

3407.

MUNICIPALITY—QUESTION OF ADOPTION OF A PLAN OF GOVERNMENT PROVIDED FOR BY SECTIONS 3515-1, GENERAL CODE NOT TO BE SUBMITTED TO ELECTORS LESS THAN NINETY DAYS BEFORE REGULAR MUNICIPAL ELECTION.

SYLLABUS:

The question of whether or not one of the plans of government provided in Sections 3515-1, et seq., General Code, shall be adopted, may not be submitted to the electors of a municipality less than ninety days before a regular municipal election.

COLUMBUS, OHIO, July 7, 1931.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“Please permit me to submit the following question for your interpretation.

The city of Shaker Heights has ready for the vote of the people of the municipality the question as to whether or not a charter form of government shall be adopted.

Section 3515-1 sets up certain provisions regarding the adoption of a charter form of government. Section 8, Article 18 of the Constitution also makes certain provisions, while Article 1, Section 2, (Section 3515-2) provides that: ‘The proposition to adopt a plan of government provided in this Act shall not be submitted to the electors of any municipality less than ninety days before a regular municipal election.’

The question, therefore, arises, after considering all of the above citations, as to whether or not the charter form of government may be voted upon by the people of Shaker Heights at the August 11th primary, which is less than ninety days before the general election, or whether or not it will be necessary to have a special election at least ninety days before the general election.”

In your letter you state that the city in question has ready for the vote of the people the matter of whether or not “the charter form of government” shall be adopted. You refer, however, to Sections 3515-1, et seq., General Code, which provide for the adoption of one of the three forms of government provided in Title XII, Division I (Chapter 1-1), to-wit: commission plan, city manager plan, or federal plan. I assume that it is proposed to vote upon whether or not one of these three plans of government shall be adopted.

Section 8, Article XVIII of the Constitution, to which you refer, provides for the submission to the electors of the question “Shall a commission be chosen to frame a charter.” This section provides further that:

“The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid.”

A ballot containing such question must contain provision for the election of a charter commission of fifteen to frame a charter and in the event the question is voted upon in the affirmative the "charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election". These provisions whereby a municipality may adopt a so-called home rule charter are, of course, self-executing and are entirely separate and distinct from the provisions contained in Sections 3515-1, et seq., relating to the adoption of one of the three plans of government hereinabove referred to. These sections of the General Code have been enacted under authority of Section 2, of Article XVIII of the Constitution, which section provides 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."

The distinction between Sections 2 and 8 of Article XVIII of the Constitution was fully recognized by the Supreme Court in the case of *Switzer v. State, ex rel.*, 103 O. S. 306, the third branch of the syllabus being as follows:

"The act of the general assembly passed April 28, 1913 (103 O. L., 767), purporting to provide optional forms of municipal government, expressly pursuant to Section 2, Article XVIII of the Constitution, and providing for the adoption of any one of them by referendum vote, has no application to the municipalities of Ohio that have adopted a charter form of government under Sections 7 and 8, Article XVIII of the Constitution of Ohio."

It seems clear, therefore, that the reference in Section 8, Article XVIII, to the submission of the question of whether or not a commission shall be chosen to frame a charter at the next regular municipal election if it shall occur not less than sixty nor more than one hundred and twenty days after the passage of the ordinance therein provided, has nothing whatsoever to do with the matter of when a question may be submitted as to the adoption of one of the plans of government provided in Sections 3515-1, et seq., of the General Code. Section 2 of Article XVIII expressly authorizes the legislature to provide detailed steps for the submission to the electors of the question of voting upon the plans of government provided by the legislature.

In your letter you also refer to Section 1, Article II of the Constitution. This section vests the legislative power of the State in the General Assembly and reserves to the people the right of the initiative and referendum. I do not consider any further reference to this section as necessary to a determination of your inquiry.

The question then resolves itself into a determination of whether or not the electors of a municipality may vote upon the proposition of adopting a plan of government provided in the act of the General Assembly passed April 28, 1913 (103 O. L. 767), less than ninety days before a regular municipal election. Section 3515-2, General Code, provides as follows:

"The proposition to adopt a plan of government provided in this act shall not be submitted to the electors of any municipality less than

ninety days before a regular municipal election. If in any municipality, a sufficient petition is filed, requiring that the question of choosing a commission to frame a charter be submitted to the electors thereof, the proposition to adopt a plan of government provided in this act shall not be submitted in that municipality as long as the question of choosing such commission or adopting a charter framed thereby is pending therein. In any municipality while the proposition of adopting any one of the three forms of government herein provided for is pending, then no other proposition herein provided for shall be submitted until said pending proposition is adopted or rejected."

In my view, the provision that such proposition "shall not be submitted to the electors of any municipality less than ninety days before a regular municipal election is perfectly clear and not subject to construction. I find nothing in the act to authorize any attempted interpretation of the word "shall" in other than its generally accepted sense and under these circumstances the authorities are uniform that the term is mandatory. The third branch of the syllabus of the case of *Maxfield v. Brooks*, 110 O. S. 566, reads:

"Where the Legislature's language is clear there is nothing for the judiciary to construe. It is solely the duty of the courts to reasonably apply the statute so as to effect its obvious purpose. * * *."

Since Section 2 of Article XVIII of the Constitution has expressly conferred upon the legislature the power to establish regulations for the adoption of various plans of government and finding the provisions of Section 3515-2, General Code, mandatory, it is my opinion that the question of whether or not one of the plans of government provided by the act of the General Assembly passed April 28, 1913 (103 O. L. 767), being Sections 3515-1, et seq., General Code, shall be adopted, may not be submitted to the electors of a municipality less than ninety days before a regular municipal election.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3408.

COUNTY COMMISSIONERS—ORDERING MATERIALS WITHOUT COMPLYING WITH PROVISIONS OF SECTIONS 2414, 2445 AND 5625-33, GENERAL CODE—UNAUTHORIZED TO MAKE PAYMENT AT LATER DATE FOR SUCH MATERIALS.

SYLLABUS:

Where through non-compliance with the statutory provisions concerning the making of contracts with a county, no valid contract exists between the county and a company for furnishing materials to the county, the county commissioners may not at a later date authorize the payment of the bills for materials furnished under such invalid contract.

COLUMBUS, OHIO, July 7, 1931.

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