667.

APPROVAL—BONDS OF AVON LAKE VILLAGE SCHOOL DISTRICT, LORAIN COUNTY, OHIO, $43,000.00 (Unlimited).

COLUMBUS, OHIO, May 27, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of Avon Lake Village School Dist., Lorain County, Ohio, $43,000.00 (Unlimited).

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of building bonds in the aggregate amount of $125,000.00, dated December 1, 1921, bearing interest at the rate of 6% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said school district.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

668.

MUNICIPALITIES — CHARTER FORM — EXPENDITURES OF FUNDS RAISED BY TAXATION—LOBBY COMMITTEE—COMMITTEE ON RECREATION FACILITIES—ENTERTAINMENT OF RETURNING ATHLETE—COMMITTEE ON INDUSTRY—HOTEL EXPENSES, WHEN

SYLLABUS:

1. *In the absence of an express charter provision, a municipality operating under a charter form of government may not legally expend funds raised by taxation for the traveling expenses of a committee to lobby before the state legislature.*

2. *The legality of expending public funds for the payment of traveling expenses of a committee appointed by a municipality to study recreational facilities and transportation problems in other cities depends upon whether or not the work of the committee is in pursuance of a*

definite and presently contemplated undertaking for the benefit of the whole municipality. Opinions of the Attorney General for 1930, *Vol. II, page* 1091, *approved and followed.*

3. *In the absence of an express charter provision a municipality operating under a charter form of government may not legally expend funds raised by taxation for the welcome and entertainment of a returning athlete.*

4. *In the absence of an express charter provision a municipality operating under a charter form of government may not legally expend funds raised by taxation for the expenses of a committee maintained to urge the retention of industries in such municipality.*

5. *Whether or not proper charter provisions could authorize the expenditure of public funds for the purposes considered in this opinion is not decided.*

6. *The direct payment of a claim for the hotel expenses of a city official without certification by the official that the claimed services were rendered, is prohibited by Section* 105 *of the Charter of the City of Cleveland.*

COLUMBUS, OHIO, May 28, 1937.

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

GENTLEMEN: I have your letter of recent date requesting my opinion as to the power of the council of the City of Cleveland to authorize, by resolution, the expenditure of public funds for the following purposes:

1. Traveling expenses of committees to lobby before the state legislature.

2. Traveling expenses of committees to study recreational facilities and transportation problems in other cities.

3. Civic welcomes to returning athletes.

4. Maintenance of committees to urge the retention of industries in Cleveland.

I note also that you submit the following question for my opinion:

> "Can the expenses of an official at a hotel, said expenses not being paid by the official, when presented direct by the hotel to the city, without the official certifying that he received the said services, be legally paid by the city?"

The legality of the expenditure of public funds depends simply upon whether the money is spent for a public or private purpose.

This guiding principle used in testing the legality of public expenditures is well stated in McQuillin's Municipal Corporations, 2nd Edition, Vol. 5, Section 2323:

> "All expenditures of public money by municipalities and indebtedness created by them, must be for a public and corporate purpose, as distinguished from private purpose, at least unless the powers of the particular municipality in regard thereto have been enlarged by the legislature, which is itself limited in its power to authorize expenditures or indebtedness for other than public purposes. * * * Furthermore, the fact that a municipality is expressly authorized to expend a certain sum without specification as to the purpose of the expenditure does not authorize it to expend funds for other than a public purpose."

Even the enlarged powers enjoyed by municipalities operating under a Home Rule Charter government, as in the present instance, are not so broad as to allow the expenditure of public funds for a non-public purpose. As announced in 28 O. Jur. 546:

> "It is not competent for a muncipality by a provision in a charter adopted under home rule, to authorize the expenditure of funds, raised by taxation, for any purpose which is not of a public nature."

In the Examiner's report attached to your letter, Section 70-A of the Cleveland Municipal Code is quoted as follows:

> "Whenever it shall be necessary for the mayor or any committee or member of the council to travel outside of the city of Cleveland upon business or affairs of the council or appertaining to the office of mayor, all necessary expenses for transportation, hotel, living, and incidental purposes shall be paid out of appropriations made to the council or the mayor for the purpose of travel expense out of the city."

Assuming that the above Ordinance is a valid exercise of the broad powers of local self-government conferred by Article XVIII of the Constitution of Ohio, our present problem narrows down to the simple question of whether the activities outlined in your Examiner's inquiry are properly the *business* or *affairs* of the municipal government of Cleveland.

Your first question is whether traveling expenses can be incurred

in connection with lobbying activities before the State Legislature. An attempted expenditure by the City Council of Cleveland for an activity which practically amounted to lobbying was considered in *State, ex rel. Thomas* vs. *Semple,* 112 O. S. 559. This was an action in mandamus to compel the acting Director of Finance of the City of Cleveland to honor a voucher drawn by the Clerk of Council pursuant to an emergency resolution of Council to cause the sum of One Hundred ($100.00) Dollars to be paid as membership dues in The Conference of Ohio Municipalities. The Director of Finance refused to honor the voucher on the ground that it would be an unlawful expenditure of public funds. In deciding that the proposed expenditure was beyond the powers of the municipality, the Court held:

> "It does not follow, from the broad powers of local self-government conferred by Article XVIII of the Constitution of the state, that a municipal council may expend public funds indiscriminately and for any purpose it may desire. The misapplication or misuse of public funds may still be enjoined, and certainly a proposed expenditure, which would amount to such misapplication or misuse, even though directed by a resolution of council, would not be required by a writ of mandamus. Without considering the validity of such a provision, it must be conceded that there is no express provision of the charter of the city of Cleveland relative to the contribution from the treasury of the city to a fund made up of contributions of various municipalities for the purposes enumerated in the constitution of the 'Conference of Ohio Municipalities'; and no general provision from which authority may be inferred to expend the funds of the city to assist in creating and maintaining an organization with offices and officers entirely separate from those of the city, selected by representatives of various municipalities of the state, with salaries and expenses also fixed by them."

The foregoing decision is followed in an opinion to be found in Opinions of the Attorney General for 1929, Vol. 1, page 157, the syllabus of which held as follows:

> "In view of the holding in the case of *State ex rel.* vs. *Semple,* 112 O. S. 559, a charter city may not legally expend its funds for services and periodicals of an association known as 'Conference of Ohio Municipalities' in the absence of specific charter provisions; whether or not such a charter provision could authorize such an expenditure is not decided."

Authority for the proposition that lobbying is not a proper function of municipal governments is found in the case of *Henderson* vs. *The City of Covington, Ky.*, 77 Ky. 312, in which the second branch of the syllabus held:

> "The city council of Covington had no power to appropriate the revenue of the city to obtain an increase of the powers of the corporation, through persons sent by the council to appear before the General Assembly and Congress."

Another case applicable to this point is *Valentine* vs. *Robertson,* 300 Fed. 521, in which the third branch of the syllabus held:

> "Authority granted to a city to 'provide for the location, construction and maintenance of streets' held to carry no implied power to appropriate public money for payment of an emissary to lobby for the passage of a legislative act authorizing the city to issue bonds for street improvements."

In view of the absence of a specific charter provision and because of the reasons hereinbefore set forth, I am of the opinion that the traveling expenses of committees to lobby before the State Legislature are not expenditures of public funds for a public purpose.

The question presented as to the traveling expenses of committees to study public recreational facilities and transportation problems in other cities seems well settled in an opinion to be found in Opinions of the Attorney General for 1930, Vol. II, page 1091, in which the first branch of the syllabus held:

> "The payment from city funds, of the traveling expenses of a recreation director employed by a city recreation board when attending a convention of recreation officials for mere purposes of general education or the acquiring of general ideas pertaining to the duties of his position is unauthorized. If, however, the attendance upon such convention is authorized by resolution of the city recreation board which in the exercise of sound discretion finds it necessary to send its recreation director on a trip in furtherance of a definite, presently contemplated undertaking for the benefit of the municipality the city may lawfully pay the necessary traveling expenses of such recreation director. Fourth branch of the syllabus of Opinion No. 1327, dated December 3, 1929, modified in conformity herewith."

From the facts submitted in your inquiry, I cannot tell whether the Committee to study recreational facilities in other cities engaged merely in the acquisition of ideas and information, or if the work of the committee was in pursuance of a definite, presently contemplated undertaking which would directly inure to the benefit of all the citizens of Cleveland. In the 1930 opinion supra, at page 1095, it was held:

> "One rule of very general application is that no expenses may be allowed to a public officer when it appears that he is on a junketing expedition or in the quest of information for personal and private purposes under the guise of performing public duties. From this there has been evolved the rule that public officers on trips in quest of general information pertaining to the duties of their office, and not with respect to a definite contemplated undertaking or course of action, can not lawfully be reimbursed for their personal expenses incurred on the trip."

The foregoing opinion, which very ably states the position of this office on the payment of traveling expenses of committees, is applicable with equal reasonableness to the legality of the traveling expenses of a committee engaged in studying public transportation problems in other cities. Needless to say, there is no substantial difference between a committee engaged in the study of transportation problems and one engaged in the study of recreational facilities. This very point is well stated in the 1930 opinion supra, at page 1094, as follows:

> "It should be noted, however, that the circumstances under which traveling expenses may be paid for a public official or employe, to-wit: when incurred with reference to a definite, presently contemplated undertaking are not confined merely to cases where the purchase of machinery or supplies is contemplated, *but extends as well to any definite contemplated undertaking.* This fact makes the rule extremely difficult of practical application. The difficulty in distinguishing between these cases where an official is on a mission, or in quest of information which may be charged directly to some definite, presently contemplated project or undertaking, or merely gathering general information, is that it requires consideration of a distinction, which, though not without a difference, is one involving, in many cases, such a slight difference as to render it dangerous to predicate a legal conclusion thereon, based on any general rule. Each

case requires separate consideration, as in each instance there are involved questions of fact upon which the determination turns." (Italics the writer's.)

I concur therefore, in the opinion of one of my predecessors that the legality of expending public funds to study municipal problems in other cities depends upon whether or not the work is in furtherance of a presently contemplated undertaking for the benefit of the whole municipality.

The legality of expending public funds to welcome a returning athlete depends upon whether or not there is any express legislative authority for such an expenditure. This principle is stated in McQuillin's Municipal Corporations, 2nd Edition, Vol. I, Section 381, as follows:

> "Without express authority, a municipal corporation may not appropriate the public revenue for collaborations, entertainments, etc. Such power cannot be implied. * * * Municipal expenditures for entertainments of official visitors, or to provide a ball and banquet have been declared illegal."

In the case of *Moore* vs. *Hoffman, City Auditor, et al.,* 13 O. Dec. Rep., 1005, an action was brought to restrain payment of expenses incurred in the entertainment of Horace Greely who was a specially invited guest of the City of Cincinnati at the Cincinnati Industrial Exposition. In denying the right of the city council to appropriate funds for such purpose, the court held in the first branch of the syllabus:

> "All municipal corporations in Ohio derive their powers by delegation from the legislature, which has conferred upon them no authority to appropriate public moneys raised by taxation to the payment of expenses for entertaining guests invited to and receiving their public hospitalities."

In *Stem* vs. *City of Cincinnati,* 9 O. Dec. Rep. 45, a taxpayer sought to enjoin the spending of Ten Thousand ($10,000) Dollars appropriated for the expenses incident to an encampment of the Grand Army of the Republic. In granting the temporary restraining order, the court held in the seventh branch of the syllabus as follows:

> "An expenditure of money raised by taxation in the

entertainment of public guests is beyond the power of a municipality."

Even though the two foregoing cases deny the city council power to appropriate money for the purpose under consideration, a municipality may, by charter provision, authorize its council to appropriate money for the entertainment of public guests. In *Sacramento Chamber of Commerce* vs. *Stephens,* 212 Cal. 607, 299 Pac. 728, it was held in the second branch of the syllabus as follows:

> "Charter provision authorizing city council to appropriate money to entertain public guests, advertise city, etc., is permissive and not mandatory."

The charter of the City of Cleveland, however, has not specifically authorized the appropriation of money for the entertainment of public guests and in the absence of such charter provision, I am of the opinion that public funds cannot be used to welcome a returning athlete.

While the legality of expending public funds to keep private industry in a municipality has never been specifically considered in any Ohio case, the analogous question of expending public money to induce industry to locate in a municipality has been definitely held to be an expenditure of public funds for a private purpose. In Cooley on Taxation, 3rd Ed., page 206, this matter is treated in the following language:

> "It may therefore be safely asserted that taxation for the purpose of raising money from the public to be given or even loaned to private persons, in order that they may use it in their individual business enterprises, is not recognized as an employment of the power for a public use. In contemplation of law it would be taking the common property of the whole community and handing it over to private parties for their private gain, and consequently unlawful. Any incidental benefits to the public that might flow from it could not support it as legitimate taxation."

The absence of any element of public purpose in expending public funds for the purpose of inducing private industry to remain in a municipality is stated in McQuillin's Municipal Corporations, 2nd Ed., Vol. 6, page 343, as follows:

> "And it may be safely stated that no decision can be

found sustaining taxation by a municipality, where its principal object is to promote the trade and business interests of the municipality, and the benefit to the inhabitants is merely indirect and incidental."

In the case of *Markley* vs. *Village of Mineral City,* 58. O. S., 430, the village council, by resolution, attempted to convey certain real estate to Markley as a donation to procure him to construct and operate manufacturing plants. In denying the municipality the power to make such a donation, the court held in the first and second branches of the syllabus as follows:

"1. A municipal corporation is without capacity to acquire land by purchase for the purpose of donating the same to a corporation or person as an inducement to build and operate manufacturing plants within the municipality.

2. Corporate funds paid out in the attempted purchase of land for such purpose are unlawfully expended, and a deed purporting to convey such land is without legal effect."

This same rule of law is also announced in *The Village of Kent* vs. *The Dithridge & Smith Cut Glass Co., et al.,* 10 O. C. C. 629, as follows:

"Where the authorities of a municipality, under an agreement with private parties, donate to them a large amount of the money of such municipality and a tract of land owned by it, in consideration of such private parties erecting a factory in such municipality, such transaction is an unlawful diversion of the municipal property, and the same can be recovered back from such private parties at the suit of the municipality."

There is only a difference of degree in the outright donation of money raised by taxation to attract industry to a municipality, and the practice of expending funds to induce industry to remain in a municipality. I am constrained therefore, to hold that public funds cannot be legally expended to urge the retention of industry in Cleveland.

The question of directly paying a claim for the hotel expenses of an official without certification by the official that such services were rendered, is completely answered by Section 105 of the Charter of the City of Cleveland, which provides in part as follows:

"No claim against the city shall be paid unless it be

evidenced by a voucher approved by the head of the department or office for which the indebtedness was incurred: and each such director or officer and his surety shall be liable to the city for all loss or damage sustained by the city by reason of his negligent or corrupt approval of such claim. The commissioner of accounts shall examine all payrolls, bills and other claims and demands against the city and shall issue no warrant for payment unless he finds that the claim is in proper form, correctly computed and duly approved; that it is justly and legally due and payable * * *"

Respectfully,

HERBERT S. DUFFY,

Attorney General.

669.

APPROVAL — ARTICLES OF INCORPORATION OF THE TUBERCULOSIS HOSPITALIZATION MUTUAL INSURANCE COMPANY.

COLUMBUS, OHIO, June 1, 1937.

HON. WILLIAM J. KENNEDY, *Secretary of State, Columbus, Ohio.*

DEAR SIR: I have examined the articles of incorporation of Tuberculosis Hospitalization Mutual Insurance Company which you have presented for my approval.

Finding the same not to be inconsistent with the Constitution or laws of the United States or of the State of Ohio, I have endorsed my approval thereon, and return the same herewith to you.

Respectfully,

HERBERT S. DUFFY,

Attorney General.