It appears that although the company or association proposing to furnish electric service in pursuance of the application herein considered is styled a cooperative concern, the membership acquired by the making of the application and the payment of the proposed so-called membership fee does not entitle the so-called "Member" to share in any profits of the concern, nor does the "Membership" entail any responsibility for the losses or debts or liabilities of the concern. In effect, the so-called "Membership" is nothing more than becoming a customer for electric service, and the fee paid is nothing more or less in effect, than a "connection fee".

Looking beyond the form to the substance of the proposed transaction, I am of the opinion, in specific answer to your question that, a board of education may lawfully make the necessary expenditure from public funds under its control for the purpose of covering the so-called "membership fee" in the Guernsey Muskingum Electric Cooperative, Inc., in pursuance of an application in the form such as you enclosed with your inquiry.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

572.

RESTRICTIONS—BUILDING—LOTS IN ALLOTMENT OR DISTRICT—ENFORCIBLE BY PARTY WHO ORIGINALLY RESTRICTED USE OF PROPERTY, OR BY SUCH PARTY'S ASSIGNS, OR BY OWNERS OF OTHER PROPERTY IN ALLOTMENT OR DISTRICT—RIGHTS NOT LOST BY TAX LIEN FORECLOSURE AND SALE OF PROPERTY.

SYLLABUS:

Where building restrictions are placed on the lots in an allotment or district and are enforcible by the person originally restricting the use of such property or by the assigns of such person, or by th eowners of other properties of the allotment or district, such rights of enforcement are not lost nor abated by a tax lien foreclosure and sale of such lot.

COLUMBUS, OHIO, May 10, 1939.

HON. RALPH J. BARTLETT, *Prosecuting Attorney, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of a request from your office for my opinion, which reads as follows:

> "I have been faced many times with a difficult question on which I can find no statutes or decision pointing toward the solution of this problem. The problem is this:

Are restrictions placed upon properties for constructions of homes up to a certain value valid against a purchaser at a judicial sale under a foreclosure for a tax lien of the County."

Taxes, assessments, benefits and interest are definitely made first liens on real estate upon which proceedings are instituted to foreclose tax liens. Section 5713, General Code, providing therefor is in part as follows:

"The state shall have a first and best lien on the lands and lots described in the delinquent land list, for the amounts of taxes, assessments and penalty and accrued interest charged prior to the delivery of such list, together with interest on the principal sum of such taxes and assessments at the rate of eight per cent. per annum, from the date of the August settlement next preceding the delivery of such list to the date of redemption thereof, and the additional charge of twenty-five cents for the making of said list. If the taxes have not been paid for three consecutive years after certification, the state shall have the right to institute foreclosure proceedings thereon, in the manner provided by this chapter, and there shall be taxed by the court on said certification, the cost of an abstract or certificate of title to the property described in said certification, if the same be required by the court, to be paid into the general fund of the county."

In Volume 3 of Cooley on Taxation, Fourth Edition, page 2943, section 1492, it is said:

"The effect of making the tax lien, by statute, a lien prior to earlier liens and encumbrances, is, of course, to make the title of the tax purchaser superior to that of prior lienholders and encumbrances and to cut off all their rights except that of redemption."

The procedure in tax lien foreclosures is set forth in Section 4718-3, General Code, which, so far as appears pertinent, is as follows:

"The proceedings for such foreclosure shall be instituted and prosecuted in the same manner as is now or hereafter may be provided by law for the foreclosure of mortgages on land in this state, excepting that if service by publication is necessary, such publication shall be made once instead of as provided by section 11295 of the General Code, and the service shall be complete at the expiration of three weeks after the date of such publication. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his petition that the certificate has been

> duly filed by the county auditor; that the amount of money appearing to be due and unpaid thereby is due and unpaid and a lien against the property therein described, without setting forth in his petition any other or further special matter relating thereto, and the prayer of the petition shall be, that the court make an order that said property be sold by the sheriff of the county, or if the action be in the municipal court, by the bailiff, in the manner provided by law for the sale of real estate on execution excepting as hereinafter otherwise provided."

Section 5719, General Code, provides that after sale, the proceeds shall be used to pay costs, taxes, assessments, penalties, interest and charges and "the balance, if any, shall be distributed according to law". It is further provided that a husband or wife is not a necessary party for the purpose of barring dower. It will thus be seen that the intention of the Legislature is that tax lien foreclosures shall be conducted, with the few exceptions noted, in the same manner as mortgage foreclosure actions, that is, all parties claiming any interest in the title or interest by virtue of a mortgage, mechanics' lien, judgment lien, and the like, should be made parties defendant for the purpose of affording them the opportunity of presenting their claims or interests by answer or cross-petition and the premises thereafter sold free from such claims or interest. To assist the prosecutor in compiling a complete list of necessary and proper parties, it is provided, as shown in Section 5713, supra, for the cost af an abstract or certificate of title being taxed as costs. I think it may be agreed, without the citation of authorities therefor, that in a regularly conducted foreclosure action instituted by the holder of a paramount lien wherein all proper persons have been made parties to the action, the premises when sold are conveyed free from all subsequent and inferior liens. It follows that the same is true if such paramount lien is a delinquent tax lien, and in a properly conducted tax lien foreclosure action, the premises are sold and conveyed to the purchaser free from all liens and encumbrances.

In the opinion in the case of Kahle v. Nisley, 74 O. S. 328, the third branch of the syllabus of Nefner v. North Western Mutual Life Insurance Co., 123 U. S. 747, 31 L. Ed., 309, is quoted with approval as follows:

> "* * * the Supreme Court of the United States had before it for consideration the nature of the tax lien, and the effect of a tax deed. The third paragraph of the syllabus of that case is as follows: 'If the tax deed is valid, it clothes the purchaser from the time of its delivery, not only with the title of the person assessed for the taxes, but with a new and complete title in the land under an independent grant from the sovereign authority, which bars or extinguishes all prior title and incumbrances of private persons, and all equities arising out of them.' "

If, then, building restrictions are such liens as would be included within the limits of the above rule, they would be terminated by a tax lien foreclosure.

In 14 Am. Jur. 608, Section 193, it is said that restrictive covenants as to the use of land or the location or character of buildings or other structures thereon create easements. Such easements are frequently defined as negative easements. A negative easement has been defined in 15 O. Jur., page 20, Section 10, as:

> "One which curtails the owner of the servient tenement in the exercise of some of his rights in respect of his estate, in favor of the owner of the dominant tenements."

Building restrictions are ordinarily placed on property for the benefit of all lots in an allotment or for the benefit of other lots in a vicinity or section. Each lot thus becomes at the same time both a dominant and a servient tenement as to every other lot included in the plan or group, in that the owner of any lot in the group may require compliance of restrictions by any or all others.

In Jackson v. Smith, 153 App. Div. 724, 138 N. Y. S. 654, the court said:

> "An easement is a servitude upon, and differs from an interest in, or lien upon, the land. It is not a part of, but is so much carved out of the estate in the land, and inasmuch a thing apart from that estate as a parcel of the land itself conveyed from it. If the principle contended for by the respondents is sound, the owner of the dominant estate, who pays taxes upon a valuation which includes the value of his easements, must also, to protect his easements, pay taxes assessed on another's property, although the value of the easements is necessarily excluded from the assessed valuation thereof. * * * The property assessed and the property conveyed upon the tax sale must be the same. If the assessment is only of the servient estate, only that can be conveyed on a tax sale; and vice versa, if the conveyance on the tax sale, or the foreclosure of a tax lien, is all of the estate or interests in the land, freed from servitude as well as liens thereon, then the assessments must be based upon the land as land, regardless of servitude as well as liens. As has been shown, in making the assessments a deduction must be made for liens and the like interests."

To the same effect, it was held in Crawford v. Senosky, 274 P. 306 (Ore. 1929), that the foreclosure of a tax lien does not cut off easements that have been carved out of one property for the benefit of another.

Where land, restricted to certain uses, is sold for taxes, purchasers do not thereafter take title free and clear of all building restrictions.

The same principle is followed in the opinion of Tax Lien Co. v. Schultze, 106 N. E. 751, 213 N. Y. 9 (1914):

> "When an easement is carved out of one property for the benefit of another, the market value of the servient estate is thereby lessened, and that of the dominant increased, practically by just the value of the easement; the respective tenements should threfore be assessed accordingly."

In Volume 3, Cooley on Taxation, Fourth Edition, page 2944, Section 1494, it is declared as follows:

> "Ordinarily, a tax sale does not divest easements charged on the property sold. Thus, private easements of light, air and access of adjoining owners over the land sold are not extinguished by the tax-sale."

I also quote the following portions of the syllabus and opinion of Lesley v. Morris, 9 Phila. (Pa.) 110, which touch the subject of your inquiry:

> "1. A vendee of real estate, who has bargained for a good and marketable title, will not be compelled to accept the property if it is burdened with a building restriction which will impair its enjoyment or affect its marketable value.
>
> 2. Such a restriction created by the covenant of a former owner is not removed by a subsequent judicial sale for taxes.
>
> It would be a very dangerous doctrine to establish, that a covenantee who is not a party to the proceedings for the collection of taxes, and who had no notice of their existence, should, without any fault of his, be deprived of a valuable right—a right which is as much property as the land itself. Such a doctrine would furnish a very easy method by which covenantors and their assigns might evade the most solemn obligations, and fraudulently rid themselves of troublesome servitudes for which they have received a large price. Such a construction of the laws relating to the collection of taxes does not appear to be necessary in order to secure the payment of the tax, and would produce a manifest injustice without any important advantage of the State or the city."

In Northwestern Improvement Co. v. Lowry, 66 P. (2d) 792 (Mont. 1937), a restricted lot was sold for delinquent taxes. A subsequent holder opened a beer parlor on the lot in violation of the restrictions. In the

action for injunction that followed, the beer parlor host, operator and owner defended on the theory that the tax sale created a new spotless title, free from any former adverse interests, including restrictions. In deciding that the restrictions survive a tax sale, the court said:

> "A tax sale, though operating to give the purchaser a title free of encumbrances, does not divest the premises of a negative easement to which they are subject."

While there are a few authorities holding a contrary view, I think it will be found that generally they are from states having far more rigid provisions for delinquent tax sales than those found in Ohio.

It is, therefore, my opinion that in Ohio the rule is the same as the majority of holdings in other jurisdictions, that is, where restrictions including minimum construction costs on any lot are enforcible by the person originally restricting the use of such property or by the assigns of such person, or by the owners of other properties of the allotment or district, such rights of enforcement are not lost nor abated by a tax lien foreclosure and sale of such lot.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

573.

BONDS—CITY OF CLEVELAND, CUYAHOGA COUNTY, $5,000.

COLUMBUS, OHIO, May 11, 1939.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of the City of Cleveland, Cuyahoga County, Ohio, $5,000.00.

The above purchase of bonds appears to be part of a $400,000.00 issue of river and harbor bonds of the above city dated July 1, 1926. The transcript relative to this issue was approved by this office in an opinion rendered to the Industrial Commission of Ohio under date of October 17, 1936, being Opinion No. 6216.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,
THOMAS J. HERBERT,
Attorney General.