2121.

MUNICIPALITIES—COUNCIL OF MUNICIPALITY OWNING AND OPERATING WATER OR ELECTRIC LIGHT PLANTS, MAY BY ORDINANCE PROVIDE FREE USE FOR PUBLIC SCHOOLS AND THOSE AGRICULTURAL SOCIETIES THAT MAY RECEIVE SUPPORT FROM FUNDS RAISED BY A TAX LEVY.

SYLLABUS:

The provisions of Section 3982-1 *of the General Code, apply to the public schools and to those agricultural societies that may appropriate property for their needs and may receive support from funds raised by a tax levy. Parochial schools and churches are not, however, believed to be included in the phrase, "Municipal or public purposes."*

COLUMBUS, OHIO, December 31, 1924.

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

Gentlemen:—

In the following words and figures you have proposed two questions about which you desire advice:

"Section 3982-1 G. C., as enacted, 110 O. L. 126, provides:

> "The council of any municipality owning and operating municipal water, gas or electric light plants, may provide by ordinance to furnish free of charge the products of such plants when used for municipal or public purposes."
>
> Question 1. May the council of a municipality owning and operating water and electric light plants provide by ordinance for free water and electric light currents for the agricultural society at fair grounds, parochial schools and churches?
>
> Question 2. May council by ordinance provide for free water and electric current for public schools?"

Section 3982-1 of the General Code was discussed in an opinion of this Department found in the Opinions of the Attorney General for 1923 at page 798, answering the question as to free water to a hospital and also to the county children's home and free water and electricity to the McKinley Memorial Building. It is there said:

> "The effect of the exercise of the power delegated to council by Section 3982-1 G. C. is that it allows the council as the legislative body of a corporation, to take the property of the municipality and bestow it elsewhere upon either a person, corporation or association that renders a service deemed to be of such character as will by its use benefit the municipality or the public generally."

That is, the property of a municipal water, gas or electric light plant may be furnished free of charge "when used for municipal or public purposes."

In the opinion referred to "public purposes" were defined or described by reference to certain authorities cited in the opinion. However, these further citations are made herein.

I find in *Gilmer* vs. *Lime Point*, 18 Cal. 229, this definition of "public use":

> "Public use has been defined as one which concerns the whole community in which it exists, as contradistinguished from a particular individual or a number of individuals."

And in *McQuillan* vs. *Hatton,* 42 O. S. 202 at page 204, cited in the opinion above referred to, the court says:

> "Whether or not the use for which property is proposed to be taken is a public use, is a question of law to be settled by the judicial power."

The word "use" as a substantive term, is synonymous with practice, benefit and application. And the word "purpose" as a substantive, is synonymous with object, design, intention, aim and end. Hence, "public use" and "public purpose" are so closely related that what is included in the first will determine the aim, end or object of the second. Public use is the result flowing from a public purpose.

A municipal purpose is the public purpose restricted to the public within the limits of the municipality, although the aim or benefit may extend to a broader public.

The language of the section, stating as it does "when used for municipal or public purposes," indicates that the object of the bounty of the council need not be within the limits of the municipality, though, perhaps, it ought to be adjacent, near to or in its neighborhood.

Had you not included in your request for an opinion reference to free water for public schools and asked about free service of the plants mentioned in Section 3982-1 of the General Code to parochial schools and churches a citation to the former opinion would have provided an answer to your present inquiry. The inclusion of these things require further notice.

The relation of the state under the Constitution to its municipalities is well shown by the following authority:

In *Billings* vs. *Railway Co.,* 92 O. S. 478, at page 484, the opinion says:

> "It must not be overlooked that the municipal government, *as well after a charter has been adopted as before,* it is an arm or agency * * * a part * * * of the state. Every instrumentality established by a city or village under a home rule charter, adopted in accordance with the Constitution, rests upon the grant of the state itself, which has delegated to the municipality the capacity to exercise the power * * *. But the authority of the state is supreme over the municipality and its citizens as to every matter and every relationship *not embraced within the field of local selfgovernment.*"

Again speaking of home rule in order to point out its limitations in *Miami* vs. *Dayton,* 92 O. S. 215, the eighth part of the syllabus reads:

> "8. The doctrine of home rule does not now, and never did, have any application to the governmental affairs of the state, or the governmental affairs of a district within the state created by the state for the exercise of certain state sovereign powers."

In a recent decision of the Supreme Court it is held that Section 3, Article XVIII of the Constitution of Ohio, confers all powers of local self-government on every municipality of the state whether such municipality has or has not adopted a charter under authority of Section 7 of Article XVIII of the Constitution.

Perrysburg vs. *Ridgeway,* 108 O. S. 245.

In a still more recent decision of the Supreme Court it is held that the power

of a municipality owning and operating a municipal light and power plant is exercised under a proprietary power and acting within such power, it may use the same, in the absence of specific prohibition, as would an individual or a private corporation.

Travelers Insurance Co. vs. *Wadsworth,* 109 O. S. 440.

In *Niehaus* vs. *Board of Education,* reported in the Ohio Law Bulletin and Reporter of August 11, 1924, the court in its opinion says:

> "The status of a municipality in its relation to the sovereign state is not different, by reason or because of the adoption of Section 3 of Article XVIII granting to municipalities authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws, than it was prior to the adoption of that provision, or would be in case of its repeal."
>
> "There having been no general surrender of sovereignty over municipalities operating under a charter of their own adoption the sovereignty of the state extends throughout the municipality in all matters not clearly surrendered and that sovereignty may not be defeated by the enactment of an ordinance inconsistent with general laws."

The case just quoted involves a state police regulation and declares that a charter city ordinance cannot disturb the operation of the same.

The foregoing citation of authorities touching muicipalities whether operated under a charter or not is to the effect that the sovereignty of the state is supreme except as to those powers that are specifically delegated to them to exercise. Municipalities are declared to be arms or agencies of the state and as a consequence have limited capacity in the exercise of certain governmental functions and have full capacity in the exercise of all those powers embraced within what is styled by the Constitution as "all powers of local self-government."

Some agricultural societies are supported by a tax levy made by the county and have the right to appropriate land necessary for their needs. Having these privileges through statutory provisions they exercise functions or promote aims that are for a public purpose or a public use. For that reason Section 3982-1 of the General Code will apply to such societies.

Parochial schools and churches are supported by religious bodies or societies. Churches may be said to function for pious purposes. The activities of these concern the public generally although they are under the control of the organizations or associations which foster them. But while the ends or purposes to which churches and parochial schools may be for the benefit or uplift of the public generally, yet they are owned and directed under the authority of those fostering them, which control, may, at the will of those having the authority, be modified or changed without reference to the public which they aim to serve.

Having in mind what is hereinbefore said about public use and public purpose the essentials of a public use are thus stated in 15 Cyc. page 444:

> "Although it has been held that the test of a public use is whether the use will confer any great public benefit or be of any interest or advantage to the public, by the weight of authority is also essential to constitute a public use that the general public be to some extent entitled to control the property appropriated or to have the right to a fixed and definite use of it, not as a mere matter of favor or by permission of the owner, but as a right."

I find that former Attorney General Hogan, in a well considered opinion found in Opinions of the Attorney General 1914, Vol. 1, page 373, has ruled that a council

of a city is without power in any way to furnish water for a parochiall school without making a charge therefor. The headnote of that opinion reads as follows:

> "Under the provisions of Section 3963 G. C. the city council is without power in any way to furnish water for parochial schools without making a charge therefor."

If, as I believe, the proposition is tenable that a public use results from a public purpose, and if it is essential to constitute a public use that the general public be to some extent entitled to control the property appropriated or to have the right to a fixed and definite use of it, as a right, then parochial schools and churches, since they are under the control of the sects supporting or managing them, do not come within the phrase "municipal or public purposes."

Before the enactment of Section 3982-1 G. C., under the provisions of Section 3963 G. C. the public schools were entitled to free water service, except where the territory of the school district was more extensive than that of the municipality wherein the same was situated, in which case a proportionate charge for water is allowed. A school district is a district such as is spoken of in *Miami* vs. *Dayton,* supra, and is one exercising certain state sovereign powers. An ordinance is not required to afford to a school district free water service, although an ordinance passed under Section 3982-1 G. C. could operate to relieve a school district from paying the proportionate charge made for water above mentioned.

Since the public schools are supported by the state and constitute one of its mandatory duties to the people of the state they are clearly for a public purpose and may receive free electric current and free gas at the discretion of council.

It is, therefore, believed, and such is the opinion of this department, that agricultural societies that may be supported by taxation and may have the right to appropriate property and the public schools are for a municipal or public purpose and come within the provisions of Section 3982-1 G. C. Parochial schools and churches are not, however, believed to be included within the meaning of that phrase and are not, therefore, intended to be included in the phrase, "municipal or public purposs."

Respectfully,

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Attorney General.