OPINION NO. 74-086

Syllabus:

A municipality and a board of education may jointly sponsor a program through which warm meals are sold to senior citizens at approximately actual cost in a school cafeteria.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, October 11, 1974

You have requested my opinion on the following matter:

> "The City of Brooklyn and the Brooklyn Board of Education are jointly proposing to provide a warm meal program for Senior Citizens. Meals would be sold at the Brooklyn High School student cafeteria to Senior Citizens for consumption on the premises. The price will be close to the actual cost and, therefore, might vary from the students price. The money necessary to provide this meal service will come from presently available sources. No additional funding from any other source whether state or federal is contemplated. Does the language of the Ohio Revised Code, Section 3313.81 prohibit the institution of this program?"

R.C. 3313.81 does not expressly prohibit the arrangement you describe, nor does it authorize it. It merely permits boards of education to establish a food service for the use of pupils, employees and others patronizing a school-related activity. In pertinent part it reads as follows:

> "The board of education of any city, exempted village, or local school districts may establish food service, provide facilities and equipment, and pay operating costs in the schools under its control for the preparation and serving of lunches, and other meals or refreshments to the pupils, employees of the board of education employed therein, and to other persons taking part in or patronizing any activity in connection with the schools. * * *
>
> "Such facilities shall be under the management and control of the board and the operation of such facilities for educational food service purposes shall not be for profit. * * *"

I think, however, that authority for such a program is found in R.C. 3313.75 and R.C. 3313.77. R.C. 3313.75 authorizes the opening of schoolhouses for any lawful purpose so long as it does not interfere with the use of the facilities for school purposes. R.C. 3313.77 more particularly provides that:

> "The board of education of any city, exempted village, or local school district shall, upon request and the payment of a reasonable fee, subject to such regulation as is adopted by such board, permit the use of any schoolhouse and rooms therein and the grounds and other property under its control, when not in actual use for school purposes, for any of the following purposes:
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> "* * * * * * * * *
>
> "(B) Holding educational, religious, civic, social, or recreational meetings and entertainments, and for such other purposes as promote the welfare of the com-

munity; provided such meetings and entertainments shall be nonexclusive and open to the general public;

"* * * * * * * * *"

(Emphasis added.)

The cafeteria and equipment needed are property under the control of the board and the purpose of this program promotes the welfare of the community.

Under this statute, school facilities have been used for the instruction of parochial school students (Opinion No. 65-010, Opinions of the Attorney General for 1965); for labor union meetings (Opinion No. 3216, Opinions of the Attorney General for 1941); and for secret sessions of grange meetings (Opinion No. 3025, Opinions of the Attorney General for 1934, approving and following Opinions No. 2438 and 442, Opinions of the Attorney General for 1917). I see no reason why a warm meals program is not similarly authorized here. See also Opinion No. 74-063, Opinions of the Attorney General for 1974, and Opinion No. 1670, Opinions of the Attorney General for 1928.

Since the price of this service to the elderly will be close to cost, and since any additional amount necessary is readily available, the prohibition in R.C. 3313.81 and 3313.811 against the sale of food on school premises for profit, except for school purposes, is inapplicable. So long as the municipality, and not the school board, pays for any cost over the amount charged, the service will not be at the expense of the school district, and thus, Opinion No. 3486, Opinions of the Attorney General for 1938, ruling that a school board has no authority to permit the serving of meals to the members of a Parent Teacher Association, church, W.P.A. club or groups at the expense of a school district can be distinguished.

Furthermore, the sponsoring parties here being political subdivisions joining in a common program for the general public health and welfare, the prohibition against the use of school property for the carrying on of a strictly private business enterprise has no application here. See Weir v. Day, 35 Ohio St. 143 (1878).

Nor do I think there can be any question as to the right of a municipality to enter into a joint project of this nature. The Supreme Court, in Bazell v. Cincinnati, 13 Ohio St. 2d 63 (1968), described the powers of a charter municipality as follows:

> "By reason of Sections 3 and 7 of Article XVIII of the Ohio Constitution, a charter city has all powers of local self-government except to the extent that those powers are taken from it or limited by other provisions of the Constitution or by statutory limitation on the powers of the municipality which the Constitution has authorized the General Assembly to impose."

Noncharter cities may exercise the same powers of local self-government as charter cities, so long as the exercise of such powers is not inconsistent with the general laws of the state. Leavers v. City of Canton, 1 Ohio St. 2d 33 (1964). Since the project described in your letter is not at variance with any

statute, a noncharter as well as a charter municipality could undertake it.

The presumption of municipal legislative constitutionality was recognized in State, ex rel. Gordon v. Rhodes, 156 Ohio St. 81 (1951), where the court held in the syllabus as follows:

> "The determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality, subject to review by the courts, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable."

I applied such a presumption in an analogous case last year in Opinion No. 73-102, Opinions of the Attorney General for 1973, where I concluded that a municipal corporation may use public funds to support the program of a federally funded council of aging.

In specific answer to your question it is my opinion, and you are so advised, that a municipality and a board of education may jointly sponsor a program through which warm meals are sold to senior citizens at approximately actual cost in a school cafeteria.