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DEPARTMENT OF LAW LETTER OPINION NO. 73-45-L (R-63)

REQUESTED BY: THE HONORABLE WILLIAM C. JACQUIN
President of the Senate

QUESTIONS:

1. Is it true that no clear authority, enabling or otherwise, exists for a county to engage in the operation of a sewer facility and, if not, by what authority does a county operate a sewer facility?

2. If such authority does not exist, how might or should the Legislature provide such authority?

3. If such authority does not exist, what are the legal ramifications of a county taxing city residents to provide operation of a county sewer facility from which they derive no use or benefit?

ANSWERS: See body of opinion.

First, as a general matter of law, a county derives its power and authority from the Arizona Constitution, Article 12, Section 4: "The duties, powers, and qualifications of such officers shall be as prescribed by law. . . ." A.R.S. § 11-251 lists the powers of a county: "The board of supervisors, under such limitations and restrictions as are prescribed by law, may * * *, and there follows the enumeration of 33 specific powers, in great detail.

It is well established that the powers of the county are entirely derivative. In Hart v. Bayless Investment & Trading Company, 86 Ariz. 379, 384, 346 P.2d 1101 (1960), the court said:

> . . . The authority of a county board of supervisors is in no way parallel to that of the legislature. It is a recognized principle

> of constitutional law that constitutions are not grants of, but limitations on, the powers of the legislature; that is, the legislature has all those powers not specifically precluded by constitutional terms. Earhart v. Frohmiller, 65 Ariz. 221, 178 P.2d 436; Roberts v. Spray, 71 Ariz. 60, 223 P.2d 808; Giss v. Jordan, 82 Ariz. 152, 309 P.2d 779. The law-making powers of the county, on the other hand, are entirely derivative. The Board of Supervisors can exercise only those powers specifically ceded to it by the legislature. Associated Dairy Products Co. v. Page, 68 Ariz. 393, 206 P.2d 1041; Maricopa County v. Southern Pacific Co., 63 Ariz. 342, 162 P.2d 619; Hartford Accident & Indemnity Co. v. Wainscott, 41 Ariz. 439, 19 P.2d 328; Board of Supervisors of Apache County v. Udall, 38 Ariz. 497, 1 P.2d 343; Board of Control of State of Arizona v. Buckstegge, 18 Ariz. 277, 158 P. 837. . . .

The same principle of law was upheld again in 1966 in the case of Robinson v. Lintz, 101 Ariz. 448, 420 P.2d 923.

A review of the powers of a county does not reveal any authority, express or implied, "for a county to engage in the operation of a sewer facility." Paragraph 30 of A.R.S. § 11-251 reads as follows: "Make and enforce all local, police, sanitary and other regulations not in conflict with general law." This does not appear to be specific enough to authorize the operation of a sewer facility when Paragraph 26 gives express authority to bury deceased indigents; Paragraph 31 to budget for funds for foster home care and other specific grants of authority.

It is the opinion of this office that, in order for the counties to operate a sewer facility, it would be necessary for the Legislature to amend A.R.S. § 11-251 by adding a paragraph expressly giving the counties authority to do this.

The conclusion of this opinion is further strengthened by A.R.S. § 36-1301 wherein the Legislature provides for the creation of a sanitary district and, as late as 1973, has made minor amendments to this section of the statute.

See also A.R.S. § 11-771.12.A, listing the powers of a "general improvement district" (A.R.S. §§ 11-771, et seq.), which is as follows:

> A. The district, acting through its board, may:
>
> * * *
>
> 3. Acquire facilities necessary for a sewage system and necessary sewage disposal and treatment plants.

If the Legislature had intended for the counties to have the authority to operate a sewer facility, it would have given them this authority directly in place of or in addition to providing for the creation of sanitary districts. The decision now would rest with the Legislature as to whether they wish to give the counties this authority.

The answer to the third question would lie in the nature of a taxpayer's suit against the county, and this is a matter in which any aggrieved taxpayer would best be advised by his or her private attorney.

Respectfully submitted,

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by F.S.

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