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1. MUNICIPALITY—MAY FRAME AND ADOPT CHARTER FOR ITS GOVERNMENT—MAY EXERCISE ALL POWERS OF LOCAL SELF-GOVERNMENT—ARTICLE XVIII, SECTIONS 3, 7, CONSTITUTION OF OHIO.
2. MUNICIPALITY MAY PRESCRIBE PROCEDURE FOR PASSAGE AND PUBLICATION OF ORDINANCES AND RESOLUTIONS—PROVISIONS PREVAIL OVER PROVISIONS OF STATUTES RELATIVE THERETO—CHARTER MAY AUTHORIZE MUNICIPAL COUNCIL TO PRESCRIBE PROCEDURE.
3. WHERE AUTHORIZED BY CHARTER, MUNICIPAL LEGISLATIVE AUTHORITY MAY PROVIDE BY ORDINANCE RULES FOR PROCEEDINGS — RULES WILL PREVAIL OVER INCONSISTENT STATUTORY PROVISIONS.

SYLLABUS:

1. A municipality, under the authority of Section 7 of Article XVIII of the Constitution of Ohio, may frame and adopt a charter for its government and may, subject to the provisions of Section 3 of the same Article, exercise under such charter all powers of local self-government.

2. A municipality adopting a charter pursuant to Section 7 of Article XVIII of the Constitution may prescribe the procedure for the passage and publication of its ordinances and resolutions, which provisions will prevail over the provisions of the statutes relative thereto; or the charter may authorize the municipal council to prescribe such procedure with like effect.

3. Where expressly authorized by charter, a municipal legislative authority may properly provide by ordinance the rules for its own proceedings and such rules will prevail over inconsistent statutory provisions relating to such proceedings.

Columbus, Ohio, August 20, 1954

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your communication, in which you request my opinion, your letter reading as follows:

“The City of ‘M’ has adopted a charter, to be effective on January 1, 1954.

“Article II of this charter, provides that the City of ‘M’ shall have all the powers, general or special, governmental or proprietary, which may now or hereafter lawfully be possessed or exercised by municipalities under the Constitution and Laws of Ohio. All such powers may be exercised in the manner prescribed in the charter, or, if not prescribed therein, *in such manner as the Council may determine*, or, unless a contrary intent appears in the Charter, *or in the enactments of the Council*, in such manner as may now or hereafter be provided by the Laws of Ohio.

“We also wish to call attention to the provisions of Sections 9, 10 and 11 of the new City Charter, copy of which is here enclosed.

“It appears that the city council has passed an ordinance, No. 1-1954, (copy enclosed) which provides in Section III, paragraph (b) for a suspension of rules by a two-thirds vote of all the members elected thereto, whereas, under the provisions of Section 731.17 Revised Code (4224 G. C.) it requires a *three-fourths* vote of all of the members elected to council, to suspend the rules.

“You will also note that Section IV, paragraph (a) provides for the publication of ordinances and resolutions of a general nature or providing for improvements *by title only*, unless council, by motion, requires otherwise. Also that the necessary publication shall be in one newspaper of general circulation in the city for the number of times set forth in the ordinance No. 1-1954.

“The City Solicitor of ‘M’ has addressed a letter to our Examiner, in which he asks the following questions:

“1. Can the city council authorize the suspension of rules by a two-thirds vote, as provided in Ordinance No. 1-1954, or is it necessary to have a *three-fourths* vote of all the members elected thereto, in order to suspend the rules, as provided by Section 731.17 Revised Code (4224 General Code)?

“2. Has the city council the authority, under Section 10-d of the City Charter, to provide, as they have done in Section 4 of Ordinance No. 1-1954, for the publication of by-laws, resolutions and ordinances *by title only*, and *in one newspaper of general circulation in the city*, which provision is in variation from the provisions of Section 731.21 Revised Code (4228 G. C.)?

“These questions seem to involve the power of the city council, under the home rule provisions of the Constitution, to vary

the procedure set forth by the statutes, in the matters of passing legislation under suspension of rules and in the publication of Ordinances, Resolutions and By-Laws."

Accompanying your letter is copy of the charter and copy of an ordinance passed by the city council of the City of "M".

A discussion of the questions presented by your letter involves some consideration of the source from which municipalities obtain, and the manner in which they may exercise their powers. Prior to the adoption in 1912, of Article XVIII of the Constitution, commonly referred to as the "Home Rule Amendment," the test for the determination of municipal powers and the manner of their exercise were embodied in the general rule, very aptly stated by the Supreme Court, in the case of *Ravenna v. Pennsylvania Company*, 45 Ohio St., 118:

"1. Municipal corporations, in their public capacity, possess such powers and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted.

"2. A municipal corporation has not the power, by ordinance, to compel a railroad company to maintain, at a street crossing within the corporate limits, a watchman, for the purpose of giving warning to passersby of the approach of trains."

So long as that rule was in effect, it was comparatively easy to determine the existence and extent of a claimed municipal power, and the lawful manner of its exercise.

A very large volume of legal precedents was swept away in the adoption of Article XVIII. Theretofore, practically the sole source of municipal power was the legislature. Thereafter, the legislature had nothing to do with the matter, except in so far as the Constitution reserved to it the right of imposing certain specific limitations on the exercise of home rule by municipalities. Section 3, of this Article provides as follows:

"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."

Section 7, of the same Article, provides:

"Any municipality may frame and adopt or amend a *charter for its government* and may, subject to the provisions of section 3

of this article, *exercise thereunder* all powers of local self-government.” (Emphasis added.)

These sections have been the subject of numerous discussions and decisions by our courts. At the outset, the Supreme Court in *State, ex rel. Toledo v. Lynch*, 88 Ohio St., 71, held that the framing and adoption of a special charter, pursuant to Section 7, was a prerequisite to the right of a municipality to exercise “all powers of local self-government.” There followed a considerable array of decisions in which the Supreme Court approved the validity of charter provisions providing for a large number of innovations, both in the governmental structure of the municipality and in matters of procedure, which were distinctly contrary to the state laws theretofore in effect.

It was not until the decision in the case of *Perrysburg v. Ridgeway*, 108 Ohio St., 245, that the Supreme Court came to the conclusion that municipalities might exercise the power of self-government given them by the Constitution, solely by virtue of the provisions of Section 3, and without adopting a charter. The *Lynch* case, in so far as it held to the contrary, was overruled. The fifth branch of the syllabus in the *Perrysburg* case is particularly noteworthy as declaring the great enlargement of municipal powers in so far as concerns the fundamental organization and governmental structure of municipalities :

“The grant of power in Section 3, Article XVIII, is equally to municipalities that do adopt a charter as well as those that do not adopt a charter, the *charter being only the mode* provided by the Constitution *for a new delegation or distribution of the powers already granted in the Constitution.* (State, ex rel. City of Toledo v. Lynch, Auditor, 88 Ohio St., 71, disapproved upon the proposition that a charter is a prerequisite to the exercise of home-rule powers under Section 3, Article XVIII.)”

(Emphasis added.)

In my opinion, the powers of a municipality which are granted to it by the home rule amendment fall roughly into two classes, (a) the structural organization whereby there are set up the officers by whom the municipality is to be governed and the distribution of governmental powers to such officers, and (b) those powers which relate to the business of the corporation, the improvements it may make, regulation of the use of its streets and properties, regulation of the conduct of its citizens, and the services to be rendered for the comfort, convenience and welfare of its people.

It appears to me that this distinction is implicit in the provision of Section 2, Article XVIII, which has not often been the subject of judicial consideration, and has been given little attention by writers on municipal government. That section reads as follows:

“General laws shall be passed to provide for the *incorporation* and *government* of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.” (Emphasis added.)

Note that these laws which the legislature is still authorized to enact are to provide not only for the incorporation but also for the *government* of cities and villages. If we read that language in connection with the language of Section 7 of Article XVIII, it will be seen that what the Constitution does is to authorize the legislature primarily to enact laws which shall prescribe the *government* of cities and villages, that is, the official organization and the distribution of powers, and that Section 7 is intended to permit the municipality, if it is not satisfied with the form of government and the distribution of powers set up by the legislature, to “frame and adopt a charter *for its government.*” In other words, the power given the General Assembly in Section 2, Article XVIII, to enact laws for the *government* of municipalities, is by Section 7 transferred to the electors of a municipality, to be exercised by them by adopting a charter.

This leads me to the conclusion that the framers of Article XVIII intended that the special charter, if so adopted, should become the fundamental law, more or less permanent, and subject only to be amended by the process later set forth in the Constitution, and should thereby supplement the general laws which the General Assembly was authorized by said Section 2 to enact.

Among the general laws heretofore enacted are Sections 731.17 and 731.21, Revised Code, relating respectively to (1) the proceedings of the municipal legislative authority, and (2) the publication of ordinances enacted by such authority. Both are obviously limitations on the exercise of the municipal authority in the field of legislation, or, more precisely, limitations on the power of that branch of the municipal government, the council, through which the corporation exercises its authority to legislate.

Quite clearly such limitations are applicable where the corporation, by failing to adopt a charter, has elected to operate under a statutory plan of government of which such limitations on the power of the legislative branch are a part. It is equally clear that such limitations could be avoided by a charter inconsistent therewith and in which there were express provisions on the subjects of proceedings and publication similar to those set out in the ordinance in question. In the case at hand, however, the charter provides (in Section 10) :

“The Council shall by ordinance make provision for :

“(a) The time and place of regular meetings of the Council;

“(b) The method of calling special meetings of the Council;

“(c) *The form and method of enactment of its ordinances and adoption of its resolutions;*

“(d) *The method of giving public notice of the enactment of its ordinance and adoption of its resolution, and of any other of its acts or proceedings which it deems proper to publish;*

“(e) The procedure for making public improvements and for levying assessments, including the procedure for combining two or more public improvements, and the levying of assessments therefor in one proceeding if the Council finds that it will be economical and practical to undertake such improvements jointly;

“(f) The advertising and awarding of contracts;

“(g) Such other general regulations as the Council may deem necessary.” (Emphasis added.)

Acting under the authority given it by Section 10 of the Charter, the council of the city of “M” has enacted Ordinance No. 1-54, a copy of which accompanies your letter. This ordinance provides, among other things :

“No by-law, ordinance or resolution of a general or permanent nature or granting a franchise, or creating a right, or involving the expenditure of money or the levying of a tax, or for the purchase, lease, sale or transfer, of property shall be passed, unless it has been fully and distinctly read on three different days, and with respect to any such by-law, ordinance or resolution, *there shall be no authority to dispense with this rule except by a two-thirds vote of all members elected thereto, taken by yeas and nays, on each by-law, resolution or ordinance and entered on the journal. No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto.*” (Emphasis added.)

It may be noted that Section 731.17, Revised Code, dealing with the passage of ordinances and formal resolutions, requires a *three-fourths vote* of all the members elected to the council to suspend the rule of the law, which requires three readings. Otherwise, the wording of the above quoted provision of the ordinance is substantially identical with the statute:

“Section IV: All ordinances and resolutions of a general nature or providing for improvements shall be published by title only, unless council by motion requires otherwise.

“(a) *The necessary publication shall be in one newspaper of general circulation in the city for the following times: Ordinances, resolutions and proclamations of elections, once a week for two consecutive weeks; notices not less than two nor more than four consecutive weeks; all other matters shall be published once.*”
(Emphasis added.)

This is a complete departure from the provisions of Section 731.21, Revised Code, which provides:

“All municipal ordinances, resolutions, statements, orders, proclamations, notices, and reports required by law or ordinance to be published, shall be published as follows:” * * *

The only basis on which it could be supposed that such charter provision, and the ordinances enacted thereunder, are ineffective to avoid the provisions of the statutes in question, is that the framers of the charter, instead of including therein a substitute for the statutory provisions in question, delegated to the municipal legislative authority the discretion to enact such substitute provisions.

It is to be remembered, however, that we are here concerned with a “distribution” of the powers of local self-government which, as to local affairs the constitution has fully conferred on the municipality concerned. Such distribution may lawfully be accomplished by appropriate charter provisions. *Perrysburg v. Ridgeway*, supra. Such charter may surely confer on the municipal council *all* of the legislative power of the corporation.

By tradition, and the precedent of the constitution in the case of the General Assembly, the legislative power is deemed to include the power of a legislative body to prescribe its own rules of proceeding. See Article II, Section 8, Ohio Constitution. The same is true in the matter of printing of laws, journals, etc. See Article XV, Section 2, Ohio Constitution.

Of much more significance, however, is the fact that the constitution is silent as to any necessity, either at the state or local level, of any publication of legislative enactments designed to afford public notices thereof, and is silent also as to the need for a provision as to the proceedings of a legislative body being controlled otherwise than by its own enactments. Thus it would seem entirely within the power of the framers of a charter to provide therein that *no publication whatever* should be required.

The basic consideration to be borne in mind, in my opinion, is that the statutory limitations here in question are a part of the whole statutory plan in prescribing the form, or mode, or structure, of municipal government; and that such structure can be changed by charter. I consider that this has been done in the instant case and that the powers conferred on the municipal legislative authority in the matter of its own proceedings and of publication of ordinances are properly within the scope of legislative function, it being entirely proper to confer by charter the full legislative capacity of the corporation on the council.

Accordingly, and in specific answer to the questions submitted, it is my opinion:

1. A municipality, under the authority of Section 7 of Article XVIII of the Constitution of Ohio, may frame and adopt a charter for its government and may, subject to the provisions of Section 3 of the same Article, exercise under such charter all powers of local self-government.

2. A municipality adopting a charter pursuant to Section 7 of Article XVIII of the Constitution may prescribe the procedure for the passage and publication of its ordinances and resolutions, which provisions will prevail over the provisions of the statutes relative thereto; or the charter may authorize the municipal council to prescribe such procedure with like effect.

3. Where expressly authorized by charter, a municipal legislative authority may properly provide by ordinance the rules for its own proceedings and such rules will prevail over inconsistent statutory provisions relating to such proceedings.

Respectfully,
C. WILLIAM O'NEILL
Attorney General