1604

1. MUNICIPALLY OWNED AUDITORIUM—ARENA—NOT A PUBLIC UTILITY—ARTICLE XVIII, SECTION 4, CONSTITUTION OF OHIO.
2. ORDINANCE 321-49, ADOPTED BY COUNCIL, CITY OF CANTON — WITHOUT LEGAL FOUNDATION, OF NO FORCE AND EFFECT.
3. IF CITY HAS NOT ADOPTED ONE OF OPTIONAL PLANS OF GOVERNMENT PURSUANT TO ARTICLE XVIII, SECTION 7, CONSTITUTION OF OHIO, SECTIONS 4323 THROUGH 4334 G. C. MUST BE FOLLOWED—POWERS AND DUTIES, DIRECTOR OF PUBLIC SERVICE—OPERATION AND MAINTENANCE OF MUNICIPALLY OWNED UTILITIES.

SYLLABUS:

1. A municipally owned auditorium-arena is not a public utility within the meaning of Article XVIII, Section 4, of the Ohio Constitution.

2. Ordinance No. 321-49, adopted by the council of the City of Canton, is without legal foundation and of no force and effect.

3. If a city has not adopted one of the optional plans of government and framed a charter or exercised its powers of local self government pursuant to the provisions of Article XVIII, Section 7, of the Constitution of Ohio, the provisions of Sections 4323 to 4334, inclusive, of the General Code, as they pertain to the powers and duties of the director of public service in the operation and maintenance of all municipally owned utilities, must be followed.

Columbus, Ohio, March 30, 1950

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

This will acknowledge receipt of your request for my opinion, which reads as follows :

> "The current examination of the records and accounts of the City of Canton disclosed the enactment by Council of Ordinance No. 321-49, creating and establishing a 'Board of Management for the Canton Municipal Auditorium-Arena,' which building is

to be used principally for sports events, entertainments, and other public gatherings. We enclose a copy of said Ordinance No. 321-49 for your information.

"It will be noted that section 5 reads in part as follows:

'The Board of Management shall have exclusive power to manage and operate, and to administer the affairs of, the Auditorium-Arena as a municipally-owned public utility of the City of Canton, including all the following specific powers:

(a) * * *
(b) * * *
(c) * * *
(d) * * *
(e) * * *
(f) * * * To exercise all other powers reasonably proper, necessary or incident to the operation, management, maintenance and administration of any municipally owned public utility, and of this utility in particular.

The foregoing specific powers are not intended to be exclusive, but shall be cumulative with all other powers which might lawfully be exercised by such board, either under Sections 4326, 4326-1, or 4328 of the Ohio General Code, or any other statutes of the State of Ohio, or the Constitution of Ohio, or under any charter of the City of Canton, if it should ever obtain one.'

"In view of the provisions of Section 4326, General Code, it would appear that the director of public service in a non-charter city is vested with the authority to supervise the construction and maintenance, as well as operate and manage municipally owned public buildings including a so-called 'Auditorium-Arena.'

"The question of vesting authority to manage and control said 'Auditorium-Arena' in a board of three members to be appointed by the Mayor, is dependent upon whether or not such municipal Auditorium-Arena comes within the meaning of the correct definition of a *municipally-owned public utility.*

"Since we are not familiar with any Court Decision or Opinion of the Attorney General directly in point on the subject of what constitutes a municipally owned public utility, we respectfully request that you give consideration to the following questions, and furnish us with your formal opinion in answer thereto:

"1. Does a municipally-owned Auditorium-Arena, which is used for public meetings, sporting events, and other enter-

tainment purposes, come within the meaning of the definition of a municipally owned public utility?

"2. (a) If the answer to question one is in the affirmative, does Ordinance No. 321-49, passed by the City of Canton, legally authorize the establishment of a 'Utilities Board' in accordance with the provisions of Section 4326-1, General Code?

"(b) Does the board appointed pursuant to the provisions of said Ordinance have authority to operate and manage the water works, sewerage and garbage disposal works belonging to the said City of Canton?

"3. In the event the answer to question one is in the negative, does the Council of a non-charter city have legal authority to enact an Ordinance vesting the management and control of the municipal 'Auditorium-Arena' in a board consisting of three members, contrary to the provisions of Section 4326, General Code, which provides that the Director of Public Service shall have the management of public buildings?"

The City of Canton has a mayor form of government, operating under the general laws pursuant to Article XVIII of the Ohio Constitution. Article XVIII, Section 4 of the Ohio Constitution reads as follows:

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

In the case of City of Akron v. Public Utilities Commission, 149 O. S. 347, the first branch of the syllabus reads in part:

"By virtue of the authority conferred by Section 4, Article XVIII of the Constitution of Ohio, * * * municipalities are empowered to operate their own utilities or secure by contract the product or service of other utilities."

What constitutes a "public utility" within the meaning of the Constitution? In the case of J. C. Heald v. City of Cleveland, and Harry L. Davis, Mayor of the City of Cleveland, 19 O. N. P. (N. S.) 305, at page 321 the court said:

> "Sections 4 and 5, Article XVIII of the Ohio Constitution, provides that any municipality may acquire, construct, own, lease, and operate a public utility; but these sections taken in connection with the remaining section clearly indicate that the utility meant is limited to lighting, furnishing water, common carrier facilities, and kindred or like utilities."

Can it be said that an auditorium is a kindred or like utility? The word "auditorium" is defined in Webster's New International Dictionary, G. & C. Merriam Company Edition, as:

> "The part of a church, theater or other public building, assigned to the audience. A room, hall, or building used for lectures, etc."

Clearly an auditorium is not a kindred or like utility within the meaning of the Constitution.

The title or Ordinance No. 321-49, adopted by the City of Canton, reads as follows:

> "Ordinance No. 321-49, creating and establishing a Board of Management for the Canton Municipal Auditorium-Arena and duties and term of service of members of such board."

The general law applicable to the management of public buildings is found in Section 4326 of the General Code, which reads in part as follows:

> "The director of public service shall * * * supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title. * * * "

The department of public service is established by general law within the executive branch of the city government with certain prescribed duties and functions. Can it be said that the legislative body has power to enact an ordinance by which certain duties granted to the director by general law can be taken from him and placed in the hands of a board not provided for in the general framework of its government? In 8 O. Jur., pages 314 and 315, it is said:

> " * * * While the Constitution of Ohio does not, in express terms, forbid the conferring of powers belonging to one branch of the state government on any co-ordinate branch, yet the fact that these governmental powers have been severally distributed

> by the Constitution to the legislative, executive, and judicial departments of our state government, clearly evidences a purpose that the powers and duties of each, shall be separate, and independent of the powers and duties of the other coordinate branches, and the distribution so made to the several departments, by clear implication operates as a limitation upon and a prohibition of the right to confer or impose upon either powers that belong distinctively to one of the other co-ordinate branches."

Ordinance No. 321-49 apparently was adopted pursuant to Section 4326-1, General Code, which reads in part as follows:

> "Whenever in any municipal corporation, the council or governing body thereof, shall, by ordinance, declare it to be essential to the best interests of such municipal corporation, the duties relating to the management and operation of municipally owned public utilities conferred upon the director of public service by sections 3956 and 4326 of the General Code, shall be vested in a board composed of three members. * * * "

however, in view of my previous statement that an auditorium, in my opinion, is not a utility within the meaning of the Constitution, I must conclude that Ordinance 321-49 is without legal foundation and any acts of the board appointed pursuant to such ordinance would be void and of no force and effect.

Your attention is directed to a recent opinion of mine, dated October 3, 1949, Opinions of the Attorney General No. 1054, in which I held in the first branch of the syllabus that:

> "If a city has not adopted one of the optional plans of government and framed a charter or exercised its powers of local self government pursuant to the provisions of Article XVIII, Section 7, of the Constitution of Ohio, the provisions of Sections 4323 to 4334, inclusive, of the General Code, as they pertain to the powers and duties of the director of public service in the operation and maintenance of all municipally owned utilities, must be followed."

In view of the foregoing, it is my opinion that:

1. A municipally owned auditorium-arena is not a public utility within the meaning of Article XVIII, Section 4 of the Ohio Constitution.

2. Ordinance No. 321-49, adopted by the council of the City of Canton, is without legal foundation and of no force and effect.

3. If a city has not adopted one of the optional plans of government and framed a charter or exercised its powers of local self government pursuant to the provisions of Article XVIII, Section 7 of the Constitution of Ohio, the provisions of Sections 4323 to 4334, inclusive, of the General Code, as they pertain to the powers and duties of the director of public service in the operation and maintenance of all municipally owned utilities, must be followed.

Respectfully,

HERBERT S. DUFFY,
Attorney General.