the council, have concurrent jurisdiction of all prosecutions for violations of ordinances of the corporation with full power to hear and determine them, and shall have the same powers, perform the same duties, and be subject to the same responsibilities in all such cases as are prescribed by law, to be performed by and are conferred upon the mayors of such corporations. Any person so appointed police justice other than a justice of the peace shall take an oath of office and give bond in such sum for the faithful performance of his duties as the council may require."

The section quoted above provides that council may appoint upon recommendation of the mayor, a police justice, who shall have the qualifications of being a resident of the corporation and a justice of the peace. The section further provides that if there be no such justice of the peace, then council may appoint another suitable person, resident of the corporation, or a justice of the peace for the township in which such corporation is situated, as said police justice, etc. Thus it would seem to be the evident purpose of the statute to require council in the first instance to appoint a police justice having the qualifications of a resident justice of the peace, although providing as an alternative in the event there is no resident justice of the peace, that council may appoint another suitable person resident of the corporation, or a justice of peace for the township in which such corporation is situated. Hence, it would seem that section 4544 G. C. must be construed to mean that if council proceeds to the process of appointment, the first condition must be exhausted before recourse may be had to the alternative provision. That is to say, another suitable person could not be appointed as police justice by council if there should be a resident justice of the peace within the corporation. Such conclusion obviously answers your question in the negative.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3864.

BOND ISSUE—REQUIREMENTS NECESSARY FOR BOND ISSUE UNDER SECTION 7630-1 G. C.—CITY BUILDING INSPECTOR NOT AUTHORIZED OR REQUIRED TO MAKE FINDING—WHERE CITY HAS CHARTER—NO EFFECT.

1. *In order that bonds may be issued under section 7630-1 G. C., the order creating the emergency described therein must be issued by the Division of Workshops and Factories in the Department of Industrial Relations following an examination by the inspectors of that division, and in a city school district wherein the municipality maintains a city building department, no function is required or authorized to be performed by such city building inspector under the general laws of the state.*

2. *Under the provisions of section 7630-1 G. C., there is no finding authorized or required of the city building inspector, and if a finding was made by the city building inspector following a physical examination of a school building, and such*

finding was different from that of the state building inspector, the finding of the state authorities would govern under the general laws of the state.

3. *In a municipality having a charter, the municipal government has no jurisdiction over the schools of the city school district or the board of education in authority in such school district.*

COLUMBUS, OHIO, January 4, 1923.

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

GENTLEMEN:—Acknowledgment is made of the receipt of your request for the opinion of this department upon the following three questions:

"*Question* 1. In a city school district what function is required of the city building inspector in condemning school property for use, in order that bonds may be issued under section 7630-1 of the General Code?

Question 2. Where the finding of the city building inspector is different from that of the state building inspector, which governs?

Question 3. In a municipality having a charter has the municipal government any jurisdiction over the schools, or the board of education?"

In your first question you indicate that the matter is upon the issuing of bonds under section 7630-1 G. C., which reads as follows:

"If a school house is wholly or partly destroyed by fire or other casualty, or if the use of any school house or school houses for their intended purpose *is prohibited by an order of the Industrial Commission of Ohio or its successor in such authority,* and the board of education of the school district is without sufficient funds applicable to the purpose, with which to rebuild or repair such school house or to construct a new school house for the proper accommodation of the schools of the district, and it is not practicable to secure such funds under any of the six preceding sections because of the limits of taxation applicable to such school district, such board of education may issue bonds for the amount required for such purposes. * * *"

You will note that the authority to issue these emergency bonds without a vote of the electors, as amended by the 84th General Assembly, is predicated upon an order from the Industrial Commission of Ohio, or its successor in such authority, such successor at the present time under the administrative code being the Department of Industrial Relations. This order must come from the state, which in cases of this kind functions through the Department of Industrial Relations, a division of which is the Division of Workshops and Factories, whose deputy inspectors made these inspections under the State Building Code, except as therein provided, for that department prior to the issuing of the order. Finding no reference to the city building inspector in section 7630-1, we now come to an examination of the state building code as to those sections applicable to school buildings.

Summarizing these sections as briefly as possible, it is provided in section 1031 G. C. that:

"The chief inspector of workshops and factories shall cause to be inspected all school houses, colleges, *** and other buildings used for the assemblage or betterment of people in the state. Such inspection shall be made with special reference to precautions for the prevention of fires, the provision of fire escapes, exits, emergency exits, hall-ways, air-space, and such other matters which relate to the health and safety of those occupying, or assembled in, such structures."

Section 1032 provides that:

"Upon inspection of such structure, the district inspector of workshops and factories shall file with the chief inspector a written report of the condition thereof."

When the order has been issued by the chief inspector of workshops and factories, following the receipt of the report of the district inspector of workshops and factories after an examination of the building, section 1033 provides that if the structure is located in a municipality, a copy of such notice shall be mailed to the mayor thereof, but if not a municipality, such notice shall be mailed to the prosecuting attorney of the county, and thereupon the mayor, with the aid of the police, or the prosecuting attorney with the aid of the sheriff, as the case may be, shall prevent the use of such structure for public assemblage until the appliances, additions or alterations required by such notice have been added to or made in such structure.

Section 1034 provides that the owner or person in control of such structure shall comply with every detail embodied in the order, and upon completion thereof shall report such fact in writing (1) to the chief inspector of workshops and factories and (2) to such mayor or prosecuting attorney, as the case may be.

Section 1035, relative to plans, reads:

"The plans for the erection of such structure, and for any alterations in or additions to any such structure, shall be approved by the inspector of workshops and factories, except in municipalities having regularly organized building inspection departments, in which case the plans shall be approved by such department."

Under this section it will be noted that in a municipality having a regularly organized building inspection department the plans shall be approved by such city building inspection department, but section 1035 does not operate until after the examination has been made, the report made to the state inspector of workshops and factories, an order issued by him and the plans for building changes prepared by the owner or person in control of such structure. These plans referred to in section 1035 frequently are prepared a considerable length of time after the issuance of the order described in 1032 G. C. by the state inspector of workshops and factories. There could be, and frequently are, many cases in which an order has been issued by the division of workshops and factories following an inspection of the structure, but later no plans were drawn for submission under 1035 G. C. because the owner or person in control of the structure may have decided to abandon its use entirely, not operating on that site in the future, removing the activity to another building, or, in the case of a private business, ceasing the conduct of the

same. Section 1036 G. C. provides the penalty where the plans so approved have been altered or the building has not been constructed or altered in accordance with the approved plans without the consent of the department that approved them, which in a municipality would be, as set forth in 1035 G. C., the city building inspection department. Similarly section 1037 G. C. is a penalty section running against those who use or permit the use of the building in violation of any order prohibiting its use, or fail to comply with any order issued by the Division of Workshops and Factories, relating to the change, improvement or repair of such structure.

Leaving for a time the sections of the state building code, attention is invited to those sections of the Ohio Municipal Code, which appear in Chapter 2 (Public Buildings), Title 12, Division 6 of the General Code. Thus section 4648 provides:

> "On application of the owner or person having control of any * * * school house * * * or other buildings used for the assemblages or betterment of people in a municipal corporation, *the mayor, civil engineer, or chief engineer of the fire department* shall carefully make a *joint examination* thereof to ascertain the means provided for the speedy and safe egress of persons at any time there assembled, and for extinguishing fire at or in such place. If the corporation has no such engineer, *the mayor* and *two members of council* shall make such examination."

Section 4649 G. C. provides that if upon such examination by the persons mentioned in 4648 G. C. it is found that such building is abundantly provided with means for speedy and safe egress of such persons, and, if above the first floor that it is provided therein with water or other equally sufficient agency and proper means to apply it, so that fire at such place may be immediately extinguished, then these persons, or a majority of them, shall issue to such owner or person having control of such building a certificate of the fact, which shall continue in force one year unless sooner revoked by council.

Section 4650 G. C. provides that if a change or alteration is made in such building the owner or person having charge of it shall notify the mayor of the fact, and he shall cause to be made a re-examination in all respects like that provided for in the preceding section (4649), and if upon such re-examination such owner or person having control is entitled to such certificate, it shall be issued to him with like effect, as appears in 4649 G. C.

The concluding section of the Municipal Code, which is pertinent to this question, is section 4657, which reads as follows:

> "The chief inspector of workshops and factories, or his district inspectors, shall make inspection of buildings named in the first section of this chapter, as often as he deems necessary, or upon the written demand of the agent or owner of such structures, or upon the written request of five or more citizens of the municipal corporation, county or township in which such structure is located; and they shall have access to such buildings at any time it is deemed necessary to inspect them."

Here it is noted that the chief inspector of workshops and factories, or his district inspectors (a state agency), may make these inspections as often as he deems necessary, and where a written demand of the agent or owner of the struc-

ture is made, or a petition of five or more citizens of a municipal corporation, county or township in which the structure is located, is presented, the chief inspector of workshops and factories is required to make such inspection, under the language of 4657 G. C.

Referring again to the state building code, section 12600-274 says:

> "It shall be unlawful for any *** board *** to construct, erect, build, equip, or cause to be constructed, erected, built or equipped any *** school house *** in any municipal corporation, county or township in this state, or to make any addition thereto or alteration thereof, except in case of repairs for maintenance without affecting the construction, sanitation, safety or other vital feature of said building or structure, without complying with the requirements and provisions relating thereto contained in *this act.*"

The words "this act" appearing in section 12600-64 G. C. refers to the state building code (102 Ohio Laws, 586).

The above sections from the General Code have been quoted for the reason that they are a part of the "general laws" of the state and the municipalities of the state are without authority to adopt or enforce any ordinance or regulation which is in "conflict with general laws." Thus section 3 of Article XVIII Constitution of Ohio provides:

> "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 Article XVIII of the Constitution 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."

These two sections of Article XVIII of the Constitution constitute the authority under which municipalities may frame and adopt their local charters, which charters however, must comply with the provisions of section 3, Article XVIII, supra. Thus under section 3 of Article XVIII the powers which can be exercised by the municipality must be those of "local self-government" and the matter of the public schools of the state is not one of "local self-government," since education is a state function and the schools are conducted by the state. Again, the municipality is limited to the adoption and enforcement of the "local police, sanitary and other similar regulations" and these are enforced only within the limits of the municipality, the boundaries of which are rarely the same as the boundaries of the city school district. The outstanding feature, however, is that these "local police, sanitary and other similar regulations" must not be "in conflict with the general laws," for if they were so they would be null and void, even though they appeared in the charter of the municipality. The effect of this is that any provisions in a municipal charter which conflict with the "general laws" heretofore cited upon this question, would be of no force because the general laws of the state by constitutional enactment have been placed first and prior to any provisions which may appear in a municipal charter.

That the schools of the state are not a local function but a state activity is made clear in a long line of decisions a few of which are herewith excerpted, to-wit:

"The common schools of the state are the fruit of the Constitution, making a general educational system." (Finch vs. Bd. of Education, 30 O. S., 37; Diehm vs. Cincinnati, 25 O. S., 305.)

"The boards of education of the state hold the property entrusted to their custody only as a public agency of the state." (Attorney General ex rel. Kies vs. Lowrey, 199 U. S., 233, 239.)

"School districts are organized as mere agencies of the state in maintaining its public schools." (State vs. Powers, 38 O. S., 54, 61.)

"The board is simply the custodian of what the legislature sees fit to intrust to it and is bound to use what it thus entrusted to it in the manner directed by the legislature and not otherwise, and to deliver it up when directed. It holds property, but only for carrying out the policy of the state. It constitutes an agency by which the state carries out its policy and purposes in educating the youth of the state.

The board of education is only a quasi corporation (30 O. S., 37; 38 O. S. 54; 10 O. S., 515; 20 O. S., 18), an organization subject to the control of the legislature. It constitutes the instrument by which the legislature administers the department of the civil administration of the state which relates to education and the schools.

Any regulation the state may prescribe for the government of the schools, the care of the school property or the means of protecting the inmates of the schools must be obeyed. If it delegates to the inspector of work shops and factories the duty of prescribing ways and means tending to insure safety for the inmates of the schools or other public institutions, the orders of these inspectors become rules of conduct for the boards having charge of such institutions." (7 O. N. P., p. 416, Akron Bd. of Education vs. Sawyer.)

" * * * the state, while granting wide powers to charter cities in other matters, has ever kept control of the public school system and all boards of education are operating under the laws of the state. * * * " (Opinion 396, Vol. 1, Opinions of the Attorney General for 1919, p. 653.)

" * * * the provisions of Article XVIII as amended have no relation to the judicial organization of the state, but *only to the government of municipal corporations.*" (State ex rel. vs. Yeatman, 89 O. S., 44.)

"While it might be conceded that article XVIII would warrant cities in dispensing with the rule referred to in so far as its purely municipal affairs are concerned; on the theory that a charter provision to that effect affects only its local self-government, I cannot reach the conclusion that article XVIII was ever intended to or in fact does authorize charter cities to set aside well established rules of public policy applicable to matters

affecting the general public or state government, as distinguished from matters of a strictly local nature." (Opinion Attorney General, Vol. 1, 1919, p. 394.)

"The doctrine of home rule does not now and never did have any application to the governmental affairs of the state." (Miami County vs. Dayton, 92 O. S., 215.)

"The home rule provisions of Sections 3 and 7, Article XVIII of the Constitution, adopted September 3, 1912, authorize chartered municipalities 'to exercise all powers of local self-government.' Indisputably these provisions are hazy and ambiguous and it is unfortunate that the members of the constitutional convention did not more fully define the powers of local self-government committed to chartered cities, and thus relieve the courts from exercise of wide discretion and from never ending appeals for construction of this constitutional clause; and likewise relieve the judicial department of the government from the criticism too often made that it has exercised the power of framing a constitution—a power that has been lodged solely in the people. It must be conceded that the provisions above named confer upon chartered cities powers that are not only purely local and purely municipal, but purely governmental. * * * The state as the *imperium* must concern itself with all its agencies, not only its municipalities, but also its counties, townships, villages and school districts. The sovereign people of the state may yield a part of its sovereignty by a constitutional provision; but whatever rule of construction may otherwise apply, wherever the contention is made that the state has yielded to a community a part of the sovereign power, the rule of liberal construction does not apply, but it must clearly and unambiguously appear that the state has done so by apt words contained in its constitution." (State ex rel. vs. Cooper, 97 O. S., 91.)

In response, then, to your first question, it will be noted that the general laws of the state have provided for this inspection of school buildings whose use might be forbidden and a bond issue thereafter filed under section 7630-1 G. C. and no reference in such general laws appears to the "city building inspector" as having any function to perform in this matter, and he is neither required nor is he permitted under the general laws of the state to forbid the use of a school building, the General Code having provided proper agencies of the state for that purpose.

In your second question you ask where the finding of the city building inspector is different from that of the state building inspector, which governs? In answer to this question you are advised that this is largely covered by what has been said heretofore and that the city building inspector could not make any official finding, since the general laws of the state provide how these inspections shall be made, that is, by either the chief inspector of workshops and factories and his district inspector, or by the persons mentioned in section 4648 G. C., or a majority of them. As indicated heretofore, since the authority to issue bonds under section 7630-1 is predicated upon the order of the state division of workshops and factories, the order of that division, that is, "state building inspector," would govern absolutely over any findings of a city building inspector. Of course in practice there is little objection to a city building inspector working in conjunction with and giving the benefit of his experience and knowledge to the district inspector of workshops and

factories, but the latter is not bound by the findings of the city building inspector under existing law.

In your third question you desire to know whether in a municipality having a charter the municipal government has any jurisdiction over the schools, or the board of education. The answer to this is in the negative for the reasons set forth heretofore, as exemplified by the court decisions cited that the municipality having a charter is limited to those things which appear in section 3 of Article XVIII of the Constitution of Ohio; that is, upon "local self government," while on the other hand education is a state function, boards of education are but the agencies of the state and any charter which would attempt to have any jurisdiction over the schools would be in conflict with the home rule provision of the Ohio Constitution. There are, of course, points of contact between the municipality and the board of education of the city school district, of which the municipality is often but a part; thus under 4761 G. C. the city solicitor or city attorney, though a municipal officer, has been given the duties of legal adviser to the city board of education. This official is chosen in various ways, according to the charter of the municipality in question; in a number of charter municipalities he is chosen by a direct vote of the people and is responsible to them, while in a city manager city he is an appointee of the city manager, serving at the will of that official as to the tenure of office and salary received. Another point of contact is that the municipal civil service commission, whether in a charter city or otherwise, is also the civil service commission of the city school district in which the municipality is located, and it is the duty of this municipal civil service commission, under the civil service act of Ohio, to furnish the board of education of the city school district a list of eligibles for the noncertificated employes of the city school district.

In reply to your question, then, you are advised that:

(1) In order that bonds may be issued under 7630-1 G. C., the order creating the emergency described therein must be issued by the Division of Workshops and Factories in the Department of Industrial Relations following an examination by the inspectors of that division, and in a city school district wherein the municipality maintains a city building department, no function is required or authorized to be performed by such city building inspector under the general laws of the state.

(2) Under the provisions of section 7630-1 G. C., there is no finding authorized or required of the city building inspector, and if a finding was made by the city building inspector following a physical examination of a school building, and such finding was different from that of the state building inspector, the finding of the state authorities would govern under the general laws of the state.

(3) In a municipality having a charter, the municipal government has no jurisdiction over the schools of the city school district or the board of education in authority in such school district.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3865.

MUNICIPAL CORPORATIONS—BUILDING DEPARTMENT CHARTER—WITHOUT AUTHORITY TO REQUIRE PERMIT FEES—WHEN FINDINGS SHOULD BE MADE—WHERE BUILDING DEPARTMENT CREATED UNDER GENERAL LAWS OF STATE—ITS AUTHORITY.