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1. MUNICIPALITY — MAY SELL PERSONAL PROPERTY NOT NEEDED BY IT — MANNER PROVIDED BY CHARTER — MANNER PROVIDED BY ORDINANCE — ARTICLE XVIII, SECTION 3, CONSTITUTION OF OHIO — SECTIONS 3699, 3703 G.C.

2. WATERWORKS PLANT — PURCHASE MATERIAL — IF EXPENDITURE EXCEEDS FIVE HUNDRED DOLLARS — PROCEDURE SHALL BE UNDER SECTION 4328 ET SEQ. G.C. — WHERE EMERGENCY, COUNCIL BY TWO-THIRDS VOTE MAY AUTHORIZE SUCH PURCHASE WITHOUT ADVERTISING — SECTION 3965 G.C.

3. DEFENSE, STATE COUNCIL OF — EMERGENCY — PRESENT WAR — POWER TO REQUISITION MATERIALS, NOT IMMEDIATELY NEEDED, BELONGING TO ANY OTHER MUNICIPALITY, FOR USE OF CERTAIN MUNICIPALITY — VITAL WATER SUPPLY — SECTION 5288 G.C.

SYLLABUS:

1. A municipality, by virtue of the power granted to it by Section 3, Article XVIII, Constitution of Ohio, may sell personal property, not needed by it, in such manner as may be prescribed by its charter, if any charter has been adopted, and in the absence of any charter provision in such manner as may be provided by ordinance, and need not comply with the provisions of Sections 3699 and 3703, General Code.

2. A municipality desiring to purchase any material required for its waterworks plant must, if the proposed expenditure exceeds five hundred dollars, proceed under the provisions of Section 4328, et seq. General Code; except by the provision of section 3965, General Code, the council by a two-thirds vote may in case of emergency authorize the purchase of such material without advertising.

3. In the event of an emergency growing out of the present war, whereby the preservation of the vital water supply of any municipality is found by the State Council of Defense to be essential to the national security or defense, said State Council of Defense may, under the power conferred upon it by Section 5288, General Code, requisition for the use of such municipality materials belonging to any other municipality and not immediately needed by it.

Columbus, Ohio, October 22, 1942.

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

Gentlemen:

I have your request for an opinion reading as follows:

"We are enclosing herewith a letter and resolution received from the Ohio Section American Waterworks Association, all pertaining to the sale and interchange of inventory materials between publicly owned waterworks plants. It will be noted that item (3) of said resolution provides:

'In order to make effective and operative the sale of material for mutual aid between political subdivisions of the state, the Bureau of Inspection and Supervision of Public Offices be requested to outline a quick procedure.'

Quite obviously, the fulfilling of the request just quoted involves a consideration of the legal requirements governing the sales of municipally owned personal property as well as the purchase of such property, especially in those cases wherein the value of the property or materials involve amounts in excess of five hundred dollars. Therefore, may we request that you examine the inclosures and give us your opinion in answer to the following question:

Due to war emergency conditions now existing, especially concerning the necessity of preserving vital water supply, may

one political subdivision owning and operating a waterworks system, sell materials not immediately needed by it, to another, or interchange by lend-lease or otherwise, such waterworks equipment and materials, without regard to the requirements of sections 3699 and 3703 of the General Code, relative to sales, and without regard to the requirements of section 4328 and related sections of the General Code, relative to purchases by municipal corporations."

Your inquiry involves the application of certain sections of the General Code relating both to the sale of municipal property and to purchases by a municipality.

Section 3698 authorizes municipalities to sell or lease real property not needed for any municipal purpose.

Section 3699 reads as follows:

"No contract for the sale or lease of real estate shall be made unless authorized by an ordinance, approved by the votes of two-thirds of all members elected to the council, and by the board or officer having supervision or management of such real estate. When such contract is so authorized, it shall be made in writing by the board or officer having such supervision or management and only with the highest bidder, after advertisement once a week for five consecutive weeks in a newspaper of general circulation within the corporation. Such board or officer may reject any or all bids and readvertise until all such real estate is sold or leased."

Section 3703 authorizes the sale of personal property, and if of value of over five hundred dollars, it is to be sold only in the manner provided for the sale of real estate.

Section 3699 in its present form was enacted many years before the enactment of the 18th amendment. Section 3 of Article XVIII of the Constitution reads as follows:

"Municipalities shall have power 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."

It will be noted that the first sentence of this section gives to municipalities "all powers of local self government" without any qualification or reservation. The balance of the section authorizes municipalities to

adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws. The qualification "as are not in conflict with general laws" plainly applies to the adoption and enforcement of local police, sanitary and other similar regulations.

It seems quite clear that the sale of real estate or personal property by a municipal corporation does not fall within the adoption and enforcement of local police, sanitary and other similar regulations, but is unquestionably the exercise of a portion of the power of local government.

Prior to the adoption of this constitutional amendment, it had been held, and correctly so, that a municipality, in order to avail itself of the right to sell or lease its property, which power it got solely from the Legislature through Sections 3698 and 3699, must exercise this power strictly in accordance with the provisions of those sections, otherwise the sale is void.

One of my predecessors, in an opinion found in 1926 Opinions Attorney General, p. 427, held:

> "The sale of real estate by the city of East Cleveland, which is not in conformity with Sections 3698 and 3699 of the General Code, is in conflict with general laws and therefore illegal."

It is true that this opinion, rendered in 1926, was handed down long after the home rule amendment went into effect, and it might seem to follow that the Attorney General in effect denied that a municipality had obtained any freedom in respect to the sale or leasing of its property by virtue of the home rule amendment. However, an examination of the opinion shows that the Attorney General was there considering the charter of a city which had expressly provided:

> "All general laws of the state applicable to municipal corporations now or hereafter enacted, and which are not in conflict or inconsistent with the provisions of this charter, or with ordinances or resolutions hereafter enacted by the commission, shall be applicable to this city, and all officers and departments thereof; provided, however, that nothing contained in this charter shall be construed as limiting the power of the commission to enact any ordinance or resolution not in conflict with the constitution of the state or with express provisions of this charter."

It followed, therefore, that the Attorney General was right in measuring the legality of the sale in question by the provisions of the charter itself, which expressly adopted the general laws of the state applicable to municipal corporations, including, of course, Sections 3698 and 3699, relating to the manner of making a sale.

In construing Section 2673a of the Revised Statutes, which was substantially the same as Section 3699, it was held in the case of Kerlin Bros. v. The City of Toledo, 20 C.C. p. 603:

> "Under Section 2673a R. S., which limits the power of council to sell municipal property so far as real estate is concerned, a three-fifths vote of the members of council, and an advertisement for two weeks are required in order to sell real estate of the city or village."

This case, however, was decided a great many years before the adoption of the eighteenth amendment and of course proceeded upon the proposition, which was then sound, that all powers of a municipality emanated from the Legislature and should be exercised in the manner prescribed by it. I have been unable to find an opinion of any court since the adoption of the eighteenth amendment holding that Sections 3698 and 3699 limit the power of municipalities in the sale and lease of their property.

In the case of State ex rel. v. Carroll, 103 O. S. 50, the court had under consideration a sale made by a city in which proceedings were had under Sections 3698 and 3699, but the only question the court had before it was as to the right of a city to pay an auctioneer for making a sale, and the court in a per curiam opinion held that it had no such authority.

In an opinion of my predecessor, found in 1938 Opinions Attorney General, p. 1028, it was held that the leasing of a building by a municipality must be in strict conformity and in full compliance with Section 3699 of the General Code. No authority whatever is cited in the opinion and there is no intimation that the powers of a municipality under home rule were under consideration.

In an opinion which I rendered on August 4, 1939, found in 1939 Opinions Attorney General, p. 1408, I held:

> "Where the charter of a charter city authorizes the city council to 'sell, convey, lease, hold, manage and control' city property, in the absence of fraud or collusion, such council may lease an auditorium in the city building, not needed for municipal purposes, for such reasonable length of time as the city council deems proper, provided such lease be made in good faith and in the interest of the public."

In the course of the opinion I referred to the opinions herein above noted, 1926 Opinions Attorney General, p. 427, which held that a sale made without compliance with Sections 3698 and 3699 was illegal, and also to an opinion found in 1930 Opinions Attorney General, p. 37, and then said:

> "That opinion, however, was concerned with a non-charter municipality and involved the application of Sections 3631 and 3698, and certain other sections of the General Code. In so far as the question now before me is concerned, Opinion No. 1371 is not particularly applicable here, for the measure of the power of the charter city of Ashland is the Constitution of Ohio and the city charter and not the sections of the General Code considered in such opinion."

I further called attention to the several limitations which the constitution imposes upon the broad power of home rule granted to municipalities, saying:

> "It is manifest, of course, that we are not here concerned with the powers of a municipality relating to taxation, assessment, borrowing money or contracting debts; nor is the city attempting to loan its credit within the meaning of Section 6 of Article XIII, above quoted, and clearly under the provisions of Sections 3 and 7 of Article XVIII, the city in question was empowered to provide in its charter that the proper city officers might 'sell, convey, lease, hold, manage and control' city property."

There remains then only the question whether a municipality, which has not adopted a charter, may exercise the powers of home rule granted to it by the constitution, and whether in the case of a proposed sale or lease of real or personal property it may by ordinance lay down its own rule for its procedure. It was held in the case of State ex rel v. Lynch, 88 O. S. 71, that a municipality which had not adopted a charter, could not exercise such powers. But the case of Village of Perrysburg et al v. Ridgeway, 108 O. S. 245, expressly overruled the Lynch case on that proposition, and held:

> "The exercise of 'all powers of local self-government,' as provided in Article XVIII, Section 3, is not in any wise dependent upon or conditioned by Section 7, Article XVIII, which provides that 'a municipality *may* adopt a charter,' etc."

Accordingly, I am of the opinion that in the matter now under consideration, municipalities which have on their hands inventory materials pertaining to their waterworks plants, not immediately needed for their purposes, may sell or exchange the same in such manner and upon such terms as the council ordains without compliance with Sections 3699 and 3703 of the General Code, unless the charter of the municipality, if any, provides what procedure shall be followed.

The question whether a municipality desiring to purchase such materials may do so without complying with Section 4328 of the General Code, presents much more difficulty, which section reads:

> "The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city."

Section 4329 requires that each bidder for a municipal contract must accompany the bid with a bond to insure that if the award is made, a contract will be entered into.

The purchase of material involves expenditure of money or the contracting of an obligation. Here the Constitution has stepped in and placed a limitation upon the powers of municipalities by committing to the Legislature certain authority. Section 13 of Article XVIII provides as follows:

> "Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

Section 6 of Article XIII, which was in the original Constitution, remains unchanged, and provides:

> "The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

The Legislature has enacted Section 4328 pursuant to the authority thus reserved to it, and it would seem to follow that where a proposed purchase of materials for the use of the waterworks of any municipality involves an expenditure of more than five hundred dollars, the municipality is ordinarily controlled by the provisions of Section 4328, et seq. However, one exception is made by Section 3965, relating to contracts for the construction and repair of waterworks. This section reads in part as follows:

> "In case of emergency, by a vote of two-thirds of all the members elected thereto, the council may authorize such director to enter into such contract without advertising."

I note the provisions of the act enacted by the 94th General Assembly, establishing what is known as the State Council of Defense. This is found in Sections 5285 to 5290, inclusive, General Code.

Section 5286 provides in part as follows:

> "The governor is hereby authorized and empowered in time of *emergency or public need in the nation or the state* to create by proclamation a state council of defense, hereinafter designated as the 'council' *for the general purpose of assisting in the coordination of state and local activities related to national and state defense.* * * *" (Emphasis mine.)

Section 5287 relates to the membership of the council.

Section 5288 prescribes the powers and duties of the council, among others the following:

> "* * * (b) To cooperate with the advisory commission to the council of national defense through its division of state and local cooperation, or with any similar federal agencies hereafter created, and with any departments or other federal agencies engaged in defense activities. * * *

(g) *To require the cooperation and assistance of state and local governmental agencies and officials.* * * *

(i) To do all acts and things, not inconsistent with law, for the furtherance of defense activities." (Emphasis mine.)

Section 5289 provides as follows:

"In order to avoid duplication of services and facilities, the council is:

(a) Directed to utilize the services and facilities of existing officers, offices, departments, commissions, boards, institutions, bureaus and other agencies of the state and of the political subdivisions thereof, and

(b) *All such officers and agencies shall cooperate with and extend their services and facilities to the council as it shall request.*" (Emphasis mine.)

In referring to this act in a former opinion under date of September 5, 1942 (1942 Opinions Attorney General No. 5428), I said:

"In addition thereto, your attention is directed to Section 5288 of the General Code, which defines the powers and duties of the State Council of Defense. It will be noted therefrom that the Council has power 'to do all acts and things, not inconsistent with law, for the furtherance of defense activities.' It is difficult to perceive how the General Assembly could have conferred any broader powers upon the State Council of Defense than it did by the use of the above language. In the exercise of the powers conferred upon it, the State Council of Defense is limited only to the extent that all acts and things done by it must be in furtherance of defense activities and not inconsistent with the law.

Obviously, the seizure of privately owned fire equipment during an air attack or great conflagration resulting therefrom would be in furtherance of defense activities and under such circumstances of necessity the taking of such privately owned equipment would certainly not be inconsistent with the constitutional provisions above quoted."

In line with that opinion, in considering the very broad sweeping powers granted by the Legislature to the Council of Defense, I am of the opinion that, in case a municipality had materials on hand pertaining to its waterworks which were not immediately needed for its use and which were needed by another municipality because of a serious emergency growing out of the war conditions and because of the necessity of preserving an adequate water supply for industries engaged in war pro-

duction, it would be within the power of the State Council of Defense to requisition such materials in the event the municipality owning the same fails or refuses to make them available. It should be noted, however, that while the power is there, no enforcement provisions were enacted and that the statute prescribes no penalty for non-compliance by any municipality.

The question of payment by the municipality receiving such materials is not covered by any existing law. A similar situation was presented in my opinion above noted (No. 5428). As there suggested, in the absence of any enforcible contract between two municipalities, there is no provision for reimbursement to the municipality which may furnish the materials requisitioned by the Council of Defense, and that is a matter which may have to be brought to the attention of the Legislature when it convenes.

Section 19, Article I, Constitution of Ohio, provides in part:

> "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure * * * a compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

It should be clearly understood that what has been said in this opinion relative to the powers of the State Council of Defense is predicated on the assumption of the existence of a real emergency affecting the national security and the duties of the state relative thereto. The power to requisition materials of the character considered in this opinion could only be invoked in the event of a situation arising where the Council of Defense finds it absolutely necessary, for the preservation of a water supply vital to the national security or defense, to exercise such extraordinary power.

Respectfully,

THOMAS J. HERBERT
Attorney General.