996.

MUNICIPALITY—CHARTER CITY—CITY PROPERTY—COUNCIL MAY LEASE AUDITORIUM IN CITY BUILDING—PROVISO, ABSENCE OF FRAUD OR COLLUSION, LEASE SHALL BE MADE IN GOOD FAITH IN INTEREST OF PUBLIC—QUERY: FIFTEEN YEARS REASONABLE LENGTH OF TIME—ASHLAND.

SYLLABUS:

1. Where the charter of a charter city authorizes the city council to "sell, convey, lease, hold, manage and control" city property, in the absence of fraud or collusion, such council may lease an auditorium in the city building, not needed for municipal purposes, for such reasonable length of time as the city council deems proper, provided such lease be made in good faith and in the interest of the public.

2. Whether or not a term of fifteen years in such a case is a reasonable length of time, is a question of fact to be determined in the light of all the facts and circumstances surrounding the transaction.

COLUMBUS, OHIO, August 4, 1939.

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

GENTLEMEN: I have your request for my opinion, dated July 26, 1939, and reading as follows:

> "We are enclosing herewith a letter from the city solicitor of the city of Ashland, Ohio, in which your advice is sought on the following question:
>
> Question 1. Is a charter city, through legislation adopted by its City Commission or Council, authorized to lease an auditorium in its City Building to a private corporation for the purpose of exhibiting motion pictures, said lease to cover a period of fifteen years?
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> A similar question concerning the lease of such an auditorium for a period of five years was answered in the affirmative by the Attorney General in Opinion No. 1371 of the year 1930.
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> May we have your formal, or informal, reply to this question at your early convenience?"

The enclosure, transmitted with your letter, reads:

> "The city of Ashland, Ohio, is a municipal corporation governed by the provisions of a charter which became effective January 1, 1916.

This is to inquire whether the city of Ashland, Ohio, may lawfully enter into a ten or fifteen year lease with a person or corporation for the Opera House owned by said city. This Opera House or auditorium is not needed for municipal purposes and such lessee would use said premises for the purpose of exhibiting motion pictures. The lessee would agree to make certain improvements in the building and auditorium which improvements, alterations or changes would become the property of the city of Ashland at the termination of the lease.

An opinion rendered by the Attorney General January 7, 1930, being Opinion No. 1371, seems to indicate that a five year lease would be permitted. The opinion, however, states that it is based upon the assumption that it is not a charter village.

The charter of the city of Ashland, Ohio, does not set forth in detail the procedure to be followed in the leasing of city property but Section 1 of the charter gives to the city the power to 'sell, convey, lease, hold, manage and control such property'. Will you please refer this to the Attorney General for opinion at your earliest convenience?"

It is noted that the city of Ashland is a charter city.

The powers and authority of charter cities flow directly from the people and not through enactments of the Legislature. By Section 3 of Article XVIII of the Constitution it is provided:

"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."

This section must be read in connection with Section 7 of the same Article, which reads:

"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 addition to the limitations contained in Section 3 of Article XVIII, supra, the people of Ohio have further ordained in Section 6 of Article XIII, and Section 13 of Article XVIII of the Constitution that:

Sec. 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."

Sec. 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."

It has been held by the Supreme Court of Ohio that Section 6, Article XIII, was not repealed by the adoption of any of the Home Rule provisions of Article XVIII. See State ex rel Toledo vs. Cooper, County Auditor, 97 O. S., 86 (1917); Berry et al vs. City of Columbus, 104 O. S., 607 (1922); State ex rel vs. Williams, Director of Finance, 111 O. S., 400 (1924); and Phillips, on behalf of City of Lima vs. Hume, Purchasing Agent, et al., 122 O. S., 11 (1930).

It is manifest, of course, that we are not here concerned with the powers of a municipality relating to taxation, assessment, borrowing money or contracting debts; nor is the city attempting to loan its credit within the meaning of Section 6 of Article XIII, above quoted, and clearly under the provisions of Sections 3 and 7 of Article XVIII, the city in question was empowered to provide in its charter that the proper city officers might "sell, convey, lease, hold, manage and control" city property.

You state that the charter "does not set forth in detail the procedure to be followed in the leasing of city property." However, it may be that the charter of the city of Ashland contains a provision similar to the one considered by one of my predecessors in office in Opinion No. 3721, rendered to your Bureau under date of October 18, 1926 (Opinions of the Attorney General for 1926, p. 427). In that opinion the charter of the city there involved provided:

"All general laws of the state applicable to municipal corporations which are not in conflict or inconsistent with the provisions of this charter, or with ordinances or resolutions hereinafter enacted by the commission, shall be applicable to this city."

Because of this provision, the then Attorney General held:

"The sale of real estate by the city of East Cleveland, which

is not in conformity with Sections 3698 and 3699 of the General Code, is in conflict with general laws and therefore illegal."

Whether or not there be any such provision in the instant case can be determined only by an examination of the city charter here under consideration.

In Opinion No. 1371, Opinions of the Attorney General for 1930, Vol. 1, page 37, to which you refer in your letter, it was held as follows:

"The council of an incorporated village may lease in the manner provided by law, a municipal auditorium, not needed for municipal purposes, to private individuals for an extended period of time, to be used for the giving of motion picture shows, providing council reserves the right in said lease to use the said auditorium whenever public occasion requires."

That opinion, however, was concerned with a non-charter municipality and involved the application of Sections 3631 and 3698, and certain other sections of the General Code. In so far as the question now before me is concerned, Opinion No. 1371 is not particularly applicable here, for the measure of the power of the charter city of Ashland is the Constitution of Ohio and the city charter and not the sections of the General Code considered in such opinion.

Apparently your question is provoked by the fact that the term of the proposed lease will extend far beyond the terms of the present officers of the city. Touching this question, it is said at page 952, et seq., Vol. 3, McQuillen on Municipal Corporations, as follows:

"* * * Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business or proprietary powers. With respect to the former, their exercise is so limited that no action taken by the governmental body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist. Consequently independent of statute or charter provisions, it is generally held that the hands of successors cannot be tied by contracts relating to legislative functions but may as to contracts relating to business affairs. * * *

Generally, contracts for public utilities, such as water supply, gas, electricity, etc., are considered as relating to the business affairs of the municipality, rather than the legislative or governmental powers, and it is no objection thereto that they

> bind the municipality beyond the term of office of the officers making the contract. So a council may give a lease to municipal property for a time extending beyond the term of such council, and may take a lease from a third person for a term not to expire until after such council would be out of office. * * *"

Three Ohio cases on this question are: Commissioners of Franklin County vs. Ranck, 9 O. C. C. 301, 6 O. C. D. 133 (1895); State ex rel. vs. Lewis, Auditor, 12 O. D. (N. P.), 46 (1901); and State ex rel v. Lutz, Auditor, 111 O. S., 333 (1924).

In the Lutz case it was recognized that county commissioners might make a contract "so indefinite in time that the same might extend beyond the life of the board and thus bind another or future board", although it was stated at page 339 of the opinion by Judge Day that it was the general rule "that such contracts, extending beyond the term of the existing board, and employment of agents or servants of the county for such period, thus tying the hands of a succeeding board, are not looked upon with favor unless the necessity or some special circumstances show that the public good requires such contracts to be made."

The Ranck case is not here material because in that case the court found that the contract attempted to be entered into by the county commissioners there involved was void because it was collusively and fraudulently made and not made in good faith.

In McGoldrick v. Lewis, 12 O. D., 46, decided by the Superior Court of Cincinnati, it was said at page 49 as follows:

> "The argument, as I understand it, against the validity of the contract, because it continues in force for three years, is that such a term extends it beyond the term of office of the officials who make the contract on behalf of the public.
>
> There is no rule of law that public officers can not enter into a contract the performance of which will extend beyond their terms of office. Such contracts are so frequently made and are so numerous that it is unnecessary to call attention to any specific instances. They will readily occur to any one.
>
> The rule with respect to the time during which a contract made by public officials may continue is, that unless limited by statute it may continue for such time as under the circumstances is reasonable."

Your attention is also directed to an opinion of one of my predecessors in office, reported in Opinions of the Attorney General for 1928, Vol. 3, p. 1735, in which it was held that boards of education might, in their discretion, contract for the transportation of pupils for a longer period than a school year if the board deemed it advisable, provided the

contract was made in good faith in the interest of the public and for a time that was reasonable under all the circumstances.

In the instant case it might well be that the city of Ashland could not rent the auditorium in question except for ten or fifteen years as menioned in the letter of the city solicitor. In any event, whether or not such a period of time be a reasonable one is a matter lying, in the first instance, within the sound discretion of the proper city officials and, in the absence of fraud and collusion, it is my opinion that if the proposed lease be entered into in good faith and in the interest of the public, it would be a valid exercise of the powers and authority conferred upon the city council by the Constitution of Ohio and the city charter.

In specific answer to your question, I therefore advise you that:

1. Where the charter of a charter city authorizes the city council to "sell, convey, lease, hold, manage and control" city property, in the absence of fraud or collusion, such council may lease an auditorium in the city building, not needed for municipal purposes, for such reasonable length of time as the city council deems proper, provided such lease be made in good faith and in the interest of the public.

2. Whether or not a term of fifteen years in such a case is a reasonable length of time, is a question of fact to be determined in the light of all the facts and circumstances surrounding the transaction.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

997.

PETITION—HOUSE BILL 14, 93RD GENERAL ASSEMBLY—FLETCHER BILL—CIVIL SERVICE—VOTE.

COLUMBUS, OHIO, August 4, 1939.

MR. F. M. KIRWIN, *500 Hartman Theatre Bldg., Columbus, Ohio.*

DEAR SIR: Pursuant to the provisions of Section 4785-175 of the General Code of Ohio, there was submitted by you for my examination a written petition bearing over one hundred names, together with a certified copy of House Bill No. 14, passed by the 93rd General Assembly on June 1, 1939, approved by the Governor and filed in the office of the Secretary of State June 7, 1939, and a summary of the same, which act is sought to be referred to the electors. Copy of said bill and summary of the same is hereto attached.

I am of the opinion that the attached summary is a fair and truthful