Note from the Attorney General's Office:

1929 Op. Att'y Gen. No. 29-0697 was overruled in part by 1981 Op. Att'y Gen. No. 81-098.

695.

APPROVAL, BONDS OF CITY OF SPRINGFIELD, CLARK COUNTY—$32,935.52.

COLUMBUS, OHIO, July 30, 1929.

Industrial Commission of Ohio, Columbus, Ohio.

696.

APPROVAL, CONTRACT FOR ELIMINATION OF GRADE CROSSING NEAR CENTERBURG, KNOX COUNTY, OHIO.

COLUMBUS, OHIO, July 31, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Your letter under date of July 25, 1929, enclosing copy of a contract between the State of Ohio, through you as Dircetor of Highways and the county commissioners of Knox County and the Pennsylvania Railroad Company, for the elimination of the grade crossing over the Akron Division tracks of the Pennsylvania Railroad Company on State Highway No. 24, located one and one-half miles southwest of Centerburg, Knox County, Ohio, duly received.

I have carefully examined the proposed agreement and find it correct in form and hereby approve and return the same to you.

Respectfully,
GILBERT BETTMAN,
Attorney General.

697.

MUNICIPALITY—MAY EXTEND WATER MAIN TO SUPPLY WATER TO FIRE HYDRANT ON PRIVATE PROPERTY—LIABILITY FOR LEAKAGE IN SUCH MAIN—MAY COMPEL INSTALLATION OF METERS AT CUSTOMERS' EXPENSE.

SYLLABUS:

1. *The cost of installing fire hydrants for use of a municipal fire department, other than privately owned fire hydrants, and of supplying water to be used from the said hydrants for fire department purposes, should be borne by funds raised by taxation, and appropriated for that particular purpose.*

2. *The method of determining the cost of water supplied for fire department purposes by a municipally owned waterworks, should be such as to not amount to discrimination against other patrons of the waterworks.*

3. *The amount of water supplied by a municipally owned waterworks for fire protection purposes should be measured at the point where delivery is made by the waterworks, that is, in the case of a municipal fire department to the fire hydrants installed by the fire department.*

4. *The cost of installing fire hydrants on private property and supplying water for use therefrom for fire protection purposes, need not necessarily be borne from public funds. Such cost, or any part thereof, may lawfully be borne by the safety fund of a municipality if, in the judgment of the proper authorities, the circumstances merit it and such a course is not inimical to the public interest and is conducive to the efficiency of the service, otherwise, such cost should be borne by the private interests which are served. In any event, it may not lawfully be borne by revenues derived from the operation of a municipally owned waterworks.*

5. *A municipality may lawfully extend a water main to supply water to a fire hydrant on private property, the cost thereof to be borne from waterworks funds. It cannot be compelled to do so.*

6. *Any leakages in a water main of a municipally owned waterworks extending to a fire hydrant which is a part of the municipal fire department, no matter where located, should be borne by the water department of the municipality. If the hydrant is not a part of the municipal fire department, but is privately owned, leakages in the main leading to the hydrant should be borne by the customer if the leak occurs beyond the point of delivery of the water. If the leak occurs in that portion of the pipe between the pumping station and the point of delivery to the customer, the leak should be borne by the waterworks. The point of delivery, in such cases, may be the hydrant or it may be otherwise fixed by agreement.*

7. *The furnishing of water by a municipally owned waterworks is in the nature of the sale of a commodity and the only restriction on the right to contract for the sale of the product is that any such contract must be fair and not be unreasonably discriminatory as against other customers. Any method of measuring the amount of water consumed by a customer that will obviate the possible objection of unjust discrimination is proper. If the authorities so determine, customers may be required to install meters at the point of delivery of the water, for the purpose of measuring the volume of water delivered.*

COLUMBUS, OHIO, July 31, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "In the case of *Rogers* vs. *Cincinnati*, 13 Ohio App. page 472, it was decided that a Director of Public Service may require consumers of water to install meters at their own expense.
>
> The syllabus of Opinion No. 1188, page 639, Opinions of the Attorney General for 1918, reads:
>
> 'The director of public service is without authority to grant reductions of water rents on account of leaks which exist upon the premises of the consumer.
>
> The rules of the waterworks cannot contain a provision permitting the director of public service to grant reductions in water rents on account of leaks occurring on the premises of the consumer.'
>
> Section 3963, G. C. in part provides that water for extinguishing fires shall be furnished free of charge.
>
> QUESTIONS:
>
> 1. May city extend a water main to supply water to a fire hydrant located on private property free of charge?
>
> 2. When a water main is extended in a manufacturing plant located within a municipality for the purpose of supplying water to a fire hydrant

located on the property of such company, is said company liable for leakage in the main located on its premises?

3. May the Director of Public Service compel such manufacturing company to install a meter at its own expense at a point where the water main enters upon the property of such company?"

Section 3963, General Code, provides in part as follows:

"No charge shall be made by a city or village, or by the waterworks department thereof, for supplying water for extinguishing fire, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of the public school buildings in such city or village. * * * "

In the case, *The Village of Euclid* vs. *Camp Wise Association,* 102 O. S. 207, the court held that Section 3963, General Code, in so far as it required the furnishing of water free of charge to charitable institutions, was unconstitutional, because the requirement was held to be a restriction or limitation on the power of the municipality to acquire, construct, own, lease and operate water-works and was beyond the power of the Legislature to impose, since the municipality possessed the power to own and operate its water-works free from such restriction or limitation by reason of the adoption of Section 4 of Article XVIII of the Constitution of Ohio.

In the case, *Board of Education* vs. *City of Columbus,* 118 O. S. 295, it is held that that portion of Section 3963, General Code, which prohibited municipalities from making a charge for supplying water for the use of public school buildings or other public buildings in such city or village, is unconstitutional for a like reason to that given in the Camp Wise case for holding it to be unconstitutional to require municipalities to furnish free water service to charitable institutions, and for the further reason that it is in violation of Section 19 of Article I of the Constitution of Ohio, which section prohibits the taking of private property for public use without compensation therefor. The first branch of the syllabus of the court's opinion in the Camp Wise case reads as follows:

"By reason of the adoption of Section 4, Article XVIII of the Constitution, in 1912, municipalities may acquire, construct, own, lease and operate waterworks free from any restrictions imposed by Sections 3963 and 14769, General Code."

The syllabus of the court's opinion in the Columbus school case reads as follows:

"1. That portion of Section 3963, General Code, which prohibits a city or village or the water-works department thereof from making a charge for supplying water for the use of the public school building or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by Section 4 of Article XVIII of the Ohio Constitution, and is unconstitutional and void. (*East Cleveland* vs. *Board of Education,* 112 Ohio St., 607, 148 N. E., 350, overruled.)

2. That portion of Section 3963, General Code, above referred to is unconstitutional and void for the further reason that it results in taking private property for public use without compensation therefor, in violation of Section 19, Article I, of the Ohio Constitution.

3. Municipalities derive the right to acquire, construct, own, lease and operate utilities the product of which is to be supplied to the municipality or its inhabitants, from Section 4 of Article XVIII of the Constitution and the Legislature is without power to impose restrictions or limitations upon that right. (*Euclid* vs. *Camp Wise Ass'n.*, 102 Ohio St., 207, 131 N. E., 349, approved and followed.)"

The judgment of the court in the two foregoing cases is predicated on the court's holding that the provisions of Section 3963, General Code, involved in the two cases, are restrictions or limitations on the powers of a municipality to acquire and operate its own water-works rather than regulations of these water-works systems in the interests of charitable institutions and public schools.

Chief Justice Marshall, in his dissenting opinion, in the case of *East Cleveland* vs. *Board of Education,* 112 O. S. 607, which opinion was adopted by specific reference as the opinion of the court in the Columbus school case, supra, said that the basic question, "Shall the municipality control the public schools within its limits, or does that power rest in the State?" upon which the minority judgment of the court upholding the constitutionality of Section 3963, General Code, was based, was not pertinent to the inquiry. In the course of the opinion he said, on page 618:

"The majority of this court are of the opinion that the minority judgment is unsound because it is based upon a false premise and assumes an issue in no wise related to the controversy. The majority respectfully claim that this controversy is controlled, not by Section 3 of Article XVIII, pertaining to home rule, but by Section 4 of Article XVIII, pertaining to ownership, operation, and control of public utilities. * * * There has heretofore been perfect unanimity and harmony upon the proposition that by those amendments certain utilities within the state of Ohio have been placed within the entire control of the municipalities within whose boundaries their operations have been carried on. * * *

This delegation of power to a municipality directly from the hands of the people is plain, unambiguous, and unequivocal, and it is free from conditions; it is apparently self-executing, requiring no enabling legislation to complete the grant of power. Any legislation relative to this subject must necessarily be confined to regulatory measures. The majority of the court are therefore of the opinion that any attempt by the Legislature to impose conditions upon the grant must be ineffective. We are not declaring the entire statute unconstitutional, because the second paragraph of the section is clearly regulatory."

The requirements of Section 3963, supra, that "no charge shall be made by a city or village, or by the water-works department thereof, for supplying water for extinguishing fire" is just as clearly a restriction or limitation on the power of a municipality to own and operate its water-works as are the requirements that free water service be furnished to charitable institutions, public schools and for the use of public buildings, and for that reason I am of the opinion that the same rule with reference to the validity of that restriction or limitation should be applied as was applied by the Supreme Court in the Camp Wise and Columbus School cases with reference to the furnishing of water free of charge for charitable institutions and public school buildings or other public buildings.

It is clear that the construction placed by the Supreme Court on the provisions of Section 3963, General Code, was, that the restrictions and limitations therein contained are restrictions and limitations on municipalities as owners of public utilities,

and not necessarily restrictions on municipalities themselves, apart from their relationship to public utilities owned and operated by them. No consideration seems to have been given by the court to the first clause of the statute: "No charge shall be made by a city or village," as an independent clause.

Apparently, the court took this clause to mean the same as the second clause: "or the water-works department thereof." The two clauses were construed as being correlative and not independent. This fact is not specifically referred to in the opinion of the court, but all the language of the opinion and all the reasoning therein, are based on the effect of the limitations and restrictions in the statute as they relate to a public utility of a municipality and not as such limitation or restrictions might affect the city or village, independent of its utility. The cases are not decided with reference to legislative power of the state exercised through its general assembly, or with reference to the home rule powers of municipalities. The Chief Justice said, as stated above:

> "The majority respectfully claim that this controversy is controlled not by Section 3 of Article XVIII, pertaining to home rule, but by Section 4 of Article XVIII pertaining to ownership, operation and control of public utilities."

In the case of *Alcorn, on behalf of the City of Cincinnati* vs. *Deckebach, Auditor,* decided by the Court of Appeals of Hamilton County, and reported in the February 11th, 1929, issue of the Ohio Law Bulletin and Reporter, it appeared that a tax-payer's suit had been instituted wherein it was sought to enjoin the city auditor and city treasurer of the city of Cincinnati from paying, from water-works funds, for 300 fire hydrants.

It appeared that by ordinance No. 79, the council of the city of Cincinnati ordained Section 126-1 of its code of ordinances, as follows:

> "Section 128-1. The superintendent of water-works, with the approval of the city manager, shall install and supply with connections, all necessary fire hydrants for fire department purposes and for the efficient functioning of the water-works. The expense of purchasing and installing such equipment shall be paid from the water-works fund."

Said council later adopted as a part of its administrative code Section 10, Article VII, Department of Water-works, which reads as follows:

> "Section 10. No charge shall be made for supplying water for extinguishing fire, cleaning fire apparatus or furnishing or supplying fire hydrants and fire hydrant connections, or for the cleaning or use of any public buildings belonging to the city."

The charter of the city of Cincinnati, as amended November 2, 1926, contains Section 9 of Article IV, as follows:

> "Revenue derived from the water-works of the city shall be used for the purposes of the said water-works, and for no other purpose, and shall not be subject to transfer to any other fund."

The case seems to have been decided largely with reference to the provisions of the city's charter and the legislation of its council, referred to above. It will be observed however, that Section 9, Article IV, of the Cincinnati City Charter, limiting

the use of revenues derived from water-works strictly to water-works purposes, is substantially the same in that respect as in Section 3959, General Code, which was held to be constitutional by the Supreme Court in the case of *Cincinnati* vs. *Roettinger,* 105 O. S., 145.

It will also be observed that the provisions of Section 10, of Article VII, of the administrative code of the city of Cincinnati are substantially the same as those of Section 3963, General Code, although the Cincinnati Code Section specifically refers to "fire hydrants and fire hydrant connections," whereas the statute merely uses the expression "furnishing or supplying connections with fire hydrants and keeping them in repair."

Some comment is indulged in by the court with reference to the fact that the provisions of Section 3963, General Code, as enacted in 76 O. L. 84, included hydrants with connections to hydrants and that when the statute was amended, as published in 102 O. L. 94, the words "and hydrants" were eliminated. It is stated however:

> "In so far as Sections 3963 and 14769, General Code, or any other section of the Code attempt to prohibit the city water-works department from making a charge for supplying fire hydrants to the fire department of said city, or make a charge for installing said fire hydrants, said sections are unconstitutional and void, in that said sections violate the rights conferred on said municipalities by Section 4 of Article XVIII of the Ohio Constitution, and further result in taking private property for public use, without compensation therefor, in violation of Section 19 of Article I of the Ohio Constitution. *Board of Education* vs. *City of Columbus,* 118 Ohio St., 295."

After discussing the meaning and effect of the charter and ordinance provisions above referred to, and the definitions of "fire hydrants" and "fire department purposes" and "water-works purposes," and the line of cleavage between a water-works department and a fire department, the court concludes:

> "The peculiar revenue of the water-works department places it in a position where the disposition of such revenue is subject to close scrutiny and limitation, in order that its application to legitimate and appropriate water-works purposes may be secured. The interest of bondholders and water lessees, in our opinion, prevents a wider construction of the charter provisions than that stated. *The City of Cincinnati et al.* vs. *Roettinger, a Taxpayer, etc.,* 105 Ohio St., 145.
>
> In our opinion both Section 128-1 of the ordinances of the city of Cincinnati and Section 10 of Article VII of the administrative code of the department of water-works are in contravention with and violate the basic law of said city, to-wit: Section 9 of Article IV of the city charter, as amended November 2, 1926. Both the ordinance and the section of the administrative code provide for a payment out of the water-works fund not only not authorized by the charter provision referred to, but distinctly prohibited by it."

The syllabus of the case reads:

> "1. A duty on the part of a municipal water-works to install fire hydrants without charge is not imposed by the provisions of Section 3963, General Code.
>
> 2. The installation and maintenance of fire hydrants is a fire department rather than a water-works function.
>
> 3. An ordinance of Cincinnati ordering the installation of fire hydrants

at the expense of the water-works fund is violative of the city's charter provision which limits the use of water works revenue to water-works purposes."

Motion to certify by Henry Urner, city auditor of the city of cincinnati, successor to Alfred F. Deckebach and Stephen W. McGrath, city treasurer of the city of Cincinnati, successor to Wm. J. Higgins, plaintiffs in error, was overruled by the Supreme Court, March 6, 1929, case No. 21533.

It should be borne in mind that there is a wide difference between a municipality's relation to its fire department and to its water-works or other public utilities, and between the method of providing revenues for the maintenance of one and of the other. The former is maintained from revenues raised by general taxation, while the latter may be, and usually is, maintained by the assessment of so-called water rents, although those rentals may no doubt be supplemented, when necessary, with funds raised by general taxation. By whatever method water-works funds are procured, their use is limited strictly to water-works purposes; water rentals, by Section 3959, General Code, which the Supreme Court held to be constitutional in *Cincinnati* vs. *Roettinger,* 105 O. S., 145, and funds raised by taxation by the constitutional provisions limiting the use of such funds to the purposes for which they are levied. There is a distinct line of demarcation between the fire department of a municipality and its water-works. One is maintained by virtue of the police power, and the other by specific authority of Section 4 of Article XVIII of the Constitution of Ohio.

There is no authority for using the funds provided for a water-works department for the use of the fire department. In the light of the Camp Wise and Columbus School cases, supra, a municipal water-works cannot be required to furnish its product for fire department uses, free of charge, by reason of the plenary powers of a municipality, with respect to its water-works, 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, as stated in the second syllabus of the Columbus School case, such action would result in the taking of private property for public use without compensation therefor.

Inasmuch as a fire department must necessarily use the product of the water-works department in carrying out its purposes, some difficulty arises in drawing the line between the two departments.

That there is such a line has frequently been recognized even before the pronouncements of the Supreme Court in the Camp Wise and Columbus School cases, supra. In 1913, the Attorney General rendered an opinion addressed to your Bureau in which it was held:

"Revenues resulting from the operation of a municipal waterworks plant may not be legally used to purchase fire hydrants to be installed for fire protection purposes. Such expense must be borne by funds raised by taxation and appropriated from the safety fund for that particular purpose." Report of the Attorney General for 1913, page 305.

In a later opinion, Annual Report of the Attorney General for 1914, page 993, the same Attorney General held:

"Under the provisions of Section 3963, General Code, it is the duty of the director of public service, by the use of the water-works fund, and without charge against the safety department, to lay pipes and furnish other incidental connections for the purpose of furnishing water to fire hydrants.

The connections to be furnished are such connections as will carry the water to the fire hydrant, as furnished by the department of public safety."

In the light of the decisions of the Supreme Court, above referred to, which were rendered since the aforesaid 1914 opinion, holding the provisions of Section 3963, General Code, requiring that no charge be made by a municipal water-works for certain purposes therein enumerated as a limitation or restriction on the plenary power of a municipality to acquire and operate its waterworks, and therefore unconstitutional, the reasoning contained in the above 1914 opinion is not strictly applicable. In the course of the 1914 opinion, the Attorney General said, on page 994:

> "Under Section 4371 and related sections of the General Code, it is the power and duty of the director of public safety, in my opinion, to designate the *location* of any fire hydrant or plug and it is also his duty to purchase such plug or hydrant ready for connection with the water distribution system of the city. It is then the duty of the director of public service, under Section 3963, to lay down such pipes and to furnish such incidental connections as are necessary to carry the water from the distribution mains of the city water-works department to the fire plugs as located by the director of public safety. It is also his duty to keep such connections so furnished by him in repair.
>
> All this must be done by the director of public service as the chief administrative authority of the water-works department and with the use of water-works funds. Section 3963 prohibits him from making any charge against the safety department for such services. If it were not for this section, however, it would be quite proper for such a charge to be made as the expense is one which really ought to be met by the taxpayers and not the users of water. This statement, however, involves a general criticism of the policy of Section 3963, General Code; there can be no question as to the meaning of the section."

In 1916, there was submitted to the then Attorney General, for examination, a lease to the city of Dover granting to that city the right to lay and maintain a single-line cast iron water main under the Ohio canal at any point within the corporate limits of the city. The lease as submitted, was signed by "T. P. Peter, Mayor." The Attorney General refused to approve the lease as submitted, and returned the same with this comment:

> "If the water main to be constructed is a part of the water-works system of the city, the Director of Public Service should be authorized and directed to execute the lease, and if the water main is a part of the fire protection system of the city, the Director of Public Safety should be authorized and directed by council to execute the lease." Opinions of the Attorney General for 1918, page 1940.

There can be no question with respect to the right of a municipality to maintain a fire department, and to render to the inhabitants of the municipality the service afforded by such a department, the cost of which is to be met from general taxation. Whether this may be done by a municipality as a part of its inherent police power under the home rule provisions of the Constitution it is not now necessary to decide. Not only is the right to maintain a fire department, which necessarily uses water from some source, specifically given by statute (Section 3617, General Code), but specific authority is given by statute to the council of a municipality to provide by ordinance for furnishing, free of charge, the product of its municipally owned water, gas or electric plants for municipal or public purposes. (Section 3982-1, General Code). That the service afforded by a municipal fire department and the product of a municipal water-works, which is used by the fire department in affording its service,

are both such uses as are in furtherance of a municipal or public purpose is too well settled to admit of controversy. Cooley on Taxation, Fifth Edition, Sections 126 and 211.

The authority granted to the council of a munciipal corporation by Section 3982-1, supra, is, in my opinion, limited by the doctrine of the Supreme Court cases above referred to, to the furnishing of the product of its public utilities, free of charge, when provision is made for the reimbursement of the utility for the value of that product, which is furnished free of charge, from funds raised by general taxation.

This fact was recognized and discussed in my former opinion No. 242, addressed to your Bureau under date of March 6, 1929, in which it was held:

> "A municipality which owns its own water-works, gas or electric plant, may lawfully provide by ordinance of its council or other legislative authority to furnish free of charge the product of such plant for municipal or public purposes, if the cost of furnishing the same is met from the general revenue fund of the corporation and not prorated among the other patrons of the water-works, gas or electric plant who are charged service rates based on the cost of the management and operation of the plant."

In the course of the opinion, after referring to the second branch of the syllabus of the Columbus School case, supra, I said:

> "However, I can not believe that the Supreme Court meant by its holding in the Columbus School case, supra, to overthrow the well settled principle of law so thoroughly grounded in the law since the advent of organized government, that private property may be subjected to taxation for public purposes. The question of the right to tax, for public purposes, was not before the Supreme Court in the Columbus case, and the holding of the court in that case can not, and should not, in my opinion, be extended to cases involving the right to provide moneys for public uses by taxation."

A municipality is not required to maintain a fire department, or to provide protection for its inhabitants against fire. The authority to provide such protection is not mandatory. It derives its auhtority to provide for protection against fire from the police power, and in so doing it acts in a purely governmental capacity, and can not be held in damages for failure to provide such protection or for mistakes of judgment in locating fire hydrants or the extension of fire protection service, or even for discrimination in the affording of such service. If it assumes to maintain a fire department and extend fire protection to its inhabitants, the officials in charge of the safety department of the municipality may, in their discretion, locate fire hydrants wherever they see fit. If, in their discretion, they deem it to be to the best interests of the municipality and the efficiency of the service to locate a fire hydrant on private property they may lawfully do so, with the property owner's consent.

No matter where such hydrants are located, whether on private property or otherwise, if the hydrants are located and maintained by the safety department, as a part of the fire protection system of the municipality, such hydrants should be installed and maintained at the expense of the safety fund which has been appropriated from the general revenues of the municipality. If, however, the hydrants are to be installed by private individuals or concerns, for use in connection with a privately maintained fire department, the hydrant may be paid for from the safety fund, if the municipal officials choose to do so, or they may require the private user to install his own hydrant, as seems proper. In no event, however, should such hydrant be provided at the expense of the waterworks fund.

Your inquiry does not disclose the specific situation you have in mind. Situations may exist of isolated property far distant from an existing water main, to which fire protection service has not been extended, and where the circumstances are such that the municipal authorities, in their discretion, do not deem it advisable to extend the service and install fire hydrants so as to afford fire protection for the property. There are instances of manufacturing plants located at considerable distances from the more closely built up portions of a municipality, where the cost of extending fire protection would be so great as, in the judgment of the officials of the municipality, to be unfair to the rest of the municipality. Some industrial concerns, because of their distance from fire engine houses, maintain their own fire fighting apparatus and use private fire hydrants to which water is furnished from the municipal water-works.

Under such circumstances, if the owners of the property desire to install fire hydrants on their property, and connect the same with municipal water mains, at their own expense, and the municipal officials permit them to do so, there can be no objection to their doing so. The water at regular rates may lawfully be paid for, to the water-works department, under those circumstances, by the safety department of the municipality if it sees fit to do so. If not, the manufacturing company itself should pay for the water.

In short, it is my opinion that the expense of installing and maintaining fire hydrants should be borne by either the safety department of the municipality or by the owners of private property served by the fire hydrants, as may be determined and agreed upon by the officials of the safety department and the private owners.

The water department should charge for all water delivered by it, through and by means of all fire hydrants, and the same should be paid for by either the safety department of the municipality or private owners of property being served through private hydrants.

This charge should be on the basis of the regular rates established for water for fire department purposes. If meters are installed for measuring the water sold for public fire protection purposes, the same system should be followed for the sale of water for private fire protection purposes. It is not the purpose of this opinion to consider the question of rates, or the method of determining the amount of water sold by a municipality through its municipally owned waterworks. It is very probable that the courts would hold it to be lawful to determine the amount of water sold to any consumer, whether a municipal fire department or a private consumer, by any method that would amount to reasonably certain accuracy. Of course, the most accurate method is the use of water meters. It is also reasonably certain that the courts would hold it to be lawful to classify patrons of a municipally owned waterworks or other utility for the purpose of fixing rates to be charged for the product of its utility so long as the classification was proper, and obviated the possible objection of unfair discrimination. In any event, by whatever method the volume of the product sold is arrived at, or the rate charged, the measurement should take place at the point of delivery of the product.

This brings us to the question: Where is the point of delivery of the water? It has always been the practice of municipal authorities, and without objection ever having been made thereto, so far as I know, to consider the curb as the point of delivery of water to consumers of water for domestic purposes, although the meters, where meters are used, are usually placed at some point within the premises of the consumer. It was upon the theory that water was delivered when taken to the curb, or entrance upon the premises of the consumer, that the opinion of 1918, referred to in your inquiry, was based. Such questions, as well as those relating to rates and similar matters, are left, to a great extent, to the discretion of the muincipal authorities. Before the adoption of Section 7, Article XVIII of the Constitution of Ohio, the municipal authorities were authorized by statute, to make rules and regu-

lations for the government and management of the water-works. Since the adoption of Section 7, Article XVIII of the Constitution, the authority to do so comes directly from the Constitution.

The courts have gone no further in fixing the line of demarcation between a municipal fire department and a municipal water-works than to say that fire hydrants and water for fire department purposes must be paid for from the safety fund of the municipality and cannot lawfully be paid for from water-works funds. It has never been held that all expenses of a water department incident to the furnishing of water for fire department purposes must be paid from revenues raised and appropriated for fire department purposes. To hold that to be necessary, would require the payment from fire department funds for all connections to fire hydrants, water mains leading to the hydrants, increased cost of installing, maintaining and operating pumps and engines of sufficient size and power to supply water at sufficiently high pressure to be of use for fire department purposes, and of all high pressure mains which are used only for distribution of water for fire department purposes.

In my opinion, a municipality, in the sale of the product of its municipally owned water-works, should lawfully deliver that product to its patrons and the point of delivery upon sale for fire department purposes is to the hydrant to be supplied by the customer. It is therefore required to supply, from water-works funds, the mains for the distribution of the water and the connections to the hydrants. In cases where water is furnished for fire protection purposes to others than the municipal fire department, and for use independent of the municipal fire department, the point of delivery of the water may lawfully be fixed by contract and need not necessarily be to the hydrant or to the point of entrance of the property of the private consumer when the water main extending to the hydrant enters upon such property. Any leakages of water should be borne by the owners of the pipes or hydrants where the leak occurred.

The safety department of a municipality may lawfully locate fire hydrants at such places within the municipality as in their judgment is proper, either on private property or otherwise. If owners of property desire to install other fire hydrants for their private use, they may be permitted to do so, and the safety department, under those circumstances, may in its discretion furnish the hydrants, do the installing thereof, or furnish the water for use from said hydrant, or pay any part of the cost thereof, as may be deemed proper. In more specific answer to your questions, it is my opinion:

First, a municipality may lawfully extend a water main to supply water to a fire hydrant on private property, the cost thereof to be borne from water-works funds. It cannot be compelled to do so.

Second, any leakages in a water main of a municipally owned water-works extending to a fire hydrant which is a part of the municipal fire department, no matter where located, should be borne by the water department of the municipality. If the hydrant is not a part of the municipal fire department, but is privately owned, leakages in the main leading to the hydrant should be borne by the customer, if the leak occurs beyond the point of delivery of the water. If the leak occurs in that portion of the pipe between the pumping station and the point of delivery to the customer, the leak should be borne by the water-works. The point of delivery, in such cases, may be the hydrant or it may be otherwise fixed by agreement.

Third, the furnishing of water by a municipally owned water-works is in the nature of the sale of a commodity, and the only restriction on the right to contract for the sale of the product is that any such contract must be fair and not be unreasonably discriminatory as against other customers. Any method of measuring the amount of water consumed by a customer that will obviate the possible objection of unjust discrimination is proper. If the authorities so determine, customers may be

required to install meters at the point of delivery of the water for the purpose of measuring the volume of water delivered.

Respectfully,
GILBERT BETTMAN,
Attorney General.

698.

REFERENDUM PETITION—FILED BY REQUISITE NUMBER OF MUNICIPAL ELECTORS—SEVERAL NAMES WITHDRAWN—WHEN VALIDATED BY SIGNATURES ON SUPPLEMENTAL PETITION.

SYLLABUS:

When a petition has been filed pursuant to Section 4227-2, General Code, seeking to refer an ordinance or other measure of council of a village, additional parts of such petition may be filed pursuant to the provisions of Section 4227-4, General Code, within thirty days after such ordinance or measure has been filed with the mayor or passed by council of such village. The withdrawal of names from the first part of such petition filed does not invalidate such part of the petition so as to prevent the remaining names appearing thereon from being taken into consideration in ascertaining the total number of signatures to such petition appearing in its various parts and which have been filed within such thirty day period.

COLUMBUS, OHIO, July 31, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date is as follows:

> "The State Highway Department, the Franklin County Commissioners and the village of Westerville wish to join in paying the cost of improving the '3C's' Highway through the village. On June 25th a referendum petition in reference to the resolution of the village council was filed with the clerk of the village, signed by 214 electors, of which number 89 later withdrew their names, presumably voiding the petition which must be signed by 164 electors.
>
> On July 10th a supplemental referendum petition was filed, signed by 138 electors.
>
> Is the supplemental petition to be considered as an addition to the original petition requiring the submission of a resolution of council to vote of the electors at the next general election?"

Sections 4227-1 to 4227-13, inclusive, of the General Code, contain the statutory provisions relative to the initiative and referendum, as applicable to municipalities.

Section 4227-4, General Code, provides in part as follows:

> "Any initiative or referendum petition may be presented in separate parts but * * * each part of any referendum petition shall contain the number and a full and correct copy of the title of the ordinance or other measure sought to be referred. * * * "

Unquestionably, under these provisions the referendum petition need not be presented in one part and if such petition were originally filed in one part under the