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1. LIBRARY—MUNICIPALITY MAY NOT AT PRESENT TIME LEGALLY ESTABLISH FREE PUBLIC LIBRARY—LEGISLATURE ABOLISHED POWER PREVIOUSLY GRANTED MUNICIPAL CORPORATION TO ESTABLISH LIBRARY—SECTION 3620 G. C., AMENDED BY H. B. 125, 97 G. A., 122 O. L., 166.
2. MUNICIPALITY MAY MAINTAIN AND REGULATE LIBRARIES ESTABLISHED UNDER SECTION 3620 G. C. PRIOR TO EFFECTIVE DATE OF H. B. 125.
3. SECTION 4004 G. C. AS AMENDED BY H. B. 125 AUTHORIZES MAYOR TO APPOINT TRUSTEES ONLY FOR MUNICIPAL LIBRARIES THAT WERE IN EXISTENCE PRIOR TO EFFECTIVE DATE OF H. B. 125.
4. COUNTY AUDITOR—MAY NOT LEGALLY MAKE DISTRIBUTION OF FUNDS TO MUNICIPAL PUBLIC LIBRARY UNLESS LIBRARY WAS IN EXISTENCE PRIOR TO EFFECTIVE DATE OF H. B. 125.

SYLLABUS:

1. It was the intention of the legislature by the enactment of Section 3620, General Code, as amended by House Bill No. 125, 97th General Assembly (122 O. L. 166,) to abolish the power previously granted a municipal corporation to establish a free public library and a municipality may not at the present time legally establish a free public library.

2. A municipality while without power to establish a free public library may nevertheless maintain and regulate those libraries established under the authority of Section 3620, General Code, prior to the effective date of House Bill No. 125, 97th General Assembly (122 O. L. 166.)

3. Section 4004, General Code, as amended by House Bill No. 125, 97th General Assembly (122 O. L. 166,) authorizes the mayor to appoint trustees only for municipal libraries that were in existence prior to the effective date of House Bill No. 125.

4. The county auditor may not legally make distribution of funds to a municipal public library unless such library was in existence prior to the effective date of House Bill No. 125, 97th General Assembly (122 O. L. 166.)

Columbus, Ohio, December 16, 1949

Hon. Guy G. Cline, Prosecuting Attorney
Pickaway County, Circleville, Ohio

Dear Sir:

Your request for my opinion is as follows:

"I have had submitted to me the following questions regarding the laws pertaining to free public libraries. During the years 1947 and 1948 the Village of Ashville maintained a free library which was during those years sponsored by the local civic club and other citizens, donors of books. During the years 1947 and 1948 the Budget Commission for the County of Pickaway allotted certain funds to the Circleville Municipal Library and to the Ashville Library. The funds the Ashville Library were paid to the Trustees of the Circleville Library under an agreement that said funds would be made available to the Ashville Library. The entire amount allotted to the Ashville Library was never paid by the Circleville Library.

"During the years 1947 and 1948 and prior thereto the Ashville Library was not an officially organized public library but relied mainly on interested parties to aid in its maintenance. At the commencement of the year 1949 the Mayor of the Village of Ashville appointed a Board of Trustees pursuant to G. C. Sec. 4004. The pertinent sections of the General Code pertaining to municipal libraries involved G. C. Secs. 3620, 4004 and 7627 to 7630. The availability of funds for such libraries from unclassified tax is pursuant to G. C. Sec. 5625-20 through which such funds are made available.

"The Budget Commission for Pickaway County allotted \$1600 to the Ashville Municipal Library for the year 1949. It is to be noted that this library, though in existence for several years was only officially organized in 1949. I have recently received a communication from the State Librarian to the effect that funds cannot be allotted to a municipal library organized after the effective date of H. B. No. 125, passed May 14, 1947, approved June 2, 1947.

"The question thus presented is whether the Auditor of Pickaway County may safely make distribution of public funds to the Ashville Municipal Library.

"G. C. Section 3620, as passed in 1947 is as follows: 'To establish, maintain and regulate free public band concerts * * * and to maintain and regulate free public libraries * * * established by the municipality prior to the effective date of this act. To purchase books, papers, maps and manuscripts * * * for such

libraries and to receive donations and bequests of money or property * * * for such libraries, in trust or otherwise, and to provide for the rent and compensation for the use of any existing free public libraries established and managed by a private corporation or association organized for that purpose.'

"G. C. Sec. 4004, as passed by the Legislature in 1947, Vol. 122, Ohio Laws, page 172, is as follows: 'Except as provided in General Code 4005-1, the erection and equipment, and the custody, control and administration of free public libraries established by municipal corporations, shall be vested in six trustees, not more than three of whom shall belong to the same political party, and not more than three of whom shall be women. Such trustees shall be appointed by the mayor, to serve without compensation, for * * * a term of four years and until their successors are appointed and qualified. In the first instance three of such trustees shall be appointed for a term of two years, and three for a term of four years. Vacancies shall be filled by like appointment for the unexpired term. Such board of library trustees shall organize in accordance with the provisions of Section 7627 of the General Code. In the exercise of their control and management of the municipal free public library, except as provided in Section 4005-1 of the General Code, such board of library trustees shall be governed by the provisions of sections 7627-1 through 7630-1, both inclusive, of the General Code.'

"The question of the State Librarian would seem to be that by adding the words 'established by the municipality prior to effective date of this act' (G. C. Sec. 3620) repeals by implication all authority of a municipality to establish a public library.

"During this year, 1949, the Board of Trustees of Circleville Municipal Library passed a resolution requesting the formation of a County Library District submitted to the Council of the City of Circleville where it was approved in accordance with G. C. Sec. 7643-1a (122 Ohio Laws 179), thus presenting the additional question pertaining to the formation of the County Library District. G. C. Sec. 7643-1a provides for the formation of a county library district by a resolution of a Board of Library Trustees where 'there is not in existence a county library district and in which all of the local, exempted village and city school districts in the county, in which there is not located a main library of a township, municipal, school district, association or county free public library, are receiving approved service from one or more of such libraries, there may be created a county library district in a manner hereinafter provided.'

"If in your opinion the Village of Ashville may legally establish a municipal library during the year 1949, then may the Board of Trustees of the Library of Circleville, Ohio, form a county library district in accordance with G. C. Sec. 7643-1a?

“From the foregoing facts it is requested that you furnish me with an opinion whether the Auditor may make the payment of the unclassified tax funds to the Ashville Public Library when approved by the Budget Commission.”

The primary question presented in your request is whether a municipal library may be established after the effective date of Section 3620 General Code, as amended by House Bill No. 125 of the 97th General Assembly. In order to determine the answer to this question it is necessary to examine Section 3620 General Code, as it existed prior to the 1947 amendment. At that time said section read as follows:

(A municipal corporation shall have power)

“To establish, maintain and regulate free public band concerts, free public libraries and reading rooms, to purchase books, papers, maps, and manuscripts therefor, to receive donations and bequests of money or property therefor, in trust or otherwise, and to provide for the rent and compensation for the use of any existing free public libraries established and managed by a private corporation or association organized for that purpose.”

(Parenthetical matter and emphasis the writer's.)

As amended by House Bill No. 125 of the 97th General Assembly, said section now reads:

(A municipal corporation shall have power)

“To establish, maintain and regulate free public band concerts *and to maintain and regulate free public libraries established by the municipality prior to the effective date of this act.* To purchase books, papers, maps and manuscripts for such libraries and to receive donations and bequests of money or property for such libraries, in trust or otherwise, and to provide for the rent and compensation for the use of any existing free public libraries established and managed by a private corporation or association organized for that purpose.”

(Parenthetical matter and emphasis the writer's.)

It is evident from a reading of Section 3620 both before and after its amendment, that the legislature must have intended some change in the power of a municipality to establish a library. This is evident from the purpose clause of House Bill No. 125. Said clause reads in part as follows:

“To provide for the recodification and revision of the laws of Ohio pertaining to public libraries. * * *”

In the case of *State, ex rel. Shaker Heights Public Library, v. Main, Clerk*, 83 Ohio App. 415, 51 Abs. 102, 38 O. O. 467, the court had under consideration House Bill No. 125. That case was an action in mandamus by the Public Library of Shaker Heights, to require the clerk of the Board of Education of the Shaker Heights School District to offer for sale certain notes authorized by the school board to be issued to provide funds for constructing a library building. The action was heard on the petition of the relator, the answer of respondent and a demurrer to the answer. The relator demurred to the answer on the ground that on its face it was not sufficient in law.

Since the facts are important, I shall set them out. In 1921 there was created under authority of Section 7643-1 et seq. General Code, *as then in effect*, the Cuyahoga County Library District. This district as so created included all the territory of the Shaker Heights School District. A board of library trustees was duly organized and proceeded to provide public library service for the county library district, including a portion of that district within the Shaker Heights School District. In 1937 the Board of Education of the Shaker Heights School District acting under the authority of Section 7635 et seq. General Code (115 O. L., pt. 2, 278) established a public library for the inhabitants of that school district, and created a board of library trustees which under the statute (Section 7638-1) was designated "The Shaker Heights Public Library". The budget commission of Cuyahoga County immediately allocated to the Shaker Heights Public Library (under the authority of Section 5625-24 General Code) a share of the classified property taxes collected in Cuyahoga County, with which taxes the Shaker Heights library trustees established and operated a public library in Shaker Heights School District. Thus, there were two library boards maintaining library facilities in Shaker Heights—the county library district board and the Shaker Heights board.

In 1945 the Shaker Heights Board submitted to the electors of the Shaker Heights School District the question of issuing bonds for the construction of a library building as authorized by Section 4005-2 et seq. The electors approved the issuance.

On January 5, 1948, the Shaker Heights Board of Education duly authorized the clerk of the board to sell anticipatory notes at a private sale as authorized by Section 2293-28 General Code. The clerk refused, saying that at the time the Shaker Heights Public Library was established,

there was, and still is in lawful existence and functioning, a county library district, including within its limits all the territory of the Shaker Heights School District.

According to Hurd, P. J., speaking for the court, two issues were present in the case:

"1. Whether the Board of Education of the Shaker Heights School District had jurisdiction in 1937 to establish the Shaker Heights Public Library, under the provisions of Section 7635, General Code, as it then existed.

"2. Whether the repeal of Section 7635, General Code, and the contemporaneous enactment of new Sections 4840-1 to 4840-5, inclusive, General Code (122 Ohio Laws, 166) either expressly or by implication terminated the existence of the Shaker Heights Public Library."

The statute under which the Shaker Heights Board of Education proceeded to organize the Shaker Heights Public Library is Section 7635 General Code, which in 1937 read as follows:

"The board of education of any city, village or rural school district, by resolution, may provide for the establishment, control and maintenance in such district, of a public library, free to all the inhabitants thereof. It shall provide for the management and control of such library by a board of trustees to be elected by it as herein provided, which board shall hold title to all such library property. Such boards of education shall also have the power for such purpose or purposes to purchase, erect, construct, enlarge, extend or improve a building or buildings for library purposes, including a site or sites therefor, and equipping and furnishing the same."

The court then stated at page 419:

"A careful analysis of this section clearly indicates a grant of power to the board of education of any city, village or rural school district to establish, control and maintain in such district a free public library. In pursuance of such purpose there is a further grant of power to purchase, construct and maintain buildings, including sites therefor.

"It would be difficult indeed to define a more comprehensive and all-embracing grant of power free from restrictions or limitations. It is true that as contended by the respondent the provisions are permissive and not mandatory. The argument of the respondent raises the question of whether the General Assembly, by the various enactments pertaining to libraries, intended that townships, municipal corporations, school districts and counties might all have overlapping libraries and stresses the fact

that under Section 3403 et seq., General Code, municipal corporations may likewise have libraries; that under Section 7635, General Code (115 Ohio Laws, pt. 2, 278), school districts may also establish libraries; and that under Section 2976-11, General Code, the same authority is granted to counties.

“It is conceded that these sections confirm the jurisdiction of these respective taxing units to establish libraries. Provisions are also found for levying taxes to support them, as well as other provisions for issuing bonds to provide funds to construct buildings. It is argued, however, that the services provided for are overlapping and that it is illogical that there should be such overlapping services.

“It is not within the province of the judicial branch of the government to question the wisdom of legislative enactments or even to question their logic. The primary purpose in the interpretation or construction of statutes is to give effect to the intention of the Legislature, as gathered from the provisions enacted, by the application of well settled rules of interpretation, the ultimate function being to ascertain the legislative will.”

On page 421, it was said:

“At the time the formation of county library districts was first authorized by the enactment of Section 7643-1, General Code, in 1921, at least four kinds of political subdivisions already were authorized to establish free public libraries for their inhabitants.

“Townships were so authorized by Section 3403 et seq., General, *municipal corporations by Section 3620*, school districts by Section 7635 et seq., and counties by Section 2976-11 et seq. In none of the stated sections of the General Code was there any restriction on the general powers of the subdivisions to provide library service, and, for all that appears in the several acts, all four kinds of libraries might exist in the same area as freely as counties, townships, municipalities and school districts have always so existed.

“We conclude, therefore, in answer to the first question posed, that the Board of Education of the Shaker Heights School District did possess in 1937 jurisdiction to create the Shaker Heights Public Library and that such library was lawfully established.

“We come now to consider the second question whether there was a repeal of the grant of power or a termination of the authority either expressly or by implication by the repeal of Section 7635, General Code, and the enactment of new Sections 4840-1 to 4840-5, inclusive, General Code.

“The statutes under which the Shaker Heights library and county district library were respectively created (Section 7635

and Section 7643-1) remained unchanged from 1937 to 1947. *In 1947, the General Assembly enacted a recodification and revision of laws relating to public libraries, which materially changed the law on this subject.* Such legislation is known as House Bill 125 (122 Ohio Laws, 166.) It was passed May 14, 1947, approved June 2, 1947, filed in the office of the Secretary of State on June 5, 1947, and became effective September 4, 1947.

“One of the principal changes effected by House Bill 125 was the *termination of authority for the creation of township, municipal school district and county libraries.*”

“Section 3403, General Code, authorizing the creation of township libraries, Section 7635, authorizing the creation of school district libraries, and Sections 2976-11 to 2976-17, inclusive, authorizing the creation of county libraries, were all repealed. *Section 3620 authorizing the creation and maintenance of municipal libraries, was so amended as to eliminate the authority to establish such libraries.*”

“*As the statutes now stand, no kind of public library except a county district library can be created.* Therefore, the Shaker Heights board of education cannot today create a school district public library as it did in 1937.

“An examination of the new provisions of the General Code, with respect to school district libraries, as set forth in Sections 4840-1 to 4840-5, inclusive, indicates a clear intentment of the General Assembly to continue the existence of school district libraries *created before the effective date of such provisions.*
* * *

“We are convinced that the General Assembly by the recent enactments did not intend to change the status quo, and that to hold otherwise would be doing violence to the clearly expressed legislative intent.”

Based on the reasoning of the Main case, *supra*, it must necessarily follow that just as the 1947 amendment abolished the power of school districts to establish libraries, the amendment of Section 3620 General Code, in 1947, contained in the same act, abolished the power of municipalities to establish libraries, although in both cases the political subdivision involved could continue to maintain and operate those public libraries already in existence.

According to your letter, the Ashville library although it was in existence, was never organized as a free public library under Section 3620 General Code. It follows, therefore, that a municipal public library may

not be established in 1949, since it is subsequent to the enactment of House Bill No. 125, 97th General Assembly, it being the intention of the legislature to terminate the authority granted for the creation of such a library.

Section 4004 as amended by House Bill 125, 97th General Assembly, referred to in your letter, contains authority for the mayor of a municipal corporation to appoint six trustees for public libraries. That section reads in part, as follows :

“Except as provided in General Code section 4005-1, the erection and equipment, and the custody, control and administration of free public libraries established by municipal corporations, shall be vested in six trustees, not more than three of whom shall belong to the same political party, and not more than three of whom shall be women. Such trustees shall be appointed by the mayor, to serve without compensation, for a term of four years and until their successors are appointed and qualified. In the first instance three of such trustees shall be appointed for a term of two years, and three for a term of four years. Vacancies shall be filled by like appointment for the unexpired term. Such board of library trustees shall organize in accordance with the provisions of section 7627 of the General Code. In the exercise of their control and management of the municipal free public library except as provided in section 4005-1 of the General Code, such board of library trustees shall be governed by the provisions of sections 7627-1 through 7630-1, both inclusive, of the General Code.”

While at first blush this would seem to give the mayor authority to appoint trustees for a newly established library, yet by the very use of the word “established” it would seem that the legislature intended these trustees to be appointed only for those libraries already in existence. This is further evidenced by the fact that the amended statute (Sec. 4004) is contained in House Bill No. 125, and the court said in the Main case that such bill was designed to prevent the establishment of any new libraries except a county district library.

Your second question, as to whether the auditor of the county may distribute funds to the Ashville Municipal Library must also be answered in the negative. Section 5625-20 General Code, as amended by House Bill No. 125, 97th General Assembly permits only the Board of Trustees

of a *public library* to certify a copy of its rules and regulations to the taxing authority with its estimates of contemplated revenues and expenditures for the purpose of adopting a tax budget. Since there is no public library in existence no such certification could lawfully be made or certified to the auditor by the budget commissioner and there being no appropriation made the auditor may not legally make distribution of funds.

In light of the above, an answer to the other questions you present is not necessary.

In conclusion, it is my opinion that :

1. It was the intention of the legislature by the enactment of Section 3620 General Code, as amended by House Bill No. 125, 97th General Assembly (122 O. L. 166,) to abolish the power previously granted a municipal corporation to establish a free public library and at the present time a municipality may not legally establish a free public library.

2. A municipality while without power to establish a free public library may nevertheless maintain and regulate those libraries established under the authority of Section 3620 General Code, prior to the effective date of House Bill No. 125, 97th General Assembly (122 O. L. 166.)

3. Section 4004 General Code, as amended by House Bill No. 125, 97th General Assembly (122 O. L. 166,) authorizes the mayor to appoint trustees only for municipal libraries that were in existence prior to the effective date of House Bill No. 125.

4. The county auditor may not legally make distribution of funds to a municipal public library unless such library was in existence prior to the effective date of House Bill No. 125, 97th General Assembly (122 O. L. 166.)

Respectfully,

HERBERT S. DUFFY,
Attorney General.