1958.

APPROVAL, BONDS OF NEWBURY TOWNSHIP RURAL SCHOOL DISTRICT, GEAUGA COUNTY—$75,000.00.

COLUMBUS, OHIO, April 11, 1928.

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

1959.

WATER WORKS—OWNED BY MUNICIPAL CORPORATION—MAY PROVIDE FREE WATER TO COUNTY CHILDREN'S HOME LOCATED OUTSIDE OF MUNICIPALITY.

SYLLABUS:

By virtue of the provisions of Section 3982-1, *General Code, the council of a municipal corporation owning and operating a waterworks may provide for free water for the use of a county children's home located outside of the city limits.*

COLUMBUS, OHIO, April 11, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication, which reads as follows:

"An act of the General Assembly to be found at page 126, 110 O. L., reads:

'(Amended Senate Bill No. 149)

To enact a supplemental section to be designated as Section 3982-1 of the General Code, authorizing municipalities to furnish gas, water or electricity free of charge to buildings used by municipalities for public purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That Section 3982 of the General Code be supplemented by the enactment of a supplemental section to be known as Section 3982-1 to read as follows:

Section 3982-1. 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: Does the council of a municipal corporation owning and operating a water works have power to provide for free water for the use of a county children's home located outside of the city limits?"

Substantially the same question which you now propound was asked my predecessor by the Bureau and received an affirmative answer, found in Opinions of the Attorney General for 1923, at page 798. The only difference lies in the fact that you now inquire with respect to a county children's home located outside the corporate limits of a municipality, whereas the previous question involved a children's home located within the corporate limits.

In my opinion the mere fact that the children's home is located outside of the corporate limits does not in any way change the conclusion reached by my predecessor. The geographical location of the children's home does not seem to have been given any weight in the consideration of the question. I note the following from that opinion, which indicates the reasons for the conclusions reached:

"The matter referred to by your first question is for a public purpose, at least in part, since part of the upkeep of the institution named is paid by taxation and a part of the services furnished by the institution is given the public without charge. The McKinley Memorial Building at Niles, Ohio, is a public building designed to accomplish a general public purpose or service. And the county children's home spoken of in your last question is used and operated solely in furtherance of the public welfare. It seems to me all of these matters spoken of in your questions come within the evident intention of the statute and each of them may or may not be the recipient of the bounty of the municipality dependent entirely upon the action of the council.

In *Village of Perrysburg* vs. *Ridgway*, Ohio Law Bulletin and Reporter, issued June 25, 1923, Case No. 17858, Supreme Court of Ohio, it is held that:

'The grant of power in Section 3 of Article XVIII of the Constitution is equally to municipalities that do adopt a charter as well as those that do not adopt a charter. * * * '

Section 3 of Article XVIII provides:

'Municipalities shall have 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.'

The exercise of the powers granted in Section 3982-1, G. C., seems to be purely a matter coming within all powers of local self-government but if that be not true to give permission for the free service mentioned in said section could not be in conflict with any general law in the nature of a police, sanitary or other similar regulation, since this section by giving such permissive authority avoids any such conflict.

The section under discussion grants council the privilege by ordinance to furnish without charge the service of the plants mentioned which it owns and operates when such service is used, first, for municipal purposes, and, second, for public purposes.

The distinction between these two uses is not set out in the section nor is either of them defined therein. Council is, therefore, left to exercise its

judgment as to what is a use for municipal as well as a use for public purposes. This discretion, when exercised so as not to abuse the spirit or purpose intended or in excess of the scope of the law, it is safe to say, may be disturbed only by modification or repeal by the same or subsequent councils. Each of these uses, however, must be for a public purpose. Use for a municipal purpose is a public use and may be assumed to be one that benefits the inhabitants of the municipality only, while a use for a public purpose, one that will benefit a broader public, such as the county, state or nation, as well as, at the same time, the citizens of the municipality."

The maintenance of the county children's home is for the equal benefit of all persons within the county, irrespective of whether or not they live within a municipality. All county property is taxed for its maintenance and, if property within the municipality may be taxed for this maintenance, it can only be upon the theory that such maintenance is for a public purpose.

It may be well to suggest that there is perhaps no necessity for resort to the provisions of Section 3982-1 of the Code to find the authority of council to furnish the water to the institution in question. The provisions of law governing the powers of municipalities in the administration of public utilities and found in Sections 3955, et seq., are of questionable force in view of the recent decision of the Supreme Court in the case of *Board of Education* vs. *City of Columbus,* decided April 5, 1928. In that case Section 3963 of the Code was held unconstitutional at least in so far as it required municipalities to furnish free water to schools. The Supreme Court, in reversing the rule announced by the minority of the court in the earlier case of *East Cleveland* vs. *Board of Education,* 112 O. S. 607, evidently followed the dissenting opinion of Chief Justice Marshall, in the earlier case, holding that the pertinent provisions of the Constitution gave authority direct to municipalities to acquire, construct, own, lease and operate water works free from control of the Legislature.

In view of the present position of the Supreme Court, it would appear that the administration of a public utility is essentially a matter within the Home Rule power of a municipality and consequently, even in the absence of statutory authority, it may well be argued that the proper administrative body of the municipality may make provision for the furnishing of free water so long as it is furnished for a public purpose. Believing as I do, however, that furnishing water to a county children's home is for a public purpose, and so within the specific provisions of Section 3982-1 of the Code, it is unnecessary to base this opinion upon the right of municipalities under Home Rule.

I am, therefore, of the opinion that, by virtue of the provisions of Section 3982-1, General Code, the council of a municipal corporation, owning and operating a waterworks, may provide for free water for the use of a county children's home located outside of the city limits.

Respectfully,
EDWARD C. TURNER,
Attorney General.