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MUNICIPAL CORPORATIONS—ORDINANCE TO BE SUBJECT TO REFERENDUM—LEGISLATIVE AUTHORITY WITHOUT POWER TO SUBMIT SUCH A PROPOSAL—BOARD OF ELECTIONS CANNOT RECEIVE, SUBMIT SUCH PROPOSAL—CHARTER; NON-CHARTER.

SYLLABUS:

In the absence of an authorizing provision in a charter duly adopted by a municipality, the council of such municipality is without authority to present to the board of elections for submission to the electors, a proposed ordinance which is to become effective only upon their approval; and the board of elections is without authority to receive, or submit such proposal to the electors of the municipality.

Columbus, Ohio, July 7, 1958

Hon. Robert C. Carpenter, Prosecuting Attorney  
Seneca County, Tiffin, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“The City of Fostoria, Ohio, proposes to place the question, ‘Shall the ordinance providing for a 1% levy on income, etc.,’ on the ballot for consideration by the electors of said city in the November election.

“I would appreciate it if you would give me a written opinion stating whether the board of elections can accept such a question for placement on the ballot if such question is submitted to the board by action of council only.”

The real question involved in your inquiry is whether the power of a municipal council to enact local legislation requires the council to act affirmatively and directly, rather than to pass on to the electorate the initial responsibility for an enactment which is only to become effective if approved by the electors.

At the outset it may be said that the primary power to enact laws or other measures bearing upon citizens or their property rests in the people of the state. By the provisions of Article II, Section 1, Ohio Constitution, this power is conferred upon the general assembly. It is there provided:

“The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. \* \* \*”

As a general proposition, the power of legislation vested in the general assembly cannot be delegated or passed on by it to any other body. This principle is broadly stated in 10 Ohio Jurisprudence 2d, 385:

“It is a cardinal principle of representative government that, except when authorized by the Constitution, the legislature cannot delegate its legislative power, that is, the power to make laws, to any other authority or body; and any attempt to do so is unconstitutional and void.”

However, it has from the beginning been considered by the courts that the grant of power to organize municipal corporations carried with it authority to authorize them to adopt ordinances and regulations of a local character and that the authority granted by the legislature in this respect does not constitute an unlawful delegation of legislative power. As stated in said 10 Ohio Jurisprudence 2d, 397:

“Local self-government has always been a part of the English and American political systems, and prior to 1912 it was customary for the legislature to delegate powers of local government to municipalities in specific instances. Such legislation was not regarded as a transfer of general legislative power but rather as a grant of authority to prescribe local regulations, according to immemorial practice, subject, of course, to the interposition of the superior in cases of necessity. \* \* \*”

In Article XVIII, Section 2, Ohio Constitution, the so-called “home rule amendment” adopted in 1912, we find the following provision:

“General laws shall be passed to provide for the incorporation and *government* of cities and villages; and additional laws may also be passed *for the government* of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.” (Emphasis added)

This provision must be read in connection with Article XVIII, Section 3, Ohio Constitution, which reads as follows:

“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.*” (Emphasis added)

Considering these two sections together, we note that while Section 3, *supra*, gives to municipalities directly, *all powers* of local self-government, it reserves to the general assembly full power to provide for their “government.” These provisions leave the legislature without power to grant, limit or revoke any *power* of local self-government. At the same time they leave the municipalities without any voice in determining the *form or functions* of their government.

As to the meaning of “government” as applied to public bodies, I think we may well resort to Webster’s Dictionary, where the word is defined as follows: “The established form of political rule and administration; the person or persons authorized to administer the laws; the governing body; the administration.”

It appears clear that the power thus given the legislature includes the determination of what officers shall govern the municipality, how they shall be chosen and for what terms, and what shall be their powers and functions *as officers*. Included is the process whereby the council may enact local legislation.

We, therefore, find in Section 731.17, *et seq.*, Revised Code, the provisions of the law governing the adoption of ordinances and resolutions. Included in these sections are provisions which give the *electors* of a municipality the right either to initiate ordinances or to demand a referendum on measures passed by the legislative body, but nowhere do we find any grant to the municipal council of any right to propose to the electors an ordinance to be enacted or rejected by them. Because of the lack of any such grant, we may well apply the well recognized rule that what the legislature had power to grant but did not, it intended to withhold.

These general provisions thereby become part of the organic law and fix the method and extent of procedure for municipalities who do not elect to adopt one of the alternative forms of governmental organizations set up by the legislature under Section 705.01, *et seq.*, Revised Code, or to avail themselves of the privilege afforded by the constitution.

In Sections 7 and 8 of said Article XVIII, the electors of a municipality are authorized to elect a charter commission to prepare a special charter, and further authorized by vote to approve such charter setting up such form of municipal organization as is proposed. The language of Section 7 of that Article appears to me to bring out the distinction between "government" and "power of self-government" as used in said Article XVIII. It reads as follows:

"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." (Emphasis added)

I am assuming, in writing this opinion, that the city of Fostoria mentioned in your letter, has not adopted a charter in which it undertakes to authorize its council to do what is proposed in your letter, to-wit, to prepare a measure and, without adopting it as an ordinance, submit it to the electors of the city for their adoption.

In the absence of such charter provision, it is my opinion that the legislative body of that city is restricted to the powers granted it by the general municipal laws hereinbefore referred to in the enactment of ordinances and is lacking in authority to pass on its responsibility for legislation to the electors.

It is further to be noted that there is no provision in the election laws, governing the filing or submission of such a proposal as is suggested in your inquiry, and the board of elections would be without any guide in undertaking to submit it.

In the case of *Leach v. Brown*, 167 Ohio St., 1, where the legislature was attempting to submit to the electors for their approval an amendment to the constitution, as it had a right to do, it appeared that the proceedings of the legislature providing for such submission were defective. The court held to that effect and enjoined the submission of the amendment. That case does not have a direct bearing upon the situation here before us but I am impressed with a statement in the course of the opinion where the court said:

"A proposal to amend the constitution is *not an inherent legislative prerogative*. The action of the general assembly in connection therewith is the exercise of a special power granted to the general assembly *which must be fully complied with*." (Emphasis added)

Citing 11 American Jurisprudence, 683.

So it is my opinion that the submission by the council of a municipality to the electorate for their approval of a proposed ordinance is not an inherent power or one growing out of the grant of legislative power.

I am confirmed in my conclusion by the fact that the law does provide a number of matters involving municipal legislation which are required either by the constitution or by acts of the legislature to be submitted to a vote of the electors before they can become effective. Among these we may mention the provision of Article XVIII, Section 8, Ohio Constitution, requiring the proposal to elect a charter commission to prepare and to adopt a special charter prepared by it to be submitted by the council to the electors. Also to like effect the provision of Section 5 of said Article XVIII requiring a proposal of a municipality to acquire a public utility to be so submitted.

Likewise, the proposition to adopt one of the special plans of a municipal organization set up by the legislature, as provided in Section 705.01, Revised Code; also the provisions of Section 5705.25, Revised Code, relating to the submission of a proposal to levy taxes in excess of the ten mill limitation. Other like provisions of the law might be cited. It appears from the fact that the law does make these various provisions requiring action on certain municipal legislation either to come from the initiative of the electors, or be subject to referendum to them, gives us the right to apply the familiar doctrine of "*expressio unius est exclusio alterius*".

Accordingly, in specific answer to your inquiry, it is my opinion that in the absence of an authorizing provision in a charter duly adopted by a municipality, the council of such municipality is without authority to present to the board of elections for submission to the electors, a proposed ordinance which is to become effective only upon their approval; and the board of elections is without authority to receive, or submit such proposal to the electors of the municipality.

Respectfully,

WILLIAM SAXBE

Attorney General