It is my opinion that this order does not amount to a prohibition of the use of such school building for its intended purpose and that its issuance does not confer authority upon the board of education to resort to the unusual authority granted in said section 7630-1 G. C.

The above resolution further recites that a portion of the issue is to be used for the purchase of a site. It is the opinion of this department that section 7630-1 G. C. does not authorize the issuance of bonds for the purchase of real estate for a school building site.

For the reasons stated, it is my opinion that the bonds under consideration are not valid obligations of said school district, and I advise the Industrial Commission not to accept the same.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3737.

ROADS AND HIGHWAYS—WHERE COUNTY COMMISSIONERS MAKE AN ASSESSMENT UPON PROPERTY WITHIN VILLAGE IN CONNECTION WITH STATE AID HIGHWAY IMPROVEMENT UNDER SECTION 1214 G. C.—HOW UNPLATTED FARM LANDS ASSESSED.

When county commissioners acting under section 1214 *G. C. and related sections, make an assessment upon property within a village in connection with a state aid highway improvement, and part of the property to be assessed consists of abutting unplatted farm lands, the tax value of the whole farm is the amount upon which the thirty-three per cent. limitation named in section* 1214 *G. C. is calculated. The commissioners are without authority to treat that part of the farm running to the depth, or average depth, of nearby platted lots, as the unit for applying said thirty-three per cent. limitation. In apportioning the assessment however, the commissioners may consider whether the farm to its entire depth is benefitted in the same proportion as platted lots of lesser depth than the farm.*

COLUMBUS, OHIO, November 20, 1922.

HON. J. F. HENDERSON, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—You have recently submitted to this office the following:

"In the village of Hayesville, Ohio, the State is building a brick road to Jeromeville, being a part of the three C's road through Ashland County. Within the corporation of Hayesville the abutting property owners are being assessed by the foot front.

QUESTION. Where there are farm lands, not allotted, but within the village, how far back can we go in assessing the one-third valuation of the property? Can we go back further than the depth of the lots in said village upon the same road?

Subsequent correspondence with you has disclosed that the Council of the Village of Hayesville passed an ordinance granting permission for the building of the

road through the village, and authority to the county commissioners to make the assessment and collect the tax, etc.: that ten per cent. of the cost of the improvement is being assessed against property within the village, the village paying ten per cent. for street and alley intersections; that the village is not paying anything as a village other than the ten per cent. for the street and alley intersections and has nothing to do with the assessments; and that the resolution of the board of county commissioners as to assessment within the village makes reference in the preamble to Section 1214 G. C. and concludes with these words, in the resolving clause:

> "Resolved ****** that ten per cent. of the cost and expense of the above improvement be assessed against the property abutting on said improvement."

Doubtless the action of the village council was taken under favor of Section 1193-1, which is to the effect, among other things, that when the village assumes no part of the cost, no action on its part, other than the giving of its consent to the improvement, shall be necessary, in which event

> "All other proceedings in connection with said improvement, including the making of assessments, shall be conducted in the same manner as though the improvement was situated wholly without a village."

The basic statute covering assessment by county commissioners on account of state aid highway improvement projects undertaken on the application of the county commissioners is Section 1214 G. C. This section is too lengthy for quotation in full. It is sufficient to say that the section provides among other things that, subject to the right of the county commissioners to make changes in the proportions of cost to be borne by county, township and property owners, and in the "assessment zone" as to whether it shall be abutting lands or lands within one-half mile, etc.

> "******* Ten per cent. of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed thirty-three per cent. of the valuation of such abutting property for the purposes of taxation, ***** The county commissioners **** upon whose application the improvement is made shall cause the county surveyor to make a tentative apportionment of the amount to be paid by the owners of property specially assessed, which apportionment shall be made *according to the benefits* accruing to the land so located * * * *."
> (Remainder of section relates to notice, filing of objections, confirmation of assessment, etc.)

As will be seen, said Section 1214 confines the method of making the assessments to the *benefit plan.* In this respect, there is quite a contrast as between assessment for road improvement outside of municipalities, and that for street improvement by a municipality itself within the municipality. The municipal plan as set out in Section 3812 G. C. embodies three methods of assessment:

> "First: By a percentage of the tax value of the property assessed.

Second: In proportion to the benefits which may result from the improvement, or

Third: By the foot front of the property bounding and abutting upon the improvement."

The legal theory underlying all these municipal plans is that they will produce a result proportionate to benefits. Assessment according to percentage of tax value, or by the foot front, will as a general rule yield an individual assessment approximately proportionate to benefits conferred. Moreover, it is to be kept in mind that whatever plan is used, there is an overruling constitutional protection that an assessment must not exceed benefits (Walsh v. Barron, 61 O. S. 15; Walsh v. Sims, 65 O. S. 211). Likewise there is an overruling statutory protection in the municipal statutes that assessments within a period of five years are not to exceed thirty-three and one-third per cent. of the value of the property assessed, calculating such value after the improvement is made (Sec. 3819). But in practice, there must of necessity be difference in procedure in determining an assessment on one plan as compared with an assessment on another plan.

Reference to these several methods of assessment prevailing in this state has been made for the reason that when it comes to the actual fixing of the assessment, it is important to keep clearly in mind the general method that is being pursued. As already noted, the only plan laid down by Section 1214 is the general benefit plan. No statutory authority has been found which authorizes a board of county commissioners to treat unplatted lands within a municipality or elsewhere, as being limited for assessment valuation purposes to the same depth or the average depth of platted lands in the vicinity. Indeed, there would seem to be no logical necessity for an average depth rule in making an assessment on the benefit plan; because the question of benefits in itself involves the exercise of a wide discretion in the assessing authority as to the amount of the individual assessment, especially as in the case now at hand Section 1214 G. C. provides for the hearing of objections to the tentative assessment and the equalization of individual assessments. Logically there would be a good reason in the case of assessment on the tax value plan, or on the foot front plan, for limiting the value of assessed lands by the average depth of other lots in the vicinity; because those plans are somewhat arbitrary in operation when compared with the general benefit plan.

Again, since there is no statutory expression on the subject it is difficult to perceive on what basis the commissioners would proceed to fix the *tax value* of a given depth of unplatted farm lands. It will be noted that the thirty-three per cent. limitation of Section 1214 does not have reference to the *actual value* of property, whether before or after the improvement is made, but does have reference to the "valuation of such abutting property for the *purpose of taxation.*" Since the unplatted farm lands you mention are abutting lands, the statute would seem to offer no warrant for treating only a part of the farm as abutting for assessment purposes.

Another point which is believed to have at least an indirect bearing upon your inquiry is the legislative policy disclosed by Section 3813 G. C. relating to municipal assessment. This section reads as follows:

"Section 3813. In making special assessments by percentage of the tax value or by the foot front on lots or lands not subdivided into lots, when such lots or lands are not assessed for taxation, the council shall fix, for

the purpose of such assessment, the value of such lots as they stand and of such lands at what council considers a fair average depth of the lots in the neighborhood, so that it will be a fair average of the assessed value of other lots in the neighborhood. In making such assessments in either of such ways on lands not subdivided into lots but which are assessed for taxation, council shall fix the value and depth in the same manner, *but the above rule shall not apply in making a special assessment according to benefits.*"

We thus have the legislature itself laying down the rule as to average depth in the case of assessment by tax value and by the front foot, accompanied by the positive statement that the rule is not to apply in making a special assessment according to benefits.

In connection with Section 3813 G. C. it is perhaps proper to refer to the case of Kohler Brick Co. vs. City, 10 C. C. (N. S.) 137. To an understanding of that case it is proper to note that present Section 3813 G. C. had existed in an earlier form of Section 2269 R. S. Said Section 2269 was repealed with the passage of the so-called New Municipal Code of 1902 (see 96 O. L. 99); but it was substantially re-enacted two years later into what is now Sec. 3813, *supra*. Therefore, the section was not in effect at the time of the assessment proceedings passed upon in the case last above noted. In that case the Circuit Court in making reference to said Section 2269 R. S. said:

"But the last provision of that section is: 'And this section shall be applicable to special assessments provided for in this chapter, excepting assessments according to benefits.'

So that it is not apparent that there was ever a provision for thus limiting the scope of the lien of special assessments, where they were laid according to benefits, and there seems to be no particular reason why there should be such limitation in those cases. We are of the opinion that where it would be proper—where it would be just to the owner of the unplatted land to thus limit the scope of the lien—it is within the power of the council to do it, without any special provision upon the subject; and it seems to us that in a case like this, the lands extending a great distance from the street where the sewer was laid, when the council came to providing for the levying of an assessment upon the abutting property according to benefits, it would have been wrong and very unjust to the owner of the property to have considered its full depth and allowed the assessment to be spread over the whole extent of the territory. One might own farm lands extending back from the sewer so that the rear part, or all except the very front part of the lands, would be without the local benefits contemplated on account of which a special assessment might be levied. It is apparent that in a sanitary sewer of this description the only property that would be specially benefited would be the property lying immediately adjacent to the street where the sewer was laid; and it would seem to be not only proper, but just, but a thing that should be required of the council, that in considering the levy for this improvement it should take into consideration the depth of the ordinary building lots upon which houses might be built which could have access to this sanitary sewer for the purposes of such sewer. If the assessment had been levied without the restrictive limitation, *we think the plaintiff's lands might have been bound* by

it; but, in the absence of a showing that that they are prejudiced in any way by the course pursued by the council, we are of the opinion that they have no footing in a court of equity; and no express statutory provision upon the subject seems to have been violated or disregarded."

It might be argued from this language of the court that by parity of reasoning the county commissioners in the case now at hand would have implied authority to make a limitation of values upon platted farm lands by treating them for assessment valuation purposes as being only of the average depth of other lots in the vicinity. But the language of the court as just above quoted is not believed to be subject to such construction. As already pointed out, there was not in existence at the time of the assessment proceedings the positive statutory direction of Section 3813 that the average depth rule should not apply to assessment on the benefit plan. Again, the views of the Court as above quoted go to the point only of limiting the scope of the lien and not to the point of whether the whole of the unplatted tract could be taken into account in fixing the value for the purpose of the thirty-three per cent. limitation. The views of the court really turn on the point that the amount of the assessment should not be permitted by the assessing body to exceed benefits.

From what has been said above, it follows that the answer to your question is to be found, not in any procedure for assessing only a part of the unplatted farm lands, but in the principle that the assessment must be so adjusted as that the unplatted lands will not be bearing an undue proportion of the assessment share of the cost.

Since it is a fact that the farm abuts on the improved street, it is difficult to perceive how part of the farm is benefited without benefit to all of it. The farm is a unit; a benefit to a part of it is necessarily a benefit to all of it. On the other hand the county commissioners in making and equalizing the assessments will doubtless take into account that the farm for its entire depth is probably not benefited when compared with platted lots, upon the ratio of depth alone; that is to say, a farm 500 feet deep would probably not be benefited in ordinary cases to the extent of five times as much as would be a platted lot 100 feet deep. Hence, the board will be at full liberty in the exercise of a sound discretion to take all such facts into consideration and so limit the *amount of* assessment that it will be just and equal when compared with the assessment of platted lots of the vicinity. But, it is the view of this department that when applying equitable principles to the adjustment of the assessment, the board is bound only by the thirty-three per cent. limitation when calculated upon the tax value of the whole farm and is neither directed nor authorized by statute to treat only a part of the farm, whether by average depth or otherwise, as constituting the standard for the thirty-three per cent. limitation.

Your letter indicates that it is proposed to make the assessment on the foot front plan. Doubtless that plan would approximate equality as between property owners; but since the plan is not authorized by Sec. 1214 and related sections, it must, to the extent required by the exercise of a sound discretion in equitably apportioning the assessment share of cost, give way to the broader "benefit plan" prescribed by Section 1214.

Respectfully,
JOHN G. PRICE,
Attorney-General.