing taxes on occupations and privileges within their respective limits.

This, the legislature may do either by general law or by special charter so far as the constitution does not prohibit. Municipal corporations, however, have no such power unless plainly conferred by statute either in express terms or by necessary implication.

The legislature of New Mexico, in addition to the general powers conferred upon municipal corporations, has as to sewers, specifically provided that city councils and boards of trustees in towns shall have power "to regulate the construction, repairs and use of vaults, cisterns, hydrants, pumps, sewers and gutters" (subsection 27, sec. 3564, Codification of 1915) and by subsection 77, section 3564, the authority is given for the levying of just and reasonable special assessments upon premises having sewer connections for the purpose of defraying the expense of maintaining, operating, and keeping in repair such sewers. The section referred to is as follows:

"That municipal corporations having sewers shall have the right by general ordinance to levy special assessments upon improved and unimproved lots and land adjoining streets and alleys through which sewer pipes are laid, and upon premises and improvements otherwise situated but having sewer connection, such as may be just and reasonable for the purpose of defraying the expense of maintaining, operating and keeping in repair said sewers, Provided, Said levy of special assessment or unimproved lots or lands shall not exceed thirty-three per cent. of the rate of assessment levied upon improved lots or land."

The special assessments authorized in this section are not to be confused with special assessments for which provision is made in section 3705 et seq. for the construction of sewers and are not governed by the same procedure. The special assessments permitted by subsection 77 are more in the nature of special benefit charges denominated as "annual rentals" in your ordinance and as such authorized by statute.

There is, however, in your section VIII the provision that the fees, rentals, and penalties collected shall constitute a fund to be expended only in paying the expense of the care, maintenance, extension, operation, and repair of the sewer system. As to whether or not funds for **extension** may be so raised, the legislature having provided a method of raising funds for **construction**, might be opened to debate. The general rule is that the providing of one method by the legislature excludes all other methods.

A case involving questions raised by the situation in which you are now placed was decided by the Court of Civil Appeals in Texas in 1927. It is the case, City of Wichita Falls vs. Landers, 291 S. W., 696. The Board of Aldermen had passed an ordinance similar to yours and providing for annual charges to be paid by all users semiannually, in advance, to raise funds for the extension of sewer system. Such charges being governed as to amount by a classification provided. Landers refused to pay. His sewer connections were removed by the city and he brought mandamus to compel the city to re-connect.

The court in that case held, with other findings, as follows:

"Where city's charges for use of sewer system were reasonable in amount, citizen cannot resist payment even though city thereafter appropriated such payment in part to extension of system without charter authority.

City of Wichita Falls is not necessarily limited to bond issue for construction or extension of public utilities such as sewer system, but may impose charges for special benefits received, in view of Wichita Falls City Charter, sec. 67, 70, 71, and Rev. St. 1925, art. 1106.

Charges assessed by city for use of sewer system cannot be constructed as general tax, but are charges for special benefits received by certain persons residing in city but not enjoyed by all."

In our opinion Section VI of your Ordinance No. 33 is enforceable. However, the only way to get an authoritative decision in this matter is to enforce the ordinance until someone succeeds in getting a competent court to decide to the contrary.