Randy L. Smith, P.E., P.S.
TRUMBULL COUNTY ENGINEER

650 NORTH RIVER ROAD, N.W. WARREN, OHIO 44483-2255
PHONE: 330-675-2640 FAX: 330-675-2642
www.countyengineer.com

Gary W. Shaffer, P.E.
Deputy Engineer
Herb W. Laukhart, Jr.
Director of Finance & Personnel
Tom W. Klejka
Highway Superintendent

February 12, 2018

City of Warren
Office of the Mayor
391 Mahoning Avenue, N.W.
Warren, Ohio 44483-4634

Re: Sewer Agreement between Warren and Trumbull County to provide service to Lordstown and Warren-Champion Subdistricts

Dear Mayor Franklin:

Thank you for your notification letter dated January 25, 2018, concerning the referenced subject matter. The Board of Commissioners have requested that I provide a response on behalf of the Trumbull County Sanitary Engineer's Office. Prior to addressing our concerns and position regarding the sewer agreement, I would like to provide some clarification to the version of events so described within your letter. You are correct that a meeting transpired on December 14, 2017 between the City and County for the purpose of negotiating a sewer agreement. The County participated in this meeting in good faith with the intent of achieving terms and consideration that were fair and equitable to both parties. I am certain that you can imagine the County's surprise when your counsel stated at the conclusion of the meeting "the compensation is non-negotiable" and the "sweetheart deal is coming to an end". I can provide you with sworn affidavits from the staff members attending the meeting attesting to these communications should you so desire, as I recognize neither you nor I were in attendance.

Based upon this initial position, the County notified various interested parties of a potential 278% fee increase. Further, there was an immediate concern for the County's largest customer, namely the General Motors Complex. For that reason, we had contacted a State Representative to inform him of a potentially catastrophic decision in regard to the rate structure. At no time were we seeking to have the Representative serve as a mediator, we simply desired to shed light on our concern and let it develop accordingly. Further, the County wanted to review other alternatives regarding water, sewer and the current rate equalization program. During times of a firm unilateral stance by the City, all options are on the table.

After a thorough review of your letter, I believe that it is responsible to respond to the issues raised and offer a framework for future discussions. You cite caselaw to support the City's assertion that you have the legal right to impose charges 150% (or more) to satellite communities and that Warren, as a host community is not legally obligated to provide sewer service to extra-territorial customers. I noted that two (2) of the three (3) caselaws that are cited concern water master meter rates and that the third caselaw is conditioned upon a petition for annexation. The sale and purchase of water is completely at the discretion of the seller and the consumer. I am

not aware of any Federal, State or Local laws that mandate a consumer to purchase water, even if a water line is present on their property. A consumer can decide to create their own water source for use and no legal mechanism exists that forces such consumer to obtain water from a public source. Thus, the findings of facts in the cited cases are correct concerning applicability to the sale of water. Likewise, there is no legal mechanism, either through Federal, State or Local laws that delineates a territory for water service and as such a public entity can extend water service at its discretion pending contracts for land use from adjoining governmental entities. This is important to point out as it is the basis for difference in water and sewer rates.

Contrary to establishing water rates, sewer rate development must follow a prescript that will allow such rate to be approved pursuant to an EPA user charge system. A public entity that chooses to not follow guidance, as published by USEPA for rate creation, runs the risk of being denied for federal assistance for capital improvement. ORC 6117.51 (c) states in pertinent part that county commissioners may require premises to connect to the sanitary sewer except where the nearest boundary of right-of-way of the sewer is farther than 200 feet from the foundation of the building. This has led many local authorities to take the position that if the sewer right-of-way is 200 feet or less from the foundation of the home, then the sewer is accessible. Because the connection is publicly mandated, the consumer has no choice, and this is the greatest distinction between establishing water and sewer rates.

In order to establish guidelines, the USEPA developed the "User Charge Guidance Manual for Publicly-Owned Treatment Works" (attachment #1). In the "Introduction" at paragraph 6, USEPA utilizes care in cautioning the developer of rates as quoted, "The reader should be aware the EPA regulations have certain constraints and/or prohibitions that either modify or limit the range of activities available to wastewater treatment works managers in the development of a user charge system. These regulations must be followed in order to receive a construction grant." To me, this would suggest that the City of Warren will place itself at risk of federal assistance in future capital improvement if it fails to follow USEPA guidance in establishing rates.

Further, the Clean Water Act (CWA) established specific provisions and law for establishing sewer use rates. Section 201 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500 provided the way in which municipalities within each state could obtain Federal grant funding for construction of sewer systems. As a stipulation to receiving these grants, Section 204 (b) of the Act requires that each grantee develop an approved system of user charges. These charges must accomplish the following:

1. Ensure that recipients of wastewater treatment services pay their ***proportionate*** (emphasis added) share of O,M&R…O,M&R is defined as:
    a. Operation and Maintenance: Expenditures incurred during the useful life of the treatment works for materials, labor, utilities and other items…
    b. Replacement: Expenditures incurred for obtaining and installing equipment, accessories or appurtenances during the useful life of the treatment works necessary to maintain the capacity and performance for which the facility was designed…

2. Generate sufficient revenues to provide for the proper operation, maintenance and replacement of the treatment works.
3. Ensure that municipalities receiving wastewater treatment service adopt the user charge system and pass through proportionate charges to the end user. ***The user charge systems adopted by individual participating municipalities may differ from that of the grantee as long as the charges to the end users are proportionate…*** (emphasis added).

Unlike water districts, where there is no regulatory requirement for establishing them, sewer districts were delineated pursuant to mandates in the CWA. This would appear to be in contrast to the advice your legal counsel provided you concerning host communities. In the early 1970's, the Governor of Ohio, under the provisions of the Clean Water Act, designated Eastgate, formerly Eastgate Development and Transportation Agency (EDATA), as the planning agency for Mahoning and Trumbull Counties. Under Section 208 of the Clean Water Act, each designated planning agency was to create and submit a plan identifying alternatives to wastewater management. Eastgate submitted their first 208 Plan in 1977 (attachment #2).

In addition to the 208 Plan, each planning agency must delineate the area that is assigned for a wastewater treatment facility. This is known as the 201 Facility Planning Area. Each Permit-to-Install (PTI) application to the Ohio EPA requires a determination whether or not the project conforms to the 208/201 Plan for the area. A 201 Facility Planning Area (FPA) is a demarcated area in which current and/or future wastewater is accounted for either within a designated wastewater treatment facility's service area or via a home sewage treatment system. The 201 Facility Planning Area (201 FPA) maps must be consulted to determine: 1) appropriate identification of FPA and receiving wastewater treatment plant, and 2) whether the project conforms with the wastewater treatment options available for said project area. The Ohio EPA uses the existing 201 Facility Plans as a guide to issue documents such as PTI's for sanitary sewer extension projects and National Pollution Discharge Elimination System (NPDES) permits issued for all discharges to waters of the State.

Both Lordstown and Champion are in the delineated 201 FPA for Warren's wastewater treatment facility (attachment #3) as are other lands in townships not served. This is mandated pursuant Warren's NPDES permit and PTI for Warren's collection system, pump stations, primary and secondary treatment facilities as well as the collection systems for Lordstown and Champion. Therefore, it would appear that Warren does not have the discretion to forgo treatment service to the delineated 201 Plan for which it is a part and would be in violation of said plan if it attempted to do otherwise. It should be noted that Warren received a Federal Grant for the construction of its secondary treatment facility in 1984. Secondary treatment costs were approximately $34 million of which Warren only paid, through an OWDA loan, approximately $8.5 million. The balance of the cost was a Federal Grant. I would assume that failure to follow the required guidance for establishing sewer rates could trigger an OEPA review of said rates and prior grant receipts.

Although I understand the perception that the County received a prior "sweet heart deal", let's consider the methodology. The County hired an Engineer, the City hired an Engineer and a third Engineer was mutually agreed to by both the County and City. This team developed a 5 year rate structure following USEPA guidance but did not clearly address City only expenses and

shared expenses. Ultimately, the County did not agree with the proposed rates. In 1988, a panel of 3 Engineers was retained by the same procedure as above to arbitrate the dispute. The panel found in the City's favor but the arbitration was not binding. No action occurred on the rates for 8 years. The City did not impose outside rates; they continued the 1985 rates with a requirement that the County would escrow the difference from the disputed amount until such time as an agreeable rate could be reached. In 1996, the County and the City mutually agreed to new rates without Engineers or Lawyers. This was accomplished by following the USEPA guidance as attached.

Based upon my current understanding that the City is willing to, negotiations can continue at a mutually agreeable date. We will continue to pay the 2017 rates and will escrow the difference ($4.89/100 cf) in our accounts and hold the same until such a time as the dispute is resolved. However, imposing such a rate ($4.89/100 cf) would constitute full service as those rates are for users outside the City but are completely served by the City. Therefore, if such rate is imposed, the County would expect full service for the full-service rate including all maintenance and replacement costs associated with the collection systems for both Lordstown and Champion, including pump stations, as well as electrical cost compensation for the operation of said systems. We also would expect that the City hire the necessary staff and purchase the necessary equipment to provide such service. Failure to do so would probably constitute a violation of your OEPA approved sewer rates and would mandate a request for review by the OEPA. A better solution than this would be to follow the model that has already been established between the City and the County in 1986 and continue the 2017 rates until a resolution is achieved.

Having addressed statements contained within your letter with specifics facts concerning sewer rate development, please consider the following path towards resolution. Appropriate caselaw concerning sewer rate disputes between host communities and satellite communities they serve is found in *United States v City of Detroit, et al, USDC No. 77-71100*. The Court mandated that Detroit implement certain terms in its wholesale wastewater services contracts that mirrored the requirements as documented in part to USEPA guidance for establishing sewer rates. In summary, the Courts forced Detroit, who was attempting to charge a higher rate to suburban customers, to develop rate structures that met federal guidelines. These included rates that address proportionality, look-backs, cost allocation and flow measurement data as well as other factors.

Another more recent example (December 25, 2017) is a resolution that occurred between the City of Auburn, New York and surrounding communities. The agreement reached was the result of over a year of negotiations between the City and towns to adopt a fair wholesale sewer rate. In December of 2015, Auburn officials proposed raising the wholesale rate by 73% - from $2.49 per 100 cf to $4.31 per 100 cf. The officials did not agree with this increase so a financial consultant was selected to establish a fair rate. The firm recommended setting the wholesale rate at $3.98 per 100 cf. The officials still did not agree. Finally a study was conducted by GHD Engineering which mapped out the sewer system and performed a "Wholesale Wastewater Rate Study". These two tools were used to develop a rate based on actual use and costs, pursuant to USEPA Guidance and calculated the proportionate rate to be $2.78 per 100 cf which was agreed to by all parties (attachment #4 & #5). I would offer that these models are good examples for advancing a resolution for fair and equitable rates and hope you see them as a viable pathway.

Moving forward, I welcome the opportunity of having more direct dialogue. I truly appreciate your professionalism in contacting me directly to review and consider a positive direction. I trust that you are giving consideration to the fee schedule that I provided to you. Any substantial variance to this schedule will necessitate considerable and time consuming reviews of the overall operation.

Thank you for your consideration of this matter.

Sincerely yours,

Randy L. Smith, P.E., P.S.
Trumbull County Engineer

Attachments