1933.

APPROVAL, BONDS CITY OF DAYTON, MONTGOMERY COUNTY, OHIO, $40,000.00, PART OF ISSUE DATED SEPTEMBER 1, 1925.

COLUMBUS, OHIO, February 15, 1938.

The Industrial Commission of Ohio, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of City of Dayton, Montgomery County, Ohio, $40,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of waterworks extension and improvement bonds in the aggregate amount of $500,000, dated September 1, 1925, bearing interest at the rate of 4½% per annum.

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

Respectfully,
HERBERT S. DUFFY,
Attorney General.

1934.

CHARTER CITY—CLEVELAND—MUNICIPAL LIGHT PLANT—RATE FOR ELECTRICAL ENERGY—PRIVATE CONSUMERS—PROPRIETARY CAPACITY—BOARD OF CONTROL—CITY COUNCIL—OPINION 613, MAY 18, 1937, AFFIRMED.

SYLLABUS:

1. *The board of control of the City of Cleveland is without authority to establish a rate for electrical energy furnished by the municipal light plant to private consumers without the approval of the city council as is provided for in Section* 112 *of the charter of the City of Cleveland.*

2. *The city charter is the organic law of the municipality so far as local powers are concerned and is supreme in matters of local self-government.*

3. *The City of Cleveland, in the operation of a municipal light plant furnishing electrical energy to private consumers, is acting in a proprietary capacity but is not estopped, however, from denying the validity of a rate for electrical energy furnished by said plant to private consumers and established by the board of control of said city, when said rate established by said board of control has not been approved by the city council as provided for in the city charter, even though the private consumers have expended large sums of money to rearrange their plants for the purpose of taking advantage of the reduced rate illegally authorized by the said board of control. Opinion No.* 613 *affirmed.*

COLUMBUS, OHIO, February 16, 1938.

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

GENTLEMEN: Pursuant to request I have reconsidered Opinion No. 613, rendered to you May 18, 1937, in the light of certain additional facts which have been submitted since the rendition thereof. Such opinion held as set forth in the syllabus:

> "Where a city charter provides that rates of municipally owned utilities shall be fixed by a municipal board of control subject to the approval of council, the establishment of such rates by such board of control is ineffective until approved by council."

A certain corporation in the City of Cleveland, relying upon reduced rates established by the board of control without the approval of council as provided for in the charter, appears to have expended substantial sums of money rearranging certain of its plants in order to take advantage of the reduced electric rates so established. It is contended that the City of Cleveland in the operation of its municipal light plant is estopped from asserting the legality of the rates so established by its board of control in view of the fact that in the operation of such plant the city is acting in a private or a proprietary capacity and is subject to the same rules as a private corporation. In support of such contention the case of *State, ex rel. LaBlond,* 108 O. S. 42, *and Butler* vs. *Karb,* 96 O. S. 472, are cited.

It is well settled law in Ohio that a city operating a municipal light plant furnishing current to private users is operating in a proprietary capacity and that the law in both of these cases cited by the consumer corporation is sound and is the generally accepted law in the majority of jurisdictions on this subject. It is apparent, however, that in neither

of these cases was there involved the interpretation of any city charter adopted under the Home Rule Amendment to the Constitution of Ohio.

Before reaching a conclusion, it is necessary to analyze the interpretation that the courts of Ohio and elsewhere have placed upon municipal charters adopted under constitutional home rule provisions. In Opinion No. 613, I referred to the case of *Bauman, et al.* vs. *The State, ex rel. Underwood, Director of Law,* 122 O. S. 269, wherein the court said:

> "The charter is an authority superior to an ordinance in a charter city, and the council cannot by ordinance divest itself of power conferred upon it by the charter. If it could do so in a single instance then manifestly it could by general ordinance divest itself of all power conferred by charter and thereby render the charter practically inoperative."

In the instant case, the charter placed upon the council the duty of approving the rates established or provided for by the board of control and this duty was for the protection of the public. This, however, was not done in the instant case and if permitted to stand would result in the council divesting itself of its powers and authority contrary to law and would be an illegal delegation of its powers and duties.

The charter of the home rule city has often been referred to as its constitution and it limits, governs and controls the council very much the same as the Constitution of the State limits, governs and controls the General Assembly.

The Ohio Supreme Court in *State, ex rel.* vs. *Frank,* 129 O. S. 604, on page 612, in discussing a charter, stated:

> "The charter becomes the organic law of the municipality so far as such local powers are concerned."

And on page 614, the court further said:

> " * * * the city charter is supreme in matters of local self-government, * * *."
>
> "A municipal council cannot delegate to one of its own committees or to any other municipal officer the power to decide upon legislative matters properly resting in the judgment and discretion of the council."

It has been determined that the fixing of rates is a legislative matter. The charter of the City of Cleveland is explicit on the fact that a rate may only be fixed with the approval of council.

There are numerous cases demonstrating conclusively the necessity of a strict compliance with the city charter. In the case of *Bising* vs. *City of Cincinnati, et al.*, 126 O. S. page 218, the court in the second branch of the syllabus states as follows:

> "Where a city charter has provided that such objection may be made either in a newspaper of general circulation in the city or in a newspaper legally established under authority of council, the city council cannot ignore the charter by publishing improvement or assessment notices in a periodical which has not the attributes of a newspaper."

Other states and jurisdictions have followed this strict construction placed by our courts upon city charter interpretations.

In the Public Utilities and Carriers Service Report No. 269, the Oklahoma Supreme Court, in discussing a similar situation in the recent case known as the *Public Service Co.*, vs. *The City of Waggoner, Oklahoma*, held:

> "That a municipality when acting in its proprietary capacity is liable on its contracts to the same extent as a private corporation, but when its liability on contracts exceeds the debt limitation or violates charter provisions, the contract is unenforcible and the city cannot be held liable on it."

In Pond on Public Utilities, 4th Edition, on page 468, the author in discussing the case of *Collier, Inc.*, vs. *Paddock, Arizona*, 291 Pac. 1000, said:

> "If the lease has been accepted in merely an illegal manner, or the charter had contained no mandatory conditions regulating the specific method in which leases of its property should be entered into, it might be successfully contended that the city is estopped from denying the binding effect of its acts, the same as a private individual would be under the same circumstances. 43 C. J. 249, note 85; *City of Louisville* vs. *Parsons*, 150 Ky. 420, 150 S. W. 498, 502. But where there has been no compliance with such provisions the failure to follow them constitutes not merely an irregularity but action wholly without any validity or binding effect upon the city. To hold otherwise is to enforce contracts against the city which have not been entered into in accordance with the mandatory provisions of its charter and to permit this would result in depriving the city of the protection these were inserted to guarantee.

> The distinction between acting in a proprietary and governmental capacity is important here because the exercise of the city's power to lease its property, whether in so doing it is acting in a proprietary or governmental capacity, must be in accordance with the mandatory provisions of its charter; no exception to this rule of actions taken in its proprietary capacity is found in that instrument."

It is well established in Ohio that parties dealing with municipal officials or with municipal governments are required to determine the extent of their authority and also are presumed to know the statutory and charter limitations placed upon the powers of municipalities or officials and that mandatory statutes and charter provisions are strictly construed.

In *Frisbie Co.* vs. *East Cleveland,* 98 O. S. 266, the fifth branch of the syllabus is as follows:

> "It is incumbent upon persons dealing with public officers to ascertain whether their proposed action falls within the scope of their authority, and whether the requirements of law affecting a contract proposed to be entered into have been complied with."

The case of *Comstock* vs. *The Incorporated Village of Nelsonville,* 61 O. S. 288, even presses this theory so far as to hold that a person contracting with a city deals at his peril.

It is also well established that a municipality cannot be estopped from denying the validity of ultra vires acts. *Railroad Co.* vs. *City,* 76 O. S. 481.

In the case of *Hicksville* vs. *Blakeslee,* 103 O. S. 508, 22 A. L. R. 119, it was held:

> "All persons dealing with a municipality are bound to know the statutory limitations upon the legislative power of its legislative body and upon subjects in excess of such power they deal with it at their peril."

The syllabus of *City of Columbus* vs. *Chicago Bonding Co.,* 11 O. A. 42, is as follows:

> "Where the board of purchase of a city governed by a charter is authorized to make expenditures in excess of $500.00

only when authority for the expenditures has been granted by the council of the city, a contract in excess of $500.00 made by the board without authority from the council of the city is void.* * *"

In the case of *Holley* vs. *The City of Toledo,* 47 O. A. 246, the court said on page 247:

"The evidence shows that the expenditure was not authorized by the city council and was in violation of Section 228 of the city charter, which prohibits the making of contracts involving the expenditure of $500.00 or more without the authorization of the city council. The contract was also in violation of Section 226 of the city charter, which prohibits the entering into a contract by the city involving the expenditure of money unless the director of finance shall first certify to the council or to the proper officer that the money required for such contract is in the treasury * * *."

The court, deciding this case under these facts, held the contract void, entitling a taxapayer to have the city's payment of money thereunder enjoined though materials had been used for the purposes intended.

In the case of *Butler* vs. *Karb,* 96 O. S. 472, on page 484, the court states as follows:

"The statute conferring power upon municipalities to establish, maintain and operate municipal lighting plants, under which the City of Columbus was acting at the time this suit was instituted, and therefore, contains no provision whatever with reference to rates or charges for current furnished to private consumers, nor does it designate any officer or body whose duty it shall be to prescribe rates for such service, but under the provisions of Section 3616, General Code, the council of the municipality is authorized to provide by ordinance or resolution for the exercise of the powers enumerated in the chapter of which that section is a part, one of which powers is the operation of an electric light plant. The authority to adopt rates for current which the municipality was empowered to furnish 'the inhabitants thereof' was clearly implied, and that duty devolved upon the municipal council. It follows that the fixing of rates for current from the city's plant by other officials or agents or employes of the city was unwarranted."

This happened before a charter existed and the court in discussing the matter held that it was clearly implied that the duty devolved upon the municipal council to fix the rates for current from the city's plant and that other officers, agents or employes in doing so for the city was unwarranted.

In the instant case, we have even a stronger situation in that the city charter of Cleveland expressly provides that the rates must be approved by council.

In *Hommel and Co.* vs. *Woodsfield,* 122 O. S. 148, the first branch of the syllabus reads:

> "Where the board of public affairs of a village has contracted for the delivery to such village of supplies or material, without authorization and direction by ordinance of council and without advertising for bids as required under Sections 4328 and 4361, General Code, such contract imposes no valid obligation upon the village. (*Ludwig Hommel & Co.* vs. *Incorporated Village of Woodsfield,* 115 Ohio St. 675, 155 N. E. 386, approved and followed.)"

In view of the above authorization, it is my opinion that the city is not estopped to deny the lack of authority of the board of control to establish the rate provided in this case when the same was not approved by council as provided for in the charter of the City of Cleveland. My Opinion No. 613 is, accordingly, affirmed.

Respectfully,
HERBERT S. DUFFY,
Attorney General.

1935.

TAXES AND TAXATION—WORLD WAR VETERAN—WHERE HE PURCHASES REAL ESTATE OR OTHER PROPERTY FROM PROCEEDS OF DISABILITY COMPENSATION OR INSURANCE AWARDED TO VETERANS—SUCH PROPERTY NOT EXEMPT FROM TAXES.

SYLLABUS:

Real estate or other property in this state purchased by a World War veteran or his guardian from the proceeds of disability compensation awarded to the veteran under the provisions of Part II of the