

DRAINAGE DISTRICTS:
CITIES, TOWNS & VILLAGES:

1. That a city in a drainage district organized under Chapter 242, RSMo, is not exempt from the maintenance tax levied by the board of supervisors of the district. 2. That a board of supervisors of such drainage district may charge for the privilege of allowing the overflow from a city's sewage lagoon to spill into the drainage ditch if the drainage from the sewage lagoon did not exist when the drainage district was organized.

OPINION NO. 13

May 24, 1971

Honorable O. L. Wallis
State Representative
District No. 152
1331 Pershing
Poplar Bluff, Missouri 63901



Dear Representative Wallis:

This is in response to your request for an opinion from this office as follows:

"I would like an Opinion on the following: A third class city, which is in a drainage district organized in a Circuit Court, Chapter 242, RS Mo.1969, is charged a drainage tax by the district. Article X, Section 6, Constitution of the State of Missouri, states, 'Exception from taxation.- All property, real and personal, of the state, counties, and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation,...'. Can the drainage district legally tax the city?"

"Furthermore, the drainage district makes a flat charge per year, in addition to the taxes, to the city for privilege of allowing the overflow from the city's sewage lagoon to spill over into the drainage ditch. Can the drainage district refuse to allow the use of the ditch for the sewage overflow if the city declines to pay the annual charge?"

In your first question, you inquire whether a third class city which is in a drainage district organized by the circuit court under Chapter 242, RSMo, can legally tax the city under Article X, Section 6, Constitution of Missouri, which exempts all property of the state, county and other political subdivisions, from taxation.

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We assume the tax you have in mind is an assessment made by the board of supervisors of the drainage district for maintenance tax based upon the net assessment of benefits originally assessed against the city for public highways in such city under Section 242.260. See Harrison and Mercer County Drainage Dist. v. Trail Creek Tp. 317 Mo. 933, 297 S.W. 1.

Section 242.490, RSMo, provides in part:

"1. To maintain and preserve the ditches, drains, levees or other improvements made pursuant to sections 242.010 to 242.690 and to strengthen, repair and restore the same, when needed, and for the purpose of defraying the current expenses of the district, the board of supervisors may, upon the completion of said improvements and on or before the first day of September in each year thereafter, levy a tax upon each tract or parcel of land and upon corporate property within the district to be known as a 'maintenance tax'. Said maintenance tax shall be apportioned upon the basis of the net assessments of benefits accruing for original construction, shall not exceed ten per cent thereof in any one year and shall be certified to the collector of the revenue of each county in which lands of said district are situated in the same book in like manner and at the same time as the annual installment tax is certified, but in a separate column, under the heading 'maintenance tax'."

Under this statute a board of supervisors has authority to levy an assessment or tax not to exceed ten percent of the original assessment upon each tract or parcel of land and upon corporate property within the district to be used to maintain, preserve, to strengthen and repair ditches, drains and levies in the drainage district.

This statute further provides that the collector shall demand and collect the maintenance tax and make return thereof and shall receive the same compensation therefor and be liable for the same entities for failure or neglect in the same manner as other taxes are collected.

Article X, Section 6, Constitution of Missouri, provides in part:

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"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; . . ."

The first question to be determined is whether the assessment made by the board of supervisors of a drainage district is a tax within the above constitutional provision.

This question was before the Supreme Court in Houck v. Little River Drainage District, 248 Mo. 373, 154 S.W. 739, aff'd 36 S.Ct. 58, 239 U.S. 254 (1913). In this case the court stated 248 Mo. l.c. 382-383:

"I. That the State, by the Legislature, has the power to create corporations for the purpose of reclaiming or improving swamp and overflowed lands by ditches and drains and levies, in districts prescribed by it, or to be ascertained and fixed by such appropriate instrumentalities as it may provide, is no longer a question in this State. Nor is it an open question that the instrumentality so created may be invested with all the necessary power and authority to construct and maintain whatever works may be necessary to accomplish such object, and to raise the funds to pay for the same by assessment on the lands to be benefited thereby. [Egyptian Levee Co. v. Hardin, 27 Mo. 495; Columbia Bottom Levee Company v. Meier, 39 Mo. 53; Mound City Land & Stock Company v. Miller, 170 Mo. 240; Squaw Creek Drainage District v. Turney, 235 Mo. 80; Morrison v. Morey, 146 Mo. 543; State ex rel. v. Chariton Drainage District, 192 Mo. 517; State ex rel. v. Taylor, 224 Mo. 393; Little River Drainage District v. Railroad, 236 Mo. 94.] These corporations, as is said in the most of the cases cited, are, when formed, public subdivisions of the State, exercising the powers granted them for the purposes of their creation, within their territorial jurisdiction, as fully, and by the same authority, as the municipal corporations of the State exercise the powers vested by their charters. That the special taxes they are authorized to levy and collect upon and for the benefit of the lands included in their districts do not come within the provisions of article 10 of the State Constitution invoked

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by the appellants, has long been settled, and has passed from the realm of legitimate discussion. . . ."

The distinction between a tax and benefit assessment is made in Fort Osage District of Jackson County v. Foley, 312 S.W.2d 144 (Mo. 1958). The issue before the court in this case was whether an assessment made under Section 242.490, supra, constituted revenue under Article V, Section 3, Constitution of Missouri which vests the Supreme Court with jurisdiction of an appeal when the revenue laws of the state are involved. The court, after citing Section 242.490, supra, stated at l.c. 145-146:

". . . since the decision in State ex rel. Broughton v. Oliver, 273 Mo. 537, 201 S.W. 868, it has been well settled that appeals in proceedings to enforce benefit assessments by drainage districts are not cases involving a construction of the revenue laws of the state within the meaning of Art. V, § 3, of the Constitution, V.A.M.S., even though such assessments are collected as other taxes. The Broughton case makes clear the distinction between revenue laws of the state and local benefit assessments in this oft-quoted statement, 201 S.W. 870: 'When the Constitution speaks of the "revenue laws of this state," as it does in section 12 of article 6, supra, it has reference to that body of laws by which funds for public governmental purposes are raised, and not to that law or body of laws by which are authorized the assessment of benefits to meet the expenses of given improvements. In other words, the two purposes make up separate schemes: (1) Revenues for public governmental purposes, and the assessment, collection and expenditure thereof; and (2) special assessments and their collection and expenditure. It is to the first class supra that the constitutional provision under review applies, and not to the latter.'

"Later cases approving and following the holding in the Broughton case are Bushnell v. Mississippi & Fox River Drainage Dist., 340 Mo. 811, 102 S.W.2d 871, 874 [5]; Pearson Drainage Dist. v. Erhardt, Mo., 196 S.W.2d 855 [1, 2]; Howell v. Division of Employment Security, etc., 358 Mo. 459,, 215 S.W.2d 467, 471-472 [3]."

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It is the opinion of this office that a benefit assessment levied by the board of supervisors of a drainage district is not in fact within the provisions of Article X, Section 6, Constitution of Missouri, which exempts real estate owned by a political subdivision from taxation.

In your second question you inquire in substance whether a drainage district organized under Chapter 242, RSMo, has authority to charge a city a flat charge for the privilege of allowing overflow from the city's sewer lagoon to empty into the drainage ditch.

A somewhat analogous case arose in Thompson v. City of Malden, 118 S.W.2d 1059 (Spr.Ct.App. 1938), in which the Springfield Court of Appeals sustained the lower court's injunction prohibiting the City of Malden from connecting a sewer outlet with the drainage ditch in a drainage district organized by a county court under Chapter 243, RSMo. The city did not have a written contract with the county court granting it permission to connect with the sewer district as provided in 243.270, V.A.M.S., Section 10838, RSMo 1929.

The court, in discussing the organization of drainage districts and their authority, stated at l.c. 1063:

"Drainage ditches are artificially created and constructed through funds raised by taxation against the lands that comprise the district. Chapter 64, Article 2, R.S.Mo.1929 creates a code unto itself and the provisions of this chapter and article limit and define the authority and duties of the governing board of drainage districts. State ex rel. Walker v. Locust Creek Drainage District, 228 Mo.App. 434, 67 S.W.2d 840; State ex rel. Harrison v. Hill, 212 Mo.App. 173, 253 S.W. 448. Drainage districts organized under the provisions of this chapter and article are public or municipal corporations and the County Court of the county in which they are organized administers their affairs. Their rights, powers and liabilities are specifically limited by the statutes that create them. State ex rel. Applegate v. Taylor, 224 Mo. 393, 123 S.W. 892; Squaw Creek Drainage Dist. v. Turney, 235 Mo. 80, 138 S.W. 12; Houck v. Little River Drainage Dist., 248 Mo. 373, 154 S.W. 739; Wilson v. King's Lake Drainage & Levee Dist., 176 Mo.App. 470, 158 S.W. 931; Id., 257 Mo. 266, 165 S.W. 734; State ex rel. McWilliams v. Little River Drainage District, 269 Mo. 444,

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190 S.W. 897; Birmingham Drainage Dist. v. Chicago, B. & Q. R. Co., 274 Mo. 140, 202 S.W. 404; Sigler v. Inter-River Drainage Dist., 311 Mo. 175, 279 S.W. 50; Arthaud v. Grand River Drainage Dist., 208 Mo.App. 233, 232 S.W. 264."

The principles of law stated above as to the rights, powers and liabilities of a drainage district are specifically limited in the statutes that create them.

Chapter 242, RSMo, governing drainage districts organized by the circuit court does not contain a statute expressly authorizing a drainage district to contract with a city for the use of a drainage ditch for a consideration as provided for in Section 243.370 which applies only to drainage districts organized by the county court.

Section 242.370, RSMo, which applies to drainage districts organized by the circuit court provides:

"Existing drains may be connected.--1. At the time of the construction, in any district incorporated under sections 242.010 to 242.690, of the plan for reclamation herein referred to, all ditches or systems of drainage already constructed in said district and all watercourses shall, if necessary to the drainage of any of the lands in said district, be connected with and made a part of the works and improvements of the plan of drainage of said district.

"2. But no ditches, drains or systems of drainage constructed in said district after the completion of the aforesaid plan of drainage of said district, shall be connected therewith, unless the consent of the board of supervisors shall be first had and obtained, which consent shall be in writing and shall particularly describe the method, terms and conditions of such connection, and shall be approved by the chief engineer. Said connection, if made, shall be in strict accord with the the method, terms and conditions laid down in said consent.

"3. If the landowner or owners wishing to make such connection are refused by the board of supervisors or decline to accept the consent granted, the said landowner or owners may file a petition for such connection in the circuit

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court having jurisdiction in said district, and the matter in dispute shall in a summary manner be decided by said court which decision shall be final and binding on the district and landowner or owners.

"4. No connection with the works or improvements of said plan of drainage of said district or with any ditch, drain or artificial drainage wholly within said district shall be made, caused or effected by any landowner or owners, company or corporation, municipal or private, by means of or with any ditch, drain, cut, fill, roadbed, levee, embankment or artificial drainage, wholly without the limits of said district, unless such connection is consented to by the board of supervisors, or in the manner herein provided."

Under this statute, the board of supervisors of a drainage district organized in the circuit court, has authority to consent in writing for other ditches, drains or systems of drainage to be connected with a drainage ditch under the terms and conditions approved by the chief engineer of the drainage district.

The question now arises whether the supervisors of a drainage district, although they have the authority to permit the connection to be made, have the right to require compensation to be paid for such service.

In State ex rel. State Highway Commission v. Union Electric Co. of Missouri, 142 S.W.2d 1099 (St.L.Ct.App. 1940), the State Highway Commission sought to recover eight hundred dollars per year from the Union Electric Company upon a contract whereby the Union Electric Company agreed to pay for its electric power lines on the State Highway bridge at St. Charles, Missouri. The court denied recovery because a statute expressly provides a public utility the right to use a public highway for its poles, lines, etc. In discussing this matter, the court stated at l.c. 1102:

"In support of its contention that it has been impliedly granted the power it seeks to exercise, plaintiff cites, by way of alleged analogy, that line of decisions which affirm the right of a municipal corporation to impose a charge in the nature of a rental upon a public utility which appropriates space in the streets and alleys of the city as the location for its poles and other fixtures. The trouble is that

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in attempting to draw such analogy, plaintiff ignores the vital difference between the power of a city in such respect and the power which it itself possesses. The consent of a municipality is a condition precedent to the right of a utility to make use of the streets and alleys of the municipality in the operation of its business (State ex inf. v. Arkansas-Missouri Power Co., 339 Mo. 15, 93 S.W.2d 887; State on inf. v. Missouri Utilities Co., supra); and since this is so, and since the requisite permission may be withheld, when a municipality once permits the exclusive appropriation of a portion of its streets and alleys, it may then in turn exact compensation in the nature of rental for the space thus occupied by the utility to the absolute exclusion of the rights of the general public. Not so, however, in the case of the commission, which is expressly denied the right to exclude the lines and appurtenances of public utilities from the units of the state highway system, and which must therefore be held to lack the right to impose a charge for the exercise of a privilege which it has neither the power to grant or to prevent. State ex rel. v. Kansas City Power & Light Co., supra."

It is our view that if the lagoon existed prior to the formation of the drainage district, no charge for connecting with the drainage ditch by the sewer lagoon could be made by the drainage district under subsection 1 of the above statute. This would also apply to any drainage systems that existed at the time the drainage district was organized.

If, as a matter of fact, the sewer lagoon was built and provision made for discharge of effluent after the drainage district was established, the provisions of subsection 2 would be applicable and the drainage district would have authority to make a charge for allowing the effluent from the city sewer lagoon to flow into the drainage ditch.

If the city and the board of supervisors of the drainage district cannot agree on the terms and conditions for allowing the effluent from the sewer lagoon to be emptied into the drainage system, the matter may be submitted to the circuit court which decision would be final and binding on the city and the drainage district as provided in subsection 3 of the above statute.

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CONCLUSION

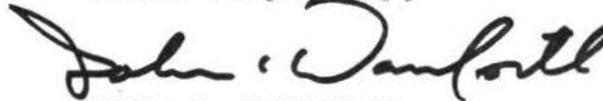
It is the conclusion of this office:

1. That a city in a drainage district organized under Chapter 242, RSMo, is not exempt from the maintenance tax levied by the board of supervisors of the district.

2. That a board of supervisors of such drainage district may charge for the privilege of allowing the overflow from a city's sewage lagoon to spill into the drainage ditch if the drainage from the sewage lagoon did not exist when the drainage district was organized.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,



JOHN C. DANFORTH
Attorney General