OFFICIAL OPINION NO. 90-43, Fort Pierre Sewer and Water Rates

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Richard P. Tieszen
City Attorney for the City of Fort Pierre
Fort Pierre Municipality
222 East Capitol
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 90-43

Fort Pierre Sewer and Water Rates

Dear Mr. Tieszen:

On behalf of the City of Fort Pierre, you have requested an opinion from this Office regarding the following factual situation:

FACTS:

The City of Fort Pierre recently passed a Municipal Ordinance for furnishing water service to customers outside the City boundaries. The owner of each residential or non-residential water pipeline connected to the City's facilities beyond the City boundaries will be required to enter into a contract with the City of Fort Pierre. The contract must stipulate the rates, gallonage, billing procedure and other provisions for providing water services as the City Council deems appropriate.

The City of Fort Pierre is also considering a similar Ordinance for furnishing sewer services to customers outside the City boundaries. In both situations, the consumer outside the City limits will be charged a higher rate than consumers inside the City limits. The City's reason for charging different rates is that the consumers inside the City have already been subjected to (1) initial assessments the implementation of the sewer and water systems and (2) are already subject to a municipal tax base utilized for the funding of such systems. Because they are not required to pay these other costs for the system, the City has proposed that those consumers outside the City limits should be billed at a higher rate for usage.

Additionally, the City of Fort Pierre intends to charge commercial users a higher rate than it will charge residential users, at least for sewer services. Finally, rates for sewer services both inside and outside the City will be dependent, to some degree, on the number of plumbing connections involved and the amount of water used.

On the basis of this factual situation, you have asked the following questions:

QUESTIONS:

1. May a municipality charge a higher rate for sewer and water services to consumers outside the City limits than to consumers inside the City limits?

2. If the answer to Question No. 1 is in the affirmative, must the rate schedule be in the form of an ordinance or may the City Council contract with each consumer separately?

3. May a municipality charge different rates to commercial users than it charges to residential users of water and sewer service?

IN RE QUESTION NO. 1:

It is clear that "a municipal corporation has only such powers as granted to it by the constitution or statutes of the state, or such as are incidental thereto." Blue Fox Bar, Inc. v. City of Yankton, 424 N.W.2d 915, 919 (S.D. 1988). Thus, in establishing sewer. The word "sewer" in this opinion relates to sanitary sewers and not storm sewers. SDCL 9-48-1.s and water rates, municipal officials have only that authority expressly granted to them or incidental thereto.

Municipal rate-making authority for sewage services is provided by SDCL 9-48-27:

Such charges shall be as nearly as may be in the judgment of the governing body equitable and in proportion to the services rendered and taking into consideration in the case of each such premises the quantity of sewage therein or thereby produced and its concentration, strength, or river pollution qualities in general. Such charges may be collected at the same time, place, and in conjunction with the water rentals in any municipality owning and operating the municipal water supply system and distribution system.

Under this statute, cities establishing sewer rates must (1) judge whether the proposed rates are equitable, (2) determine whether the rates are "proportionate" to the services rendered, and (3) consider the quantity and strength of the sewage generated.

The municipality's authority for setting water rates is more general. While a municipality clearly has authority to establish water rates under SDCL 9-47-1, SDCL 9-47-11, and SDCL 9-47-27, those statutes do not establish guidelines for setting water rates. Nonetheless, as a matter of common law (and undoubtedly public policy), municipal rates must be equitable and not unjustly discriminatory. Rutherford v. City of Omaha, 183 Neb. 398, 160 N.W.2d 223, 228 (1968).

Because the requirement for "equitable" rates is common to both utilities, the factual situation involved here will first be examined in light of this criterion. Then, the other two criteria that are unique to sewer rates will be examined.

Although the South Dakota Supreme Court does not appear to have directly addressed the issue, other state courts have considered whether the classification of groups of consumers allows for equitable utility rates. While a difference in utility rates under substantially similar conditions of service may constitute unjust discrimination, reasonable classifications between customers may be made when those classifications are rationally based upon factors such as the cost or value of the service and the time, quantity and proposed use of the utility. Mountain States Legal Foundation v. Utah Public Service Commission, 636 P.2d 1047, 1052 (Utah 1981); Great Western Sugar Co. v. Johnson, 624 P.2d 1154, 1187 (Wyo. 1981); Laramie Citizens v. City of Laramie, 617 P.2d 474, 484 (Wyo. 1980); Rutherford v. City of Omaha, 183 Neb. 398, 160 N.W.2d 223, 228 (Neb. 1968); Application of Boise Water Corp., 349 P.2d 711, 714, 715 (Idaho 1960); Caldwell v. City of Abilene, 260 S.W.2d 712, 714 (Tex. 1953). It has been held to be "axiomatic in rate making" that establishing different rates for different classes of customers is not unlawful discrimination when those classifications are reasonable. American Hoechest Corp. v. Dept. of Public Utilities, 379 Mass. 408, 399 N.E.2d 1 (1980). See also McQuillin Mun. Corp. 31.30a (3rd Ed. 1983). Consistent with this principle, "the great majority of the cases support the rule that public utilities generally may discriminate, in respect to rates, between customers within and those outside the municipalities primarily served." Bleick v. City of Papillion, 365 N.W.2d 405, 407 (Neb. 1985). The reason that this classification is proper is that, as in the facts involved herein, "residents of the municipality have borne the cost of establishing or financing the system" thereby justifying higher rates for non-residents.

As set forth above, two additional considerations also apply in setting sewer rates. Those considerations are whether the rates are "proportionate" to the services rendered and whether the quantity and strength of the sewage generated warrants the charges. First, the proportionality criterion leaves a great deal of discretion to the municipal officers involved. It is at least arguable that this criterion necessitates a review of either the cost or the value of the service since consideration of the quantity and strength of the sewage generated is a separate consideration under SDCL 9-48-27. Whether a rate is proportionate to the services rendered could, for example, involve the consideration of whether each resident should pay a pro rata or proportionate cost of the total system. In the alternative, the proportionality consideration could involve a consideration of whether, from a consumer prospective, the service is proportionate to the "value" received by that consumer. Again, this criterion is discretionary.

Second, cities are required to consider the quantity and strength of the sewage generated. The rates ultimately set for sewer services may include classifications according to the number and type of plumbing fixtures on the premises or may be relative to the amount of water used on the premises, if it is metered. SDCL 9-48-28, Omaha, 160 N.W.2d at 228. This consideration is not exclusive and should be examined together with the other considerations set forth above in order to establish appropriate sewer rates based upon the factual situation particular to the city involved.

In sum, the answer to your first question is that a municipality does have authority to classify customers according to their geographic location when the classification is reasonable, and, when sewer services are involved, the rates are otherwise proportionate to the service rendered and based on a consideration of the strength and quantity of the sewage.

IN RE QUESTION NO. 2:

SDCL 9-48-26 requires sewer and water rates to be established by municipal ordinance. This statute does not distinguish between those rates established for consumers inside or outside the municipality:

Any municipality which has installed or shall install sanitary and storm sewerage, a system of sewerage, sewerage pumping stations, or sewage treatment or purification works, any and all of which are hereinafter termed sewer utilities, for public use may by ordinance establish just and equitable rates of charges or rentals to be paid to such municipality for

the use of such sewer utilities by every user whose premises are served by a connection to such sewer utilities directly or indirectly. A municipality may also submit to the voters of such municipality at any general election or any special election called for such purpose the question of whether or not the municipality shall be authorized to establish charges or rentals for the use of sewer utilities. If a majority of the voters voting upon such question shall vote in favor thereof then such municipality may by ordinance establish just and equitable rates of charges or rentals to be paid to such municipality for the use of such sewer utilities by every user whose premises are served by a connection to such sewer utilities directly or indirectly. (Emphasis added.)

The only exception to the ordinance requirement is SDCL 9-48-32 which provides:

A municipality wherein a sewage treatment or septic plant is maintained shall have power to contract for the privilege of connecting to said plant for the purpose of treating or disposing of private sewage or industrial waste originating within the municipality or within one mile of the corporate limits, provided said plant has capacity over the requirements of the municipality for handling such sewage or industrial waste.

Under SDCL 9-48-32, the only contractual right that may be granted by the city to another is the "benefit" of connecting to the sewer line itself. Blue Fox Bar, Inc., 424 N.W.2d at 919. In Blue Fox Bar, Inc., the South Dakota Supreme Court held that a contract executed under SDCL 9-48-32 would "merely give the city the right to allow a party to use the sewer system at a stated rate." The court further stated that such an agreement allowing connection to a sewer line at a specified rate created no duties, rights or obligations on either party and was therefore not a binding, legally enforceable contract. The court's rationale was predicated upon its long-standing holding that because the supervision and regulation of sewers is one of the city's police powers, it may not be bargained away by contract. Erickson v. Sioux Falls, 70 S.D. 40, 14 N.W.2d 89, 95 (1944).

Based upon SDCL 9-48-26 and the State Supreme Court's interpretation of SDCL 9-48-32, it is my opinion that municipal sewer rates must be set by ordinance.

Although the law pertaining to water services is more general, a similar analysis applies. No specific statute exists that requires water rates to be set by ordinance or resolution. Thus, SDCL 9-19-1 and 9-19-3 apply:

9-19-1. The word "ordinance" as used in this title shall mean a permanent legislative act of the governing body of a municipality within the limits of its powers.

The word "resolution" as used in this title shall mean any determination, decision, or direction of the governing body of a municipality of a special or temporary character for the purpose of initiating, effecting, or carrying out its administrative duties and functions under the laws and ordinances governing the municipality.

9-19-3. Every municipality shall have power to enact, make, amend, revise, or repeal all such ordinances, resolutions, and regulations as may be proper and necessary to carry into effect the powers granted thereto, and to provide for the punishment of each violation thereof by a fine not exceeding one hundred dollars or by imprisonment not exceeding thirty days or by both such fine and imprisonment.

These statutes authorize a municipality to set its water rates in either the form of an ordinance or a resolution. In practice, the municipality would ordinarily set forth its methodology or manner of calculating water rates within an ordinance. Then, the municipality would pass resolutions from time to time that would implement or carry out the purposes of the permanent ordinance. It should also be recognized that, given the State Supreme Court's determination that a municipality may not "bargain away" its police power by contracting for sewer services, the same rationale would undoubtedly apply to contracting for water services.

The answer to your question is that the City of Fort Pierre must set its sewer and water rates by ordinance, or, in the case of water rates, set forth its methodology for setting those rates in an ordinance with resolutions being used to implement the ordinance.

IN RE QUESTION NO. 3:

As established in Question No. 1, municipalities do have authority to impose reasonable classifications in sewer and water rates. Classifying users according to residential, commercial or industrial use has been held to be consistent with the goal of establishing equitable rates. Omaha, 160 N.W.2d at 228; Annot., 61 A.L.R.3d 1236, 1270, 1271 (1975). Again, the City's discretion with regard to sewer rates should be exercised after also considering (1) whether the proposed rate is "proportionate" to the service rendered and (2) whether it is appropriate in light of the strength and quantity of the sewage generated.

Thus, the answer to this question is that a municipality does have authority to classify users according to residential or commercial usage so long as the classification is reasonable and, in the case of sewer rates: (1) is proportionate to the services rendered and (2) involves consideration of the strength and quantity of the sewage.

Respectfully submitted,

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