OPINION NO. 69-130

Syllabus:

The sale of excess property, real or personal, by a municipality is the exercise of home rule powers. If the municipality is a noncharter municipality then such sales must be accomplished as required by Section 721.03, Revised Code, with respect to real property and Section 721.15, Revised Code, with respect to personal property. Opinion No. 140, Opinions of the Attorney General for 1966 and Opinion No. 787, Opinions of the Attorney General for 1957, are hereby overruled.

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: Paul W. Brown, Attorney General, September 29, 1969

You have requested my opinion on the following question:

> "May a municipality operating without charter and under the statutes of Ohio sell its property, real or personal, without advertising for bids?"

As you pointed out in your opinion request, Opinion No. 140, Opinions of the Attorney General for 1966, appears to be in conflict with recent decisions with respect to the powers of municipalities. The issue involved, of course, is the interpre-

tation of Article XVIII, Section 3, Constitution of Ohio. This is the commonly referred to "home rule" provision. Article XVIII, Section 3, supra, in conjunction with Article XVIII, Section 7, Constitution of Ohio, has been the source of the substantial and often times confusing court decisions.

The confusion was recognized by the Ohio Supreme Court in 1958 in the case of The State, ex rel. Canada v. Phillips, 168 Ohio St. 191. Then Justice Taft, at page 199 of that decision, stated as follows:

> "Apparently, however, we are confronted with two lines of our own decisions which cannot be fully reconciled on any reasonable basis. To the extent that we can reconcile those cases on any reasonable basis, we should endeavor to do so, especially where overruling them would disturb long established and recognized administrative and legislative practices. However, to the extent that they cannot be reconciled, we believe it is our duty to determine and pronouncements of law we will follow, and then overrule our other decisions and pronouncements to the extent that they cannot be reconciled with those which we are now following. Otherwise, we will create an impossible situation for courts that are supposed to follow our decisions and for lawyers who must base their advice to clients on decisions which we render."

The Canada case, supra, involved a charter municipality which had passed an ordinance regarding the selection of a chief of police for the municipality, which ordinance was in conflict with than Section 143.34, Revised Code. With its decision in the Canada case, supra, the Ohio Supreme Court embarked upon a course of bringing some order out of the confusion existing as a result of prior decisions in the home rule area. In light of decisions subsequent to the Canada case, supra, I believe that the Court has now adopted a single line of authority which is determinable and which, as will be pointed out, governs the answer to the question you have asked.

The Canada decision, supra, endorsed the proposition that Article XVIII, Section 3, supra, provides for two broad types of powers to be exercised by municipalities. That section reads 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."

The two broad types of powers are the powers of local self-government and local police, sanitary and other similar regulations. In the Canada case, supra, the ordinance in question was determined to fall within the powers of local self-government as opposed to being a police, sanitary or other similar regulation. Having made this determination, the next issue to be decided was whether or not the municipality in question had adopted a charter pursuant to Article XVIII, Section 7, supra, which section reads as follows:

> "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."

The city of Columbus was the municipality in question in the Canada case, supra, and had adopted a charter. Having so found as a question of fact, the Supreme Court then determined that a charter city may adopt ordinances with respect to the exercise of the powers of local self-government which are inconsistent with state statutes and "if it does, the mere interest or concern of the state, which may justify the state in providing similar police protection, will not justify the interference with such exercise by a municipality of its powers of local self-government." The State, ex rel. Canada v. Phillips, supra, Syllabus No. 7.

In 1960, the Ohio Supreme Court rendered the next decision which continued to develop the consistent line of authority being adopted by that Court. The case in which that decision was rendered was the case of State, ex rel. Petit v. Wagner, 170 Ohio St. 297. The facts in this case were very similar to the facts in the Canada case, supra, with exception that the municipality involved was a noncharter municipality. Again, the Court found that the power being exercised was a power of local self-government as opposed to being a local police, sanitary or other similar regulation. On the basis, however, of the recognized distinction between the powers of charter and noncharter municipalities as provided by Article XVIII, Section 7, supra, the Court held that the municipality did not have the power to adopt an ordinance which was "at variance" with a state statute. It should be noted, at this point, that the Petit case, supra, is the first case in which the court is establishing the test to be applied when the exercise of power is the exercise of local home rule power and a noncharter municipality is involved. The test is stated at page 303 of the Petit decision, supra, as follows:

> "* * * There is in the present case a direct variance between the statute permitting only members of a police department to take an examination of the type here under consideration and the ordinance which contains no such limitation, and it is our conclusion that such variance renders the ordinance invalid. Dif-

ferently stated, a noncharter municipality is without authority under the provisions of Section 3, Article XVIII of the Constitution, to prescribe less restrictive qualifications for civil-service-examination applicants than are prescribed by statute, since such municipal action would be at variance with the general law."

Thus, as a result of the Petit case, supra, when the exercise of power by a municipality is the exercise of local home rule power and the municipality is a noncharter municipality, the ordinance will be invalid if at variance with a state statute.

In December 1964 and March 1965, the Ohio Supreme Court decided two cases which affirmed, in the first instance and amplified, in the second instance, the Court's current approach to the home rule problem. The first case decided was Leavers, et al. v. City of Canton, et al., 1 Ohio St. 2d 33 (1964). This case was similar to the Petit case, supra, and the Court specifically held, at page 37 of the Opinion, as follows:

"In the case before this court, Canton, a noncharter city, passed an ordinance dealing with a local government regulation which is at a variance with a state statute, and the ordinance is, therefore, invalid under the provisions of Section 3, Article XVIII of the Ohio Constitution."
(Emphasis added)

The second case was Village of West Jefferson v. Robinson, 1 Ohio St. 2d 113 (1965). This case dealt with the enactment of an acknowledged police power ordinance (a "Green River" ordinance). The Court specifically held, in Syllabus No. 1 as follows:

"The power of any Ohio municipality to enact local police regulations is derived directly from Section 3 of Article XVIII of the Ohio Constitution and is no longer dependent upon any legislative grant thereof, as it was prior to the adoption in 1912 of that section of the Constitution."

The argument in that case was that because the General Assembly had provided, in then Sections 715.63 and 715.64, Revised Code, for the licensing by municipalities of exhibitors and transient sellers, that the Green River Ordinance of the Village of West Jefferson was in direct conflict with such state statutes. The Court, in Syllabus No. 3 of its decision in the West Jefferson case, supra, held as follows:

"The words 'general laws' as set forth in Section 3 of Article XVIII of the Ohio Constitution means statutes setting forth police, sanitary or similar regulations and not statutes

which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations."

The West Jefferson case, supra, stands for the proposition that when the attempted exercise of power is a local police, sanitary or other regulation, then it makes no difference whether the municipality enacting the ordinance is a charter or noncharter municipality. The local ordinance will stand or fall on the sole test of whether or not such ordinance is in conflict with general law.

Most recently, the Ohio Supreme Court rendered its decision in the case of Young v. City of Dayton, et al., 17 Ohio St. 2d 71 (1967). In this case, the Supreme Court acknowledged that the sale of surplus property by a municipality is the exercise of a power of local self-government. The Court did find, however, that the charter of the city of Dayton had not been complied with in the sale and, therefore, voided the sale. In determining that the power to convey property no longer needed for municipal purposes was a power of local self-government, the Court quoted Babin V. City of Ashland, et al, 160 Ohio State 328 (1953). This was the case, as you pointed out, upon which the opinion of my predecessor relied for authority in Opinion No. 140, supra.

By way of summary, and to clarify my opinion, the current tests being applied by the Ohio Supreme Court with respect to home rule issues may be summarized as follows:

1. The exercise of a home rule power by a charter municipality is proper notwithstanding the ordinance may be at variance with state statutes. The State, ex rel. Canada v. Phillips, supra.

2. The exercise of a home rule power by a noncharter city is improper and not effective when the ordinance is at variance with a state statute. State, ex rel. Petit v. Wagner, supra.

3. The exercise of local police, sanitary and other similar regulations (police power) is valid and effective, without consideration as to whether or not the municipality is a charter or noncharter municipality, only if the ordinance is not in conflict with general laws. Village of West Jefferson v. Robinson, supra.

The Babin case, supra, is consistent with the foregoing tests presently being applied by the Ohio Supreme Court in that the exercise of power was the exercise of a local home rule power and the municipality of Ashland was a charter city. Babin v. Ashland, supra, at page 350.

Therefore, based upon the foregoing, it is my opinion and you are so advised that the sale of excess property, real or personal, by a municipality is the exercise of home rule powers. If the municipality is a noncharter municipality then such sales must

be accomplished as required by Section 721.03, Revised Code, with respect to real property and Section 721.15, Revised Code, with respect to personal property. Opinion No. 140, Opinions of the Attorney General for 1966 and Opinion No. 787, Opinions of the Attorney General for 1957, are hereby overruled.