

FILE

subject

*Water Rates Public  
Regulations*

Copy to



STATE OF KANSAS

*Office of the Attorney General*

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER

Attorney General

February 15, 1974

Opinion No. 74- 57

James W. Putnam  
Madison City Attorney  
14 West 6th - Box 604  
Emporia, Kansas 66801

Dear Mr. Putnam:

You request our opinion concerning section 14-201 of the Madison, Kansas, city code which states in pertinent part thus:

"WATER RATES FOLLOWING METER INSTALLATIONS.  
When water meters are installed in the city, the following monthly rates shall become effective upon publication of this ordinance.

\* \* \*

"The above rates shall be increased twenty-five percent (25%) for all water furnished to properties outside of the city limits. Each business or individual property owner or water user to which water is piped must pay not less than the minimum charge or \$1.60 plus surcharge of \$4.00 per month. The property owner shall be responsible for paying for water used by users living on his property."

In the correspondence enclosed with your letter, it is suggested that the principle question presented by this ordinance is whether its enforcement deprives a property owner of due process of law by requiring him to pay the debt of his tenant, for water furnished to the latter.

In Dunbar v. City of New York, 251 U.S. 516, 64 L. Ed. 384 (1920), plaintiff, owner of real property in the city of New York, brought an action to cancel a lien upon the property based upon unpaid charges for water. The lessee, a partnership, had covenanted

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"to pay the charges for water which should be assessed against or imposed upon the building during the lease, and if not so paid it should be added to the rent then due or to become due."

The partnership had been adjudged bankrupt, and the claim for unpaid water charges was not discharged in the bankruptcy proceeding. Plaintiff urged that the lien violated § 1 of the Fourteenth Amendment of the United States Constitution, and that it operated to deprive plaintiff of property without due process of law. The Court accepted neither of these arguments. Counsel urged that express, voluntary consent was necessary, under a prior decision of the Court to entitle the city to such a claim. The Court disagreed:

"Counsel assumes that the [previous] case presented an instance of an express consent. In that counsel is mistaken. The consent was implied from the fact that the law imposing the water rents preceded the mortgages. And so in the water charge in controversy, it was imposed and made a lien on plaintiff's property by the charter of the city, and therefore the . . . court . . . decided that the consent of the plaintiff could be implied, and any other conclusion would have been impossible.

"A city without water would be a desolate place, and if plaintiff's property was in such situation it would partake of the desolation. And, as a supply of water is necessary, it is only an ordinary and legal exertion of government to provide means for its compulsory compensation.

"It is of no consequence, therefore, at whose request the meters were installed in the property. The meters, as observed by the appellate division, were 'not the instrumentalities for furnishing the water,' they only registered its consumption. And besides, the lease made by plaintiff contemplated the use of water by the lessees, and provided, as far as the lessor (plaintiff) could, for the payment of the charges for it. That her tenants defaulted in their obligation by reason of their bankruptcy was her misfortune, but it did not relieve the property, which, we may say, would be unfit for human habitation if it could not get water."

The Court expressly rejected the argument of plaintiff in support of her claim that the lien operated unconstitutionally to make a "lessor liable for the personal debt of a lessee."

At 64 Am.Jur.2d, Public Utilities, § 60, the writer states thus:

"The consumer of public utility services is liable in contract for the charges for such services. In the absence of a lien authorized by statute or special agreement, a public utility cannot impose liability for utility charges incurred upon one other than the user or one who contracted for the supply, and this limitation applies with equal force to . . . the ordinances of a municipal corporation. In the absence of statute there is no unconditional personal liability imposed upon owners of real estate for water rents or water rates while the property is in the possession of their tenants. . . . Accordingly, a requirement in a statute making a landlord liable for light or water furnished by the city to his tenants is reasonable, is such a power as may be conferred by the state upon the municipality, and does not violate due process in requiring one person to pay the debt of another."  
[Emphasis supplied.]

In the annotation at 19 A.L.R.3d 1227, dealing with electricity, gas and water charges, the writer prefaces the article thus:

"The resolution of the questions presented . . . is not determined by the simple application of clear, well-settled principles subject to logical well-established exceptions, but rather by the application of varieties of statutory provisions . . . ."

A general proposition for which much authority exists is that in the absence of an authorizing statute, a city may not impose liability upon the owner of property for unpaid utility charges for services furnished to the tenant. Such decisions are frequently found in jurisdictions in which cities rely upon municipal charters, or state legislative action for their governmental powers. This is not the case in Kansas, where cities enjoy the constitutional power of home rule under Article 12, § 5 of the Kansas Constitution.

In Claflin v. Walsh, 212 Kan. 1 (1973), the Court stated thus:

"No longer are cities dependent upon the state legislature for their authority to determine their local affairs and government. Since home rule, cities have power granted directly from the people through the constitution without statutory authorization. . . ."

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"Section 5(d) of Article 12 requires a liberal construction of the powers and authority granted cities for the purpose of giving to cities the largest measure of self-government. This provision simply means that the home rule power of cities is favored and should be upheld unless there is a sound reason to deny it. Where the legislature has acted in some area a city's power to act in the same area should be upheld unless the legislature has clearly preempted the field so as to preclude city action. Unless there is actual conflict between a municipal ordinance and a statute, the city ordinance should be permitted to stand." 212 Kan. at 6-7.

Thus, if the legislature may enact a statute making a landlord liable for light or water furnished by the city to his tenants, under Article 12, § 5, a Kansas city may also do so, without the necessity of statutory authority.

If ever any concern should be properly denominated a matter of local affairs and government, the collection of bills for municipal water service is one.

In Dunbar, supra, the Court held that a lien authorized by state statute or city charter against real property for water furnished to the property and used by the tenant, which lien must be satisfied by the property owner notwithstanding the tenant had expressly agreed to pay such charges, did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, nor did it require the owner to pay the debt of another, thus taking his property without due process. The provision of the ordinance in question here appears equally sound and free from constitutional infirmity. The ordinance requirement that billing shall be made to the property owner becomes as a matter of law an element of every contract with the city whereby it furnishes water to any property, and the property owner cannot on the face of the ordinance claim that in paying for water furnished to his property he is satisfying a debt or contractual obligation incurred by another.

If you should have further questions concerning this matter, please do not hesitate to call upon us.

Yours very truly,



VERN MILLER  
Attorney General

VM:JRM:jsm