OFFICIAL OPINION NO. 68

November 28, 1947.

Hon. John H. Lauer, Chairman,
State Highway Commission of Indiana,
State House Annex,
Indianapolis, Indiana.

Dear Mr. Lauer:

I have received your request for an official opinion upon the following questions:

> "1. Is the City of Kendallville or the municipally owned water and light utilities in Kendallville required at its expense to move the street light poles and fire hydrants in order to permit construction and widening of the streets as planned and as contracted by the State Highway Commission?
>
> "2. Can the City of Kendallville or their municipally owned water and light utilities legally borrow money to meet the cost of performing the work of moving the light poles and fire hydrants as mentioned in No. 1?
>
> "3. Is it the legal duty of the State Highway Commission to include the moving of light poles and fire hydrants as a part of the construction to be paid for with State Highway construction funds?"

Although your request does not so state, I shall assume that the equipment involved was installed within the limits of an existing highway right of way.

It is fundamental that all highways of the State, including streets and alleys in municipalities are held in trust for the public for highway purposes are under the control of the Legislature, directly or indirectly, and hence a city in exercising control of its streets and alleys acts under delegated power as an agent of the State.

> Farmers' etc. Telephone Co. v. Boswell Telephone Co. (1918), 187 Ind. 371;
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> City of Vincennes v. Vincennes Traction Co. (1918), 187 Ind. 498;

The power thus conferred upon cities or towns may be withdrawn at any time.

> Farmers' etc. Telephone Co. v. Boswell Telephone Co., *supra.*

There is no power resting in municipalities to barter away either the present or future control of streets, alleys or other public places, since the right of control is within the police power of the State and may not be alienated by any subdivision of the State having local control of public highways.

> Grand Trunk etc. R. Co. v. City of South Bend (1909), 174 Ind. 203;
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> Pittsburgh etc. R. Co. v. Warrum (1907), 42 Ind. App. 179;
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> Vandalia R. Co. v. State, *ex rel.* (1906), 166 Ind. 219.

If a municipality, in the exercise of a delegated state power could not so alienate it, then it follows that the municipality itself could not secure rights superior to the state power to control highways.

There remains the question of whether any statutory provisions control in this matter. Chapter 256 of the Acts of 1937, as amended by Chapter 278 of the Acts of 1945, contains the provisions for constructing and improving the roadway of streets by the State Highway Commission where a state highway is routed over that street. In so taking over a street the State Highway Commission is assuming direct control on behalf of the State of the public trust in the streets for highway purposes.

Section 2 of Chapter 256 of the Acts of 1937 (Burns' 1933, R. S. 36-2902) makes no express provision for the removal of hydrants or utility poles. Its general tenor, however, seems to indicate that as to those municipal conveniences and utilities which are maintained as appurtenant to a street, the burden is upon the municipality to make provision for them. In fact, the Commission may even contract with the municipality to bear a part of the cost of the improvement. The following are some pertinent excerpts from Section 2:

"* * * As part of the construction work, said commission shall construct within the limits of any such street, the curbs and gutters, manholes, catch basins and the necessary construction work to make connections with existing drainage structures and facilities; and if any such existing drainage facilities are inadequate the city or town affected shall upon notice from said commission as hereinafter provided construct or improve at its own expense such connecting drainage facilities as the commission may determine as necessary to conform to the drainage facilities installed by the commission. * * * Provided, that in all such projects the state highway commission of Indiana shall enter into an agreement with any city or town of the state under the provisions of which any such city or town affected may obligate itself to pay all or any part of the costs of such necessary right of way in case said commission acquires such necessary right of way by grant, purchase or condemnation, or to pay all or part of the cost of construction thereof, * * * If there are any tracks, pipes or conduits in such street, said commission is given the authority after determining to construct or improve such street to require and compel the owner or owners thereof to restore to good condition or renew such tracks, pipes or conduits, and it shall be the duty of said owner or owners within ninety (90) days after being notified to do so, to restore or renew such tracks, pipes or conduits, * * *. Nothing in this section contained shall in any way annul, limit or abridge the right of any such city or town, either at its own expense or at the expense of property-owners subject to assessment therefor, to improve the sidewalks and curbs along any such street forming the route of any such highway and/or to construct sewers and drains therein and/or to construct or maintain any portion of the roadway of such street not improved or maintained by said commission. * * *"

I find no authority in the above section which would permit the Highway Commission to pay the expense of moving fire hydrants or utility poles. In fact, the implication is to the

contrary: that the Highway Commission may only assume the burden of discharging the State's obligation to the public for adequate highway facilities. Other obligations to provide municipal services remain those of the municipality. I think that is true whether the municipality is engaged at the time in a proprietary or government function.

I am, therefore, of the opinion that the answer to your first question is in the affirmative, that the expense of removing street light poles and fire hydrants is that of the City of Kendallville. This opinion, however, is limited expressly to the fire hydrants and light poles. The answer to the first question necessarily answers the third. It is not the duty of the Highway Commission to include the expense of moving light poles and fire hydrants as a part of construction costs to be paid from State Highway funds.

In answer to your second question as to the authority of the City of Kendallville or their municipally owned water and light utilities to legally borrow money to meet the cost of performing the work of moving such light poles and fire hydrants, it is submitted that under the provisions of Section 48-1902, Burns' 1933, Clause Eighth, same being Section 1, Chapter 85, Acts 1913, general authority is given the Board of Public Works of any city to purchase or construct and to operate water works, gas works, electric light works, telephone, heating and power plants, etc., for the purpose of supplying such city and the inhabitants thereof with the use and convenience of such works.

The general supervision over the operation and maintenance of such utilities, unless acquired pursuant to a special statute for that purpose, is vested in the Board of Public Works under the provisions of Section 48-1219 Burns' 1945 Supplement.

City of Lebanon v. Dale (1942), 113 Ind. App. 173, 178, 179.

The right to acquire and operate such utilities would necessarily by implication carry with it the authority to maintain and repair the same, and a right to relocate the poles and fire hydrants required to be done by the city as herein pointed out, in order for such city to maintain and continue the operation of such utilities. On this question the Supreme Court of Indiana in the case of Letz Mfg. Co.

v. Public Service Commission of Indiana (1936), 210 Ind. 467, in ruling on the validity of the issuances of certain water works revenue bonds of the City of Crown Point, Indiana, said on page 477 of the opinion:

> "Since the contract entered into by the town of Oxford, as discussed in Underwood v. Fairbanks, Morse & Co., *supra,* was executed, special statutes have been enacted explicitly authorizing municipalities to enter into contracts for the purchase of water-works equipment, the extension and repair thereof, and to issue bonds payable from the revenues thereof, kept in a separate fund expressly for that purpose. Even without these statutes this court consistently held that municipalities had an inherent authority to make such improvements as those contemplated in the instant case, and to provide for the general welfare and health of their citizens. Such powers are not strictly confined, but are liberally construed for the purpose of permitting a municipality to provide for the welfare, health, comfort, and protection of its inhabitants."

In addition to the foregoing, it is provided in Sections 54-607 et seq. Burns' 1933, same being Section 103 et seq., Chapter 76, Acts 1913, as amended, that any municipality shall have the power to purchase or construct and operate a utility. Under Clause (b), Section 54-610 Burns' 1933, same being Section 106 of said act, as amended, authority is given to construct, acquire, purchase, condemn, operate and/or manage any utility, or make extensions or replacements thereto, and in connection therewith is authorized to issue its bonds or securities and pledge or assign the net earnings and profits of said utility, with the provision the same shall not constitute the general bonds or obligations of the civil city payable otherwise and from such utility.

> Southern Indiana Gas & Electric Co. v. City of Boonville et al. (1938), 213 Ind. 307, 310.

Of course, it is possible that these utilities may be operating under some special statute. For instance authority is given to operate a water works under Section 48-5301 et seq.

Burns' 1933, same being Chapter 235, Acts 1933. If so authority to issue bonds for the acquiring the same or for "extensions, additions, betterments and improvements" is authorized by Section 19 of said act, same being Section 48-5319 Burns' 1933.

Long v. Stemm (1937), 212 Ind. 204, 211.

Authority is also given fifth class cities to make extensions, additions or improvements to water works, where the same is unencumbered, under the provisions of Section 48-5441 Burns' 1933, same being Section 1, Chapter 259, Acts 1933, and authority to issue bonds for such improvements or extensions are authorized by Section 10 of said act, same being Section 48-5450 Burns' 1933. It was held in the case of Long v. Stemm, *supra.* at page 211 of the opinion, that the use of either of the last two referred to statutes was optional in such municipality.

From the foregoing, it is clear the city not only has an inherent power to take the necessary steps to properly operate such utilities and make the necessary revocation of such poles and fire hydrants, but adequate authority is given it under several alternative statutes to issue its bonds if necessary for such expenses so incurred.

OFFICIAL OPINION NO. 69

December 1, 1947

Miss Margaret E. Lake,
Secretary, State Board of Depositories,
Public Deposit Insurance Fund,
242 State House,
Indianapolis 4, Indiana.

Dear Miss Lake:

I have received your request for an official opinion on the following question:

> "* * * Are the funds, placed in custody of the Treasurer of a County Hospital Board, organized under the Acts of 1903 as amended, considered to be