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Randy Smith, P.E., P.S.
Trumbull County Engineer
650 North River Road, N.W.
Warren, Ohio 44483-2255

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

Dear Randy:

This is in response to your letter to Mayor Franklin dated February 12, 2018. That letter posited several putative legal impediments to the City's right to impose sewer rates greater than those it charges to its own residents. Whatever may be the source of the legal analysis—Mr. Brutz, the County's lawyer in this matter, stated that he was not—it is wildly inaccurate. The County Letter relies on vague allusions to EPA statutes, and fails to cite the relevant Ohio, or federal, case law. This letter will present the relevant law, and then briefly respond to the arguments contained in the letter.

Ohio Law

Of course, the starting point regarding the powers of an Ohio city is Ohio law. And the law regarding the authority of Ohio cities regarding the imposition of fees for the use of its utilities is crystal clear. Not a single Ohio court has ever ruled that the utility rates (water, sewer, electricity) charged by a municipality to an extraterritorial user were unlawful. This is to be expected, as the Supreme Court has squarely held that the courts are without legal authority to review utility rates charged by cities to extraterritorial users. *Fairway Manor, Inc. v. Summit County Com'rs*, 36 Ohio St.3d 85 (1988).

Fairway Manor involved a challenge by an extraterritorial user to water rates charged by the City of Akron. The user sought an order requiring the city to continue to supply water to it and contesting the proposed rate, which was higher than that charged to other customers. Citing Section 4, Article XVIII of the Ohio Constitution, the Court first held that a municipally-owned public utility is exempt from regulation by the General Assembly. As a consequence, "the degree of control which the courts will exert over such public utilities is strictly limited to protecting *residents of the municipality* from the imposition of rates which are unreasonable . . ." (Emphasis in original.) Turning to the question presented, the court rejected the plaintiff's demands that the court order (1) the city to provide water to it (2) at the same rate as other customers, stating:

> Municipally owned public utilities have no duty to sell their products, including water, to extraterritorial purchasers absent a contractual obligation. . .. [A] municipality does not assume a duty to continue supplying water in perpetuity to extraterritorial customers merely by virtue of having once agreed to supply it. This court has further held that the General Assembly is without power to require a municipality to furnish water to noninhabitants or to limit the price the municipality may charge for such service. The municipality has the sole authority to decide whether to sell its water to extraterritorial purchasers.

Internal citations omitted.

In 2017, the Ninth Circuit Court of Appeals reaffirmed *Fairway* in a case that is even more on point with the present dispute. In *Hudson v. Akron*, 2017-Ohio-7590 (9th Dist.), the City of Hudson challenged an *additional* surcharge—Hudson customers were already paying rates that were approximately 60% higher than those charged to Akron customers[1]—that Akron proposed to charge to Hudson users. Citing *Fairway Manor*, the Court concluded that since

> Akron has no obligation to provide water services to customers in Hudson absent a contractual agreement . . ., the most rudimentary extension of the [*Fairway Manor*] holding is that Hudson customers have no right to demand reasonable water rates from Akron, unless those rates are negotiated into a contract. To conclude otherwise would frustrate the high court's holdings . . . by allowing Akron's extraterritorial customers to demand essentially the same right to reasonable water rates as residents of the municipality, irrespective of whether the extraterritorial customers entered into a contractual agreement with Akron for water utility services.

To attempt to avoid the clear implication of these decisions, the County Letter argues that municipally-supplied sewer service is different than water, relying on (1) R.C. 6117.51, which authorizes counties to require residents within two hundred feet of a sewer line to connect and (2) the fact that the Lordstown and Champion subdistricts are within the City's CWA § 201 facility planning area. These contentions are deeply flawed.

First, the holding of the *Fairway Manor* case is not limited to water. The Court stated: "Municipally owned public utilities have no duty to sell their products, *including* water, to extraterritorial purchasers absent a contractual obligation." Clearly, the case encompasses municipally owned wastewater treatment utilities.

Second, the argument that, under certain circumstances a resident "does not have a choice" (because he may be required to connect to a sanitary sewer) is as a legal matter, a distinction

[1] Akron is merely one of numerous Ohio cities that charge their extraterritorial customers, both other governmental units that operate their own water/sewer distribution/collection systems as well as private entities, higher rates than they impose on their own residents, either via contract or ordinance.

without a difference—the *Fairway Manor* case encompasses **all** city-owned utilities—; and, as a factual matter, irrelevant. In the myriad instances where a potential customer does not have its own water well and cannot legally or practically drill one (as is true in virtually every developed area) or is not located in proximity to another public water system transmission line, the consumer "does not have a choice." In any event, in the present instance, the City is not ordering the County, or its customers, to connect to the City sewer system.

Federal Law

The Letter's reliance on Clean Water Act §201 (and §208)—"it would appear that Warren does not have the discretion to forgo treatment service to the delineated 201 Plan for [*sic*, of] which it is a part and would be in violation of said plan if it attempted to do otherwise"—betrays a woeful misunderstanding of the FPA process. Once again, the Letter fails to cite any court cases that support the contention. The reason is that there is none. As *Fairway Manor* holds, cities are not required to provide any of its utilities to non-residents. Moreover, the FPA does not, and could not, attempt to override the Ohio Constitution. The FPA does not mandate that Warren provide service to Lordstown and Champion Township, much less at a prescribed rate. What it does is functionally preclude those areas from being served by a different POTW unless the Facilities Plan is amended.

The Letter's references to other putative federal authorities is equally baseless.[2] Section 204(b), which authorizes USEPA to issue construction grants, is not applicable for a host of reasons. First, Warren is not applying for a federal grant. Second, EPA ceased providing construction grants pursuant to this section more than three decades ago. Third, it does not prohibit a grant recipient from charging what rates it chooses. It merely provides that EPA may refuse to issue a grant if the rate structure doesn't comport with the statute. Most importantly, in the fifty years since the CWA was enacted, no court has ever struck down a city's user fee system on the basis that it didn't comply with §204 (or §201). The reported cases all address situations where USEPA has insisted that a grant recipient be able to collect sufficient revenues to support the POTW that was being awarded a grant.

CONCLUSION

Randy, the purpose of devoting so much ink to the legal analysis is so that the County does not take a position in the negotiations based on the misapprehension that Warren does not have authority to impose the sewer fees that it deems appropriate. Having said that, I have had the chance to speak directly with the Mayor and many of the other City's representatives, and there is a sincere desire on the City's part to make the transition from the previous contract to a new

[2] The County's reliance on *United States v. City of Detroit,* Case No. 77-71100 (U.S. D.C., E.D. Michigan) is impossible to verify. That case has been pending for over forty years and the court has issued hundreds of orders, and the Letter does not indicate which ruling it believes is pertinent.

arrangement without the need for litigation, if possible. But any such arrangement will need to recognize that the City sewer customers will not be treated less well than the County.

At our last meeting, we presented the County with a new offer regarding a user fee schedule. I trust that at our next meeting—our team is available from 9-11 on April 16, and at 8-10 and 1-3 on April 19—the County will come prepared with an offer that will materially bridge the gap between the parties on the financial issues, a time frame for meaningful I&I reduction, as well as the other outstanding issues.

Very truly yours,

Stephen P. Samuels

cc: Jim Brutz
Mayor Doug Franklin
Greg Hicks
Edward Haller
Robert Stahl

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