Note from the Attorney General's Office:

1934 Op. Att'y Gen. No. 34-2478 was overruled in part by 2008 Op. Att'y Gen. No. 2008-032.

(1) When a life tenant died on the sixth day of February, 1932, without having paid the taxes assessed against the real estate in which he had a life interest for the tax year 1931, such taxes are a personal obligation of such decedent (Section 5680, General Code), and by reason of the provisions of Section 10509-170, General Code, it is the duty of the executor of such decedent's will or the administrator of his estate to file with the Probate Court, along with his account as such executor, certificates of the county treasurer and county auditor showing such taxes to have been paid. (Opinion No. 546 appearing in Opinions of the Attorney General for 1933, approved and followed.)

(2) Since the amendment of Section 2658, General Code, by the 89th General Assembly, the county treasurer cannot maintain an action in the nature of a suit to recover such taxes, as distinguished from special assessments against a life tenant of his executrix.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2478.

CITY SOLICITOR—NOT REQUIRED TO ACT AS LEGAL ADVISER TO BOARD OF EDUCATION WHEN—MAY BE COMPENSATED BY BOARD FOR LEGAL SERVICES.

SYLLABUS:

1. *In a municipality which has adopted a charter, which charter does not provide that the solicitor or law director of the said municipality shall act as adviser to and attorney for the board of education of the school district of said city and does not contain a provision expressly imposing upon the said solicitor or law director the duties imposed by the general laws of the state, it is not the duty of the said solicitor or law director to act as adviser to and attorney for the said board of education without compensation.*

2. *Under such circumstances the said board of education may lawfully employ the said solicitor or law director as its adviser and attorney and may lawfully pay him reasonable compensation for his services as such.*

COLUMBUS, OHIO, April 9, 1934.

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:

"We are enclosing herewith a copy of the charter of the City of Maple Heights, Cuyahoga County; also copy of an agreement entered into by the Council of the City of Maple Heights and an attorney, as Director of Law for this city.

QUESTION: Is such attorney required to act for the board of education of the Maple Heights City School District in accordance with the provisions of Section 4761 of the General Code, without compensa-

tion from the board of education; or, may the board of education legally employ him and pay him reasonable compensation for his services?"

Under the charter of the City of Maple Heights, the Director of Law of the said city is not an elective officer and is not required by virtue of the said charter, to act as adviser to, or attorney for the Board of Education of the Maple Heights City School District. Article IX of the said charter provides as follows:

> "Sec. 1. The Director of Law shall be an attorney at law admitted to practice in the State of Ohio. He shall be appointed by the Council to serve at their pleasure.
>
> Sec. 2. The Director of Law shall act as the legal adviser to, and attorney and counsel for the municipality and for all officers in matters relating to their official duties. He shall prepare all contracts, bonds, and other instruments in writing in which the municipality is concerned and shall endorse on each his approval of the form and correctness thereof, and no contract with such municipality shall take effect until the approval of the Director of Law is endorsed thereon. He shall be the prosecuting attorney in any court of the municipality and shall perform such other duties as may be required and provided by the Council."

A director of law for the said city has been duly appointed by resolution of council, copy of which is enclosed with your inquiry.

This resolution fixes the duties of the Director of Law and provides for his compensation. No mention is made therein of any duties to be performed by the said director in so far as the board of education of the city school district of the City of Maple Heights is concerned.

Section 4761, General Code, provides as follows:

> "Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education of the county."

The sole question presented by your inquiry is whether or not the said director of law is required, by reason of the provisions of Section 4761, General Code, to act as attorney for, and adviser to the board of education of the Maple Heights City School District.

It has been held that a board of education may employ other counsel if the city solicitor refuses or fails to act as required by Section 4761, General Code, and the board and not the members in their individual capacity will be liable for the fees of such counsel. *Caldwell* vs. *Marvin*, 8 O. N. P. (N. S.) 387; *Board of Education* vs. *Board of Education*, 4 App., 165.

It is clear, however, that if the Director of Law of the City of Maple Heights is required by virtue of Section 4761, General Code, to act as attorney for the board of education of Maple Heihts City School District as a part of his duties as such law director, the board of education can not lawfully pay him for such services in addition to his salary as law director.

In the Constitution of 1851, Article XIII, Section 6, it is provided that the General Assembly shall provide for the organization of cities and incorporated villages by general law. Upon the adoption of the amendments of 1912 to the Constitution of Ohio, without repealing Section 6 of Article XIII, it was again provided in Section 2 of Article XVIII thereof:

"General laws shall be passed to provide for the incorporation and government of cities and villages."

At the same time there were adopted Sections 3, 4, 5 and 7 of Article XVIII of the Constitution of Ohio. By force of said Section 7, a municipality is authorized to frame, adopt or amend a charter for its government and may, subject to the provisions of Section 3 of the said Article XVIII exercise thereunder all powers of local self-government. Said section 3 secures to municipalities the right to exercise all powers of local self-government, subject, of course, to other constitutional restrictions.

In Section 2 of Article VI of the Constitution of Ohio, it is provided:

"The General Assembly shall make such provisions by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state."

And in Section 3 of Article VI it is provided:

"Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds."

In view of the constitutional provisions relating to the public school system referred to above, the question is at once presented as to whether or not the General Assembly may impose upon municipalities the duty to provide for legal services to the board of education of the district in which the municipality is located, as it has done by Section 4761, General Code, which duty can not be shirked by the adoption of a charter which does not impose upon the legal department of the municipality the duty of rendering that service.

This question is not without difficulty and is complicated by reason of the grant to municipalities in Section 3 of Article XVIII of the Constitution of all powers of local self-government and in Section 7 thereof, adopted at the same time, the power to frame, adopt or amend a charter for its government under which it may exercise all powers of local self-government subject to the provisions of said Section 3, without defining or even suggesting what the limitations on the charter may be, other than the exercise thereunder of all powers of local self-government subject to the provisions of Section 3 of Article XVIII of the said Constitution.

Many questions have arisen with reference to what are and what are not "powers of local self-government." The courts are being constantly called upon

to differentiate between the powers of the state and of municipalities within the state, under so-called home rule constitutional provisions. The result has been a mass of judicial opinions on the subject that has created a hazy and perplexing situation, to say the least. Not only is this true in Ohio, but in every other state where similar constitutional provisions exist. McQuillin in his work on Municipal Corporations, 2nd Edition, in a quite exhaustive treatment of the subject, says in Section 93:

> "While the rights of local self-government or rights of home rule are constantly dealt with by the courts they have never been precisely defined authoritatively. * * The difficulty is of long standing. In its very nature the differentiation is not, and never can be, entirely free from perplexity. Efforts to prescribe a definite municipal orbit, excluding state activity therein, has brought about confusion and has evolved so-called distinctions which are not distinctions at all. The result has been involved artificial legal rules, superfined legalism beyond the comprehension of the layman, which entwine or shade into each other, impracticable of general application, or even of application in the state of their origin."

It is well settled by the courts of this state that the terms of Section 7 of Article XVIII of the Constitution of Ohio, vest in cities adopting a charter the power to provide the manner of the selection of their own purely municipal officers. *State ex rel. Bailey et al.* vs. *George,* 92 O. S. 344; *State ex rel.* vs. *Hillenbrand,* 100 O. S. 339. Also, that a charter provision as to city government prevails over inconsistent statutes where those statutes have not been enacted in pursuance of constitutional provisions expressly or impliedly reserving to the General Assembly powers in the exercise of which the statutes had been enacted. *Fitzgerald* vs. *Cleveland,* 88 O. S. 338; *State ex rel.* vs. *Edwards,* 90 O. S. 305; *Billingsley* vs. *Ry. Co.,* 92 O. S., 478; *State ex rel.* vs. *French,* 96 O. S., 172; *State ex rel.* vs. *Cincinnati,* 101 O. S., 354; *Hile* vs. *Cleveland,* 107 O. S., 144.

In *Fitzgerald* vs. *Cleveland, supra,* it is held that the provisions of Section 7 of Article XVIII of the Constitution of Ohio, authorizes any city or village to frame, adopt or amend a charter for its government and to prescribe therein the form of its government and defines the powers and duties of the said departments and officers thereof, provided they do not exceed the powers granted in Article XVIII, Section 3 nor disregard the limitations imposed in that article, *or other provisions of the Constitution.*

The power granted to municipalities to adopt a charter by Section 7 of Article XVIII and the power to acquire, construct, own, lease and operate public utilities and to contract with others for the services of a public utility as granted to municipalities by Sections 4 and 5 of Article XVIII of the Ohio Constitution, are clearly analogous. Both are self-executing grants of power and both grant plenary power which is not subject to restriction by the legislature.

Although the legislature had provided in Section 3963, General Code, that: "No charge shall be made by a city or village or the waterworks thereof for * * the use of the school buildings in such city or village", the Supreme Court of Ohio held in the case of *Board of Education of the City School District of Columbus,* vs. *City of Columbus,* 118 O. S. 295, as follows:

> "1. That portion of Section 3963, General Code, which prohibits a city or village or the waterworks department thereof from making a

charge for supplying water for the use of the public school buildings or other public buildings in such city or village, is a violation of the rights conferred upon municipalities by Section 4 of Article XVIII of the Ohio Constitution, and is unconstitutional and void. *(East Cleveland* vs. *Board of Education,* 112 Ohio St., 607, 148 N. E., 350, overruled.)

3. Municipalities derive the right to acquire, construct, own, lease and operate utilities the product of which is to be supplied to the municipality or its inhabitants, from Section 4 of Article XVIII of the Constitution and the legislature is without power to impose restrictions or limitations upon that right. *(Euclid* vs. *Camp Wise Assn.,* 102 Ohio St., 207, 131 N. E., 349, approved and followed.)"

If the General Assembly is without power to require of municipalities the furnishing of water for the public schools within their boundaries, it is likewise without power, in my opinion, to require of municipalities the furnishing of legal services to boards of education where the municipality has adopted a charter and thereby so organized its local government as to not provide for that service. It is significant that in some city charters express provision is made for its solicitor or law director to act as attorney for the board of education of the school district in which the city is located. For instance, in Section 77 of the charter of the City of Columbus it is provided that the city solicitor shall perform the duties which are imposed upon city solicitors by the general law of the state. This provision has always been regarded as requiring the solicitor to act as attorney for the Columbus City Board of Education in accordance with the provisions of Section 4761 of the General Code.

I am therefore of the opinion in specific answer to your question that the law director of the City of Maple Heights is not required to act as adviser to and attorney for the board of education of the city school district of Maple Heights, and that the said board of education may legally employ him as its attorney and may lawfully pay him reasonable compensation for his services as such attorney.

Respectfully,

JOHN W. BRICKER,

Attorney General.

2479.

FEES—UNDER SECTION 4556 FEES ALLOWED MAYOR AND MARSHAL DO NOT EXTEND TO ALLOWANCE MADE TO JUSTICE OF PEACE AND CONSTABLE UNDER SECTION 3019, GENERAL CODE.

SYLLABUS:

The provisions of section 4556, General Code, as to fees of a mayor, being the same as those allowed a justice of the peace, and as to fees of a marshal, chief of police and other police officers being the same as those allowed a constable for service of writs or process of a court, do not extend to and include an allowance which may be made in certain cases by the county commissioners to a justice of the peace or constable as provided by section 3019 of the General Code.