OPINION NO. 81-098

Syllabus:

It is proper to use waterworks funds for the maintenance and operation of fire hydrants for public purposes. (1929 Op. Att'y Gen. No. 697, vol. II, p. 1056; 1929 Op. Att'y Gen. No. 242, vol. I, p. 349; 1913 Op. Att'y Gen. No. 401, vol. I, p. 305, overruled in part.)

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, December 21, 1981

I have before me your request for my opinion on "whether waterworks funds may be used for the maintenance and operation of fire hydrants."

The power to operate a municipal utility is granted by the people in Ohio Const. art. XVIII, §4. This section, which is part of the Home Rule amendment adopted in 1912, states in pertinent part:

> Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service.

It has been held that, since the adoption of this amendment, the power of municipalities with respect to public utilities stems from this section and art. XVIII, §§5, 6, and 12. Together, these sections confer a self-executing plenary power upon any municipality to own and operate public utilities, to contract with others for the products and services of such utilities, and to fix the rates for such products and services; a legislative enactment purporting to restrict or limit this power is invalid. See Swank v. Village of Shiloh, 166 Ohio St. 415, 143 N.E.2d 586 (1957) (syllabus, first paragraph); State ex rel. Toledo v. Weiler, 101 Ohio St. 123, 128 N.E. 88 (1920); Dravo-Doyle Co. v. Village of Orrville, 93 Ohio St. 236, 112 N.E. 508 (1915) (syllabus, first paragraph).

Among those types of public utility which a municipality may undertake to operate is that of a municipal water system ("waterworks"). It has been held that "[i]n the construction and maintenance of a system for supplying water to its inhabitants, a municipality acts in a proprietary capacity." City of Barberton v. Miksch, 128 Ohio St. 169, 190 N.E. 387 (1934) (syllabus, second paragraph), approved and followed, Hall v. City of Youngstown, 15 Ohio St. 2d 160, 239 N.E.2d 57 (1968) (syllabus, first paragraph).

Fire hydrants have recently been held to be an incidental part of a waterworks. The second syllabus paragraph of Hall v. City of Youngstown, supra, states:

> The maintenance of fire hydrants, which are an incidental part of a city water system, is a function proprietary in nature, and a city is amenable to an action for any damages caused by its negligent failure to maintain in proper working condition the hydrants included in that water system.

Thus, the Ohio Supreme Court determined that waterworks system maintenance, including the maintenance of fire hydrants, is a proprietary operational function of a municipal utility. In Hall, the Court also limited the scope of prior decisions which held that a municipality is acting in a governmental capacity in the acquisition and allocation and subsequent use of waterworks resources for fighting fires.

Given that a municipal corporation acts in a proprietary capacity in operating and maintaining a waterworks, and the holdings of Hall that a municipal waterworks is charged with a duty to maintain in proper working condition the hydrants of its water system and that the fulfillment of this duty to maintain is a necessary incident to the operation of a water system, I conclude that waterworks funds may be properly used for the maintenance of fire hydrants.

I turn next to consider the remainder of your request, which asks "whether waterworks funds may be used for the. . .operation of fire hydrants." I assume from the context of your question that the "operation" to which you refer is the provision of water through a fire hydrant to fight a fire or for some other public purpose, without a corresponding charge being assessed by the waterworks upon that municipal department using the water.[1]

This question may be resolved by reference to statute. R.C. 743.27 provides:

> The legislative authority of any municipal corporation owning and operating municipal water. . .plants, may provide by ordinance that the products of such plants, when used for municipal or public purposes, shall be furnished free of charge.

It is beyond question that the operation of a fire department and the extinguishment of fires constitutes a proper public purpose. Wheeler v. City of Cincinnati, 19 Ohio St. 19 (1869). Under the plain language of R.C. 743.27, the legislative authority of a municipal corporation owning and operating a waterworks might choose to provide for the operation of the fire hydrants under the waterworks' control for fire department purposes "free of charge." Insofar as it is "free of charge" to the fire department, the cost of the provision of water would be unreimbursed to the waterworks, and ultimately be borne with waterworks funds. I thus conclude that waterworks funds may properly be used for the operation of fire hydrants for public purposes.

In your letter of request, you have alluded to Alcorn v. Deckebach, 31 Ohio App. 142, 166 N.E. 597 (Hamilton County 1928), R.C. 743.05, and 1929 Op. Att'y Gen. No. 697, each for the proposition that "maintaining and operating. . .fire hydrants from the waterworks fund" is improper.

The plaintiff in Alcorn challenged the propriety of a Cincinnati ordinance which provided that fire hydrants were to be purchased and installed into the municipal water system at the expense of the waterworks department with waterworks funds. The court held, 31 Ohio App. at 149, 166 N.E. at 599:

---

[1] I note that R.C. 743.09 not only permits but requires that a municipal waterworks provide water free of charge for "extinguishing fire, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes." These provisions have, however, been declared unconstitutional as a legislative attempt to limit the power directly granted by art. XVIII, §4. Swank v. Village of Shiloh, supra; Bd. of Educ. v. City of Columbus, 118 Ohio St. 295, 160 N.E. 902 (1928); Alcorn v. Deckebach, 31 Ohio App. at 147, 166 N.E. at 598 ("[i]n so far as [G.C.] 3963 [now R.C. 743.09]. . .attempt[s] to prohibit the city waterworks department from making a charge for supplying fire hydrants to the fire department. . .[it is] unconstitutional and void. . .").

> The line of cleavage between the waterworks department and the fire department, which departments must necessarily co-operate for the benefit of the city at large, must be drawn somewhere, and it is our opinion that this line should not extend in favor of the fire department beyond the main connection or unions, and that such line does not include the fire hydrants upon the side of and for the purposes of the waterworks department, but, on the contrary, excludes the fire hydrant, it being a contrivance for the benefit of, and the purposes of, the fire department.

Given the later holding of the Supreme Court in Hall, that fire hydrants are an incidental part of a city water system, and language in that opinion that "the question of where the water supply. . .ends, and firefighting. . .begins. . .[is] at the hydrant nozzle" (15 Ohio St. 2d at 165, 239 N.E.2d at 60), the determination in the Alcorn case that fire hydrants serve firefighting purposes to the exclusion of waterworks interests has been effectively overruled. Hence, I believe that the Alcorn case can no longer be cited as support for the proposition that fire hydrant expenses may not be borne by waterworks funds.

I note, however, that your question is directed to the maintenance and operation, and not to the acquisition and installation, of fire hydrants; Alcorn considered the operation of fire hydrants only insofar as was necessary to determine the "line of cleavage between the waterworks department and the fire department." Therefore, I do not find it necessary to address other aspects of this case, as they are not germane to the questions you have raised. See generally note 1, supra.

R.C. 743.05 deals with the disposition of any surplus funds remaining "[a]fter payment of the expenses of conducting and managing the water works." As noted above, Hall determined that fire hydrants are an incidental part of a waterworks system; as such, the maintenance costs for those hydrants constitute an expense of operating the waterworks. Similarly, if the legislative authority of a municipal corporation chose to provide that the operation of fire hydrants for some public purpose was to be "free of charge" under R.C. 743.27, to the extent that the waterworks was unreimbursed, such provision of free operation would constitute another expense of operating the waterworks. Therefore, I conclude that R.C. 743.05 is not determinative of your question, as the expenses of "maintenance and operation of fire hydrants" may properly be expenses of operation of a waterworks.

Finally, you have directed my attention to 1929 Op. Att'y Gen. No. 697, vol. II, p. 1056. This opinion and 1913 Op. Att'y Gen. No. 401, vol. I, p. 305, have been "cited as authority for the proposition that fire hydrants are not appurtenances of the waterworks" by a predecessor in your office. 1948 Op. Att'y Gen. No. 4250, p. 617 at 618. Insofar as 1929 Op. No. 697 and 1913 Op. No. 401 so hold, I find that they must be overruled in light of Hall, which held fire hydrants (at least once installed) to be an incidental part of a waterworks.

A predecessor in this office further opined in 1929 Op. No. 697 and his prior 1929 Op. Att'y Gen. No. 242, vol. I, p. 349, that a municipality could not properly choose to provide water "free of charge" for public purposes, such as is currently provided for by R.C. 743.27. He stated that the application of waterworks funds to cover such an unreimbursed use would constitute a "taking of private property for public use without compensation": that is, that unless some corrective limitation is

implied, a provision such as R.C. 743.27 would be constitutionally impermissible under Ohio Const. art. I, §19.[2] He opined that any shortfall due to "free of charge" service must be reimbursed to waterworks funds from general revenues to avoid this constitutional conflict.

Subsequent to these opinions, the Ohio Supreme Court considered the question of a municipal determination to furnish water "free of charge" for public purposes at waterworks' expense. In Swank, cited above, the court observed, 166 Ohio St. at 418, 143 N.E.2d at 588-89:

> In the Cleveland "free water cases" (State ex rel. Mt. Sinai Hospital of Cleveland, v. Hickey, Dir., 137 Ohio St., 474, 30 N.E. [2d], 802; 138 Ohio St., 389, 35 N.E. [2d], 444), this court upheld the power of a municipality to provide by ordinance for the furnishing of free water to certain charitable institutions. The court in the first of those cases cited several cases from other jurisdictions recognizing that a municipality operating a waterworks possesses the power to supply water gratis to public, religious, educational or charitable institutions.
>
> If the power granted to municipalities may not be legislatively restricted to prevent them from furnishing free water to private charitable institutions, a fortiori it should not be restricted to prevent them from furnishing free water to other municipal departments or to the public of each municipality as a whole.

The court concluded that in light of the constitutional grant of power in art. XVIII, §4 to operate a municipal utility, the legislature could not constrain a municipality from choosing to provide water "free of charge" for a public purpose at the waterworks' expense. The court further noted the existence of R.C. 743.27, to confirm "[t] his conclusion [as] the more reasonable."

By parallel reasoning and under authority of Swank, I overrule those portions of 1929 Op. No. 242 and 1929 Op. No. 697 which purport to require a municipality to reimburse waterworks funds from general revenues for water provided "free of charge" for public purposes.

Therefore, it is my opinion, and you are hereby advised, that it is proper to use waterworks funds for the maintenance and operation of fire hydrants for public purposes. (1929 Op. Att'y Gen. No. 697, vol. II, p. 1056; 1929 Op. Att'y Gen. No. 242, vol. I, p. 349; 1913 Op. Att'y Gen. No. 401, vol. I, p. 305, overruled in part.)

---

[2] 1929 Op. No. 242 states at 353:

> Inasmuch as the charging of a rate for the service of a public utility greater than the actual proportionate cost of the service and the diverting of the excess to a public use results in the taking of private property for public use without compensation in violation of Article I, Section 19 of the Constitution of Ohio, . . .
>
> . . .moneys equal to the amount of ["free of charge" service received] should be appropriated from the general revenues of the municipality and paid to or credited to the waterworks. . . .

Similarly, 1929 Op. No. 697 concludes at 1062:

> [A] municipal water-works cannot be required to furnish its product for fire department uses, free of charge. . .nor may it be permitted to do so, at least in so far as the revenues of the water-works are derived from water rentals because. . .such action would result in the taking of private property for public use without compensation therefor. (Emphasis added.)