STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION By KRIS MAYES ATTORNEY GENERAL February 14, 2023	No. I23-001 (R23-003) Re: County board of supervisors' authority to enter into a short-term agreement to supply water to county residents

To: The Honorable David Cook
Arizona House of Representatives

Question Presented

Can a county board of supervisors enter into a short-term agreement on an emergency basis with a government entity or private company to supply water to county residents who lost their previous water source and are awaiting the construction of a new permanent water system?

Summary Answer

Yes, a county board of supervisors has the authority to temporarily supply water to county residents to preserve public health and sanitation under A.R.S. § 11–251(17), (31). A county may do so through an intergovernmental agreement with a public agency with whom it shares a joint shared power, A.R.S. § 11–952, or by contracting with a private company, A.R.S. § 11–201(A)(3).

Discussion

The powers of counties in Arizona are limited to "those powers that are expressly or by necessary implication delegated to them by the legislature." *Marsoner v. Pima County*, 166 Ariz. 486,

488 (1991). "The issue must be approached from the affirmative, that is, what constitutional or statutory authority can the county rely upon to support its questioned conduct?" *Maricopa County v. Black*, 19 Ariz. App. 239, 241 (1973).

"The County has broad contractual powers." *Pima County v. S. Pac. Co.*, 95 Ariz. 41, 42 (1963). But the contract must "flow expressly, or by necessary implication" from the statutes authorizing the county's activity. *Sw. Gas Corp. v. Mohave County*, 188 Ariz. 506, 510 (App. 1997). As to intergovernmental agreements, these require that "each of the agencies has the power to perform the services or action contemplated in the contract pursuant to which they agree to allocate responsibilities between them." Ariz. Op. Atty. Gen. I84-135 (Oct. 1, 1984); *see* A.R.S. § 11–952(A).

Counties possess express statutory authority to preserve public health and sanitation. The board of supervisors of a county may "Adopt provisions necessary to preserve the health of the county, and provide for the expenses thereof," A.R.S. § 11–251(17), and may "Make and enforce all local, police, sanitary and other regulations not in conflict with general law." A.R.S. § 11–251(30). These statutes form part of a county's police power to "further the general health, safety, and welfare of their residents." *See Washburn v. Pima County*, 206 Ariz. 571, 576, ¶¶ 12–13 (App. 2003).

The territorial supreme court, commenting on a substantially identical statute, emphasized that the language used in A.R.S. § 11–251(17) "indicates a broad grant of power, and that it was intended to intrust to the board [of supervisors] a large discretion concerning the means to be employed for the preservation of the public health. It would not be the part of wisdom to unduly hamper with restrictions the exercise of so important a function." *Haupt v. Maricopa County*, 8 Ariz. 102, 106–07 (1902). In that case, the court held that counties possess the requisite power to contract with a property owner to take and destroy property to prevent the spread of infectious diseases. *Id.* at 107. In *Marsoner*, our supreme court analyzed a county's authority under A.R.S. § 11–251(17) and upheld a county ordinance regulating "adult amusement establishments" to prevent the spread of HIV. 166 Ariz. at 488. Similarly,

counties may pass and enforce ordinances regulating the use of septic tank sanitation. *Davis v. Hidden*, 124 Ariz. 546, 548 (App. 1979). This broad grant of power is not limitless, and does not extend so far, for example, as to allow a county to regulate the "production, processing, distribution and sale of milk and milk products." *Associated Dairy Products Co. v. Page*, 68 Ariz. 393, 397–98 (1949).

Our supreme court declared long ago that "one of the agencies most conducive to a high standard of public health is a pure and abundant water supply." *City of Tombstone v. Macia*, 30 Ariz. 218, 223 (1926) (upholding public purpose of city waterworks). Other courts have echoed the primacy of water to preserve the public health. *See, e.g., City of Columbus v. Mercantile Tr. & Deposit Co. of Baltimore*, 218 U.S. 645, 661 (1910) (endorsing statement that: "Public considerations of the highest obligation require that the city and its inhabitants shall have a continuous water service adequate to the preservation of the public health and the public safety."); *Souza v. City of W. Chicago*, 181 N.E.3d 276, 295, ¶ 58 (Ill. App. Ct. 2021) (noting a city's "ability to provide water to its citizens . . . indisputably implicates local public health"). Residents who lose water access face a public health crisis, including the potential spread of fire or disease, that makes ensuring a continued supply of water while a long-term solution is reached a public health function. *Veach v. City of Phoenix*, 102 Ariz. 195, 197 (1967) (water for fire protection); *Pinetop Lakes Ass'n v. Ponderosa Domestic Water Imp. Dist.*, 1 CA-CV 09-0395, 2010 WL 2146415, at *5, ¶ 19 (Ariz. App. May 27, 2010) (mem. decision) (clean water to prevent spread of disease).

Accordingly, when county residents lose their access to water, a county board of supervisors has the authority to temporarily supply water to preserve public health and sanitation under A.R.S. § 11–251(17), (31). This conclusion is derived from the broad applicability of the public health statute. *See Haupt*, 8 Ariz. at 106–07. Although a county lacks the express authority to operate a long-term water utility, *see Page*, 68 Ariz. at 396 (distinguishing powers of a county and municipal corporations), access to water serves important public purposes within the county's express power to protect public

health, *see, e.g.*, *Pinetop Lakes Ass'n*, 1 CA-CV 09-0395, at *5, ¶ 19 ("domestic water delivery benefits the general public health"); *City of Scottsdale v. Mun. Ct. of City of Tempe*, 90 Ariz. 393, 398–99 (1962) (operation of a sewage disposal plant is necessary for the preservation of public health); *Jones v. City of Phoenix*, 29 Ariz. 181, 185 (1925) (garbage collection is a governmental activity necessary for the preservation of public health); *see also Owens v. Glenarm Land Co.*, 24 Ariz. App. 430, 434–35 (1975) (Donofrio, J., specially concurring) (noting that "due to the uniqueness and critical need for water in the State of Arizona it is implied that the [board of supervisors] may enact an ordinance requiring proof of availability of water in furtherance of its duty to conserve and promote the public health, safety, and general welfare, an express legal power of the Board").

This conclusion is bolstered by noting that the circumstances contemplated here are readily distinguishable from the activities normally performed by public utilities. Based on the opinion request, we understand that the county would not be building or operating a water system; i.e. laying pipes under roads, supplying metered connections at residences, or constructing pumps, treatment plants or reservoirs. *Cf. City of Mesa v. Salt River Project Agr. Imp. & Power Dist.*, 92 Ariz. 91, 99 (1962) (noting the "large investment" the District "made in generating equipment and the various works necessary to supply power to consumers" and "by its investment has committed itself to a public utility undertaking"). The temporary nature of the proposal further supports the conclusion that the county's activity would not be akin to that of a public utility. *See Trico Elec. Coop. Inc. v. Ariz. Corp. Comm'n*, 86 Ariz. 27, 38 (1959) (defining a public utility as one that carries "on an enterprise for the accommodation of the public, the members of which as such are entitled as of right to use its facilities"); *Ariz. Corp. Comm'n v. Nicholson*, 108 Ariz. 317, 320 (1972) (holding trailer park supplying water to tenants was neither a utility nor public service corporation, reasoning that it is "clear that while the supplying of water is usually a subject matter of utilities' service, this alone does not carry the presumption that all use of service in connection with such water is a dedication to public use").

Finally, the urgent need to address the loss of domestic water must be emphasized. *See Johnson Utilities, LLC v. Ariz. Corp. Comm'n*, 249 Ariz. 215, 217–18, ¶¶ 1–4 (2020) (commission can appoint interim director of water utility to protect public health and safety); *cf. In re Flint Water Cases*, 960 F.3d 303, 311 (6th Cir. 2020) (affirming denial of motion to dismiss based on qualified immunity to state and local officials involved with public-health water crises). The very purpose of the county's public health powers includes protecting residents when exigent circumstances arise. *See Haupt*, 8 Ariz. at 107 (noting a broad reading of the public health power is necessary for the board to adopt "measures, according to the peculiar exigencies of the situation which is presented"). Water is necessary for life and the loss of water is certainly an exigent circumstance.

Conclusion

When county residents lose access to their previous water source, and there will be a delay before regular service can resume, counties have the power to preserve public health and sanitation by contracting with a utility or another government entity to provide water on an emergency basis.

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