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MUNICIPAL CORPORATION — ORDINANCE DULY PASSED BY LEGISLATIVE AUTHORITY, TO AUTHORIZE TRUSTEES OF SINKING FUND TO SELL CERTAIN SECURITIES — USE PROCEEDS TO PURCHASE SECURITIES, UNITED STATES OR OBLIGATIONS, MUNICIPAL CORPORATION — VALID ORDINANCE.

SYLLABUS:

An ordinance duly passed by the legislative authority of a municipal corporation authorizing the trustees of the sinking fund to sell at not less than par and accrued interest securities in which the trustees have theretofore invested the funds of such sinking fund and use the proceeds of such sale to purchase securities consisting of either United States obligations or obligations of such municipal corporation is valid and the trustees of the sinking fund may lawfully act in pursuance of the power so authorized.

Columbus, Ohio, March 21, 1942.

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

Gentlemen:

I have your request for my opinion wherein you ask whether the Board of Sinking Fund Trustees of the City of Cincinnati is authorized to sell securities in which it has invested its moneys and use the proceeds of such sale to purchase other securities. Accompanying your request is a copy of Ordinance No. 16-1942 of the City of Cincinnati which provides:

“AN ORDINANCE No. 16-1942

To provide for the sale of securities held in the Sinking

Fund and the purchase of other securities by ordaining supplementary Section 47-12a of the Code of Ordinances.

Whereas, the trustees of the Sinking Fund hold bonds which will mature in years in which the proceeds thereof will not be needed for the purpose of meeting the obligations of the fund; and

Whereas, in a number of years in the future, the Sinking Fund will be required to meet maturity obligations far in excess of the cash which will be available from maturing investments in such years; and

Whereas, it will be for the best interest of the Sinking Fund to dispose of securities in which its funds have heretofore been invested which will mature in years in which the proceeds are not required to meet the obligations of the fund, and to invest the proceeds of the sale in other securities which will mature most closely in the years in which large sums will be required to meet such obligations of the Sinking Fund; now, therefore,

Be It Ordained by the Council of the City of Cincinnati, State of Ohio:

Section 1. That the Code of Ordinances is hereby supplemented by ordaining Section 47-12a to read as follows:

Sec. 47-12a. The trustees of the Sinking Fund are hereby authorized to sell, at not less than par and accrued interest, any securities in which it has heretofore invested its funds and use the proceeds of such sale to purchase securities consisting either of United States or City of Cincinnati obligations. The maturities of the obligations to be so purchased shall be so timed as to most closely provide the funds necessary to meet future obligations of the Sinking Fund.

Section 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law."

Sections 4514 and 4517, General Code, respectively provide:

Section 4514.

"The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be reinvested in like manner."

Section 4517.

"The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation

and the interest maturing thereon. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or moneys in their possession."

In Opinion No. 2322 of the Opinions of the Attorney General for 1921, found in Volume I, at page 678, the then Attorney General construed these sections, along with others, and reached the following conclusion as is disclosed by the syllabus of such opinion which reads:

"The sale of securities in the hands of the sinking fund trustees, for the purpose of raising funds to purchase municipal bonds offered for sale by the municipality, is unauthorized by law and illegal, and such an act is a breach of official duty, rendering such trustees liable to the municipality for any loss or damage occasioned by reason of such illegal transaction."

However, the reasoning of such opinion, as well as several statements made therein, support the conclusion that the trustees of the sinking fund have no power to sell securities except as provided in Section 4517, General Code, supra, and that under no circumstances could securities be sold and the proceeds thereof reinvested in other securities. In the body of the opinion, it was said:

"This section clearly indicates that the trustees of the sinking fund 'shall invest all moneys received by them in bonds of the United States,' etc. The section does not authorize such trustees to sell the securities already within their possession as investments in order to raise funds for the purpose of other investments, but definitely authorizes the investment of moneys in their possession not already invested."

In 1928, the question again arose and was submitted to the then Attorney General for his opinion. He reviewed the 1921 opinion, as well as the case of *Cleveland v. Baker*, 4 O. App., 68, and with considerable hesitation stated that he felt impelled to follow the 1921 opinion. However, he called attention to Section 4519, General Code, and stated that council might possibly possess authority to give to the trustees of the sinking fund by general ordinance the power of sale and reinvestment where such course would be clearly beneficial to the sinking fund. See Opinion No. 2385 of the Opinions of the Attorney General for 1928, Volume III, page 1811.

Section 4519, General Code, to which the 1928 opinion referred, provides:

“The trustees of the sinking fund may investigate all transactions involving or affecting the sinking fund of any branch or department of the municipal government, and they shall have such other powers and perform such other duties, not inconsistent with the nature of the duties prescribed for them by law, as may be conferred or required by council.”

In addition thereto, your attention is directed to Sections 3 and 7 of Article XVIII of the Constitution of Ohio which respectively provide:

Section 3.

“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.

“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.”

In 28 O. Jur., 243, it is said:

“The powers of local self-government conferred upon municipalities by article 18 of the Constitution are limited to such governmental powers as might be exercised by the state itself. On the other hand, such powers extend to and include all those which might be exercised by the state itself, through the legislature, within the proper domain of municipal government.”

The powers of local self-government granted by the above constitutional provisions appear to be broad enough to comprehend authority to permit the sinking fund trustees to sell bonds in the sinking fund and reinvest the proceeds of such sale in other bonds where it is advantageous to the fund to do so. This power to grant such authority to the sinking fund trustees rests in the legislative authority of the municipal corporation and would in most cases be the council, although under some charter forms of government the body exercising the legislative functions is denominated in some other way.

I have given consideration to Section 13 of Article XVIII and Section 6 of Article XIII of the Constitution of Ohio which respectively provide:

Section 13, Art. XVIII.

“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, Art. XIII.

“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.”

In view of the broad construction which our Supreme Court has given to those two provisions, there seems to be no doubt of the power of the General Assembly to prohibit by general law the sinking fund trustees from selling bonds in the sinking fund and reinvesting the proceeds of such sale in other bonds.

The question therefore to be determined is whether the General Assembly has by any enactment prohibited that which the ordinance permits. Very often it has been held that an act granting power to a municipal body is not only a grant but also a limitation and that legislative affirmative description implies a denial of all of the nondescribed powers. See, for example, *Frisbie Company v. East Cleveland*, 90 O.S. 266. Such pronouncements are merely an extension of the doctrine that public officers have such powers only as are expressly granted to them by law and such as may be implied from those expressly granted. In other words, the theory is that the legislature by granting power has impliedly withheld all those not granted. This principle is somewhat analogous to and finds some support in the legal maxim *expressio unius est exclusio alterius*.

Nevertheless, a municipal corporation may exercise all powers of local self-government except that the General Assembly may by statute

regulate its fiscal affairs. If an ordinance of a municipal corporation with respect to financial transactions conflicts with a law enacted by the General Assembly, the ordinance to the extent of the conflict is invalid.

One test which has been used to determine whether a municipal ordinance conflicts with a state law is whether the ordinance permits that which the statute forbids and prohibits and vice versa. *Village v. Struthers v. Sokol*, 108 O.S., 263; *Schneiderman v. Sesanstein*, 121 O.S., 80, 85, 86.

I find no provision of the Ohio General Code which expressly prohibits the trustees of the sinking fund from selling bonds and reinvesting the proceeds of such sale in the purchase of other bonds. Consequently, there is no conflict between the Cincinnati ordinance heretofore quoted and any act of the General Assembly. The ordinance is therefore valid and authorizes the Trustees of the Sinking Fund of the City of Cincinnati to sell at not less than par and accrued interest securities acquired by the sinking fund prior to the effective date of such ordinance, and use the proceeds of such sale to purchase securities consisting of either United States or City of Cincinnati obligations, the maturities of which shall be so timed as most closely to provide funds necessary to meet future obligations of the sinking fund.

Respectfully,

THOMAS J. HERBERT

Attorney General.