Firehouse Lawyer

Volume 7, Number 3 *March 16, 2007*

Joseph F. Quinn, Editor

Joseph F. Quinn is legal counsel to more than 30 fire districts in Pierce, King and other counties throughout the State of Washington.

His office is located at:
7909 40th St. West
University Place, WA 98466
(in UP Fire Dept's Station 3-2)

Mailing Address:
P.O.Box 98846
Lakewood, WA 98496

Telephone: 253.589.3226

Fax: 253.589.3772

Email Joe at:
quinnjoseph@qwest.net

Access this newsletter at:
www.Firehouselawyer.com

Inside This Issue

Should Fire Departments Have to Pay to Use Hydrants?

We have never heard of a fire department being compelled to pay the water company or municipal water purveyor to use the water from fire hydrants to fight fires, or for other uses. Nonetheless, a recent case explores that possibility. In *Lane et al. v. City of Seattle et al.,* King County Superior Court No. 05-2-07351-9SEA, the City of Seattle and some other general purpose governments (smaller cities) joined several fire districts as third-party defendants, claiming that the fire departments should pay Seattle City Light for access to the fire hydrants owned by Seattle Public Utilities, but located in the fire districts or in the smaller cities that the districts serve, such as Burien. We have just learned that the claim against the fire departments has been dismissed, upon a motion for summary judgment. And well it should have been.

However, the case presents an opportunity to discuss the legal analysis related to use, maintenance, and operations of the fire hydrants. Let us start with this: the general operation of a municipal water system is a proprietary function. *Stiefel v. City of Kent,* 132 Wn. App. 523, 132 P.2d 1111 (2006). Under *Stiefel,* maintenance and use of hydrants for street cleaning may be a proprietary or a governmental function, depending on whom, when and why it was done. Purveying water to private parties such as construction crews for use at building sites is also proprietary, but purveying water to hydrants for fire suppression is a *governmental* function, the *Stiefel* court said. Since general purpose governments such as cities thus serve dual purposes when operating hydrants, both types of functions must be taken into account.

Discovery in the above-mentioned case revealed that the various cities acknowledged that they do allow water to be taken from hydrants regularly for various purposes, above and beyond fighting fires. The City of Shoreline's answers to interrogatories said water from hydrants was also used for slurry sealing, vactoring, and street sweeping, by the city or its contractors. Seattle admitted using hydrant water for water quality flushing, hydro-seeding of landscaping projects, flow tests, and construction sites. Except for the flow tests, all of the above are proprietary, not governmental uses, under *Stiefel.*

Another argument against imposing fees for hydrant use on fire

departments was that the cities and other general governments exerted more control over the hydrants. Seattle Public Utilities installed, repaired and replaced the hydrants in the public right of way. The general purpose governments, not the fire districts, enacted and enforced the fire codes in their respective cities. These fire codes determine hydrant placements. The fire district only used the fire hydrants to serve the citizenry, and within their statutorily limited purpose, as special purpose districts. In other words, the use of hydrant water was not unlike use of the traffic signals in response to emergencies. Moreover, there was no way to determine a quantifiable amount of hydrant use, or water taken, attributable to the fire districts or fire departments as opposed to other users.

It was also noted that fire departments sometimes use private property owners' hydrants and water systems to fight fires. In those instances, obviously the fire department is not charged for use of such water.

Probably the Seattle case is not unique in the nation. In *Alameda Water & Sanitation Dist. v. Bancroft Fire Protection Dist.,* 35 Colo. App. 192, 532 P.2d 60 (1974) the court held the fire district was not required to pay for hydrant water or maintenance, as the statute imposed no such obligation and hydrants were already maintained by the water district. This decision was upheld in *Alameda Water & Sanitation Dist. v. Bancroft Fire Protection Dist.,* 190 Colo. 195, 544 P.2d 979 (1976) in which the court pointed out the water district was obligated by statute to repair the hydrants for the fire district.

Because of legal doctrines like these, I usually advise my fire district clients that they not only have no obligation to pay for hydrant use, they also have no duty to maintain or "flow" the hydrants to ensure adequate water pressure or flow to use such hydrant to fight fires. Another good reason not to maintain the hydrants, but leave that to the water district or company, is the holding in the case of Shannon *v. The City of Grand Coulee,* 7 Wn. App. 919, 503 P.2d 760 (1972). In that case, after the plaintiff's property was destroyed by fire, the client successfully sued the water company (i.e. the city), which failed to provide water to the hydrant adequately for fire suppression. My concern is that, based on that case, if a fire district assumes the responsibility to maintain and pressure test the hydrants, it should expect to be held liable if the hydrant proves to be inadequate and someone suffers a loss or damages.

In *Shannon,* the court said it was the duty of the city (water company) to maintain an adequate supply of water for public safety. The Court of Appeals, Division III, said: "We have no hesitancy to hold that a city

maintaining a water system to which fire hydrants are connected has a duty to regularly inspect that system to insure an adequate supply of water flows to those hydrants. Only by so doing, does a city meet the statutory duty to provide an efficient water system, at least when that system is supportive of fire protection. The failure to so inspect over a 3-year period is a breach of that duty as a matter of law." 7 Wn. App. at p. 922. Due to this holding, we recommend fire districts not assume that duty to inspect or maintain, as that could lead to liability.

I have the transcript of Judge Spearman's oral ruling on the Seattle case, in case anyone wants to read his analysis.

MULTI-YEAR LID LIFT LEGISLATION

Most of my readers are familiar already with the so-called "1% lid", which refers to the statutory limitation that restricts taxing districts in Washington from increasing their property tax revenue by more than 1% from the previous year's tax levy, unless voters approve the increase. Also, since property values have generally been increasing annually far more than 1%, and since taxes are levied annually, each year the rate "erodes" somewhat, unless the lid is lifted. Some fire districts in western Washington present the voters with "lid lift" elections annually to maintain their property tax rates, for example, at $1.50 per thousand as approved long ago by voters. Of course, elections cost money. So, someone reasoned, why not allow these so-called "lid lift" elections to cover more than just one year? That could save thousands annually across the State of Washington in really unnecessary election costs. The upshot of that idea is two bills currently before the Washington House and Senate to allow lid lifts to last up to six years. HB 1369 and SB 5498 are the top legislative priority of the Washington Fire Commissioners Association this year; they seem to be progressing well as of this writing, with SB 5498 headed to the Senate Floor and the Second Reading Calendar.

In the meantime, clients have begun asking me questions about the ramifications of these laws, should one or the other be adopted into law. For example, I have been asked, "Does the new legislation apply to emergency medical services levies?" The answer seems clearly to be in the affirmative, as EMS levies have been held by the courts to fit within the definition of "regular property taxes". The same conclusion applies whether the levy is a six-year, ten-year, or permanent EMS levy. In other words, EMS levies are not excess levies as allowed by the constitution and other statutes.

Also, I have been asked when such a multi-year lid lift might first be placed upon the ballot, when one considers that the election statutes now require a longer "lead time" for filing the requisite resolution and ballot title (also explanatory statement and other material for the local voters pamphlet) than the former 45-day statute. I am assuming that this legislation, if approved, will bear the usual effective date, i.e. effective 90 days after adjournment of the legislature. That would mean an effective date in late July, which is still prior to the primary election, which now under the latest statutory revisions, is held in August. However, (the question was asked) will the elections departments accept the filing or election requests,

before the law is effective in July? In my opinion, the acceptance for filing of such election materials is a ministerial act, not a discretionary one. If the election, when held, is legal, I see no basis for a county auditor to refuse to accept for filing materials related to an election allowed by law, simply because the law is not in effect yet, on the day of filing. However, I would say that the auditor has no duty to accept materials before the statute is adopted by the Legislature and signed into law by the Governor. I am, in other words, limiting my opinion to laws that have been fully adopted but are not yet effective, at the time of the filing request.

SPEAKING OF THE 1% LID LAW…

As readers may recall, there is still an appeal pending of the Superior Court Judge Mary Roberts' ruling that the 1% lid law, enacted as Initiative 747, is unconstitutional. The briefing schedule is set before the State Supreme Court, but given the oral argument and decision schedules, it is not clear that the decision will be rendered early enough to affect this year's election "planning". Let us hope that the new legislation allowing multi-year lid lifts passes and is signed into law, as that would make that decision less important. Besides, as I have said before, the smart money would argue that her decision will be overruled by the high Court.

DISCLAIMER