

**Note from the Attorney General's Office:**

1957 Op. Att'y Gen. No. 57-787 was overruled by 1969  
Op. Att'y Gen. No. 69-130.

787

MUNICIPALITY, NON-CHARTER — SALE OF PROPERTY —  
ART. XVIII, SEC. 3, OHIO CONSTITUTION — COMPLIANCE  
WITH CHAPT. 721., REVISED CODE, UNNECESSARY.

SYLLABUS:

A municipality which has not adopted a charter limiting its powers by adopting the provisions of the statutes relative to the sale of its property, has authority under the power of home rule provided by Section 3 of Article XVIII of the Constitution, acting in good faith, to dispose of property belonging to it in such manner and for such consideration as it deems proper, without compliance with any of the provisions of Chapter 721, of the Revised Code.

Columbus, Ohio, July 12, 1957

Hon. James A. Rhodes, Auditor of State  
Columbus, Ohio

Dear Sir:

I have before me your letter requesting my opinion and reading as follows:

“During the course of examination of the Village of Marble Cliff, Franklin County, Ohio, a non-charter village, the examiner has raised the question of the propriety of the sale of certain real estate owned by the village.

“The full terms of a certain lease containing an agreement to purchase at the termination of said lease or renewal thereof are embodied in Ordinance No. 532 enacted by the Council of said village, a copy of which is attached hereto for your consideration.

“The village has not affirmatively adopted the statutes of Ohio relating to municipalities as a part of its basic law and has adopted no specific ordinance establishing procedure for the sale or lease of its property.

“I understand the lease containing the purchase agreement was entered into without complying with the provisions of Chapter 721, Revised Code, dealing with the sale or lease of property by a municipality. Under these circumstances your consideration and opinion on the following question is requested:

“May a municipality dispose of real property belonging to it, as above outlined, without compliance with Chapter 721, Revised Code, relating to advertising and competitive bidding in the disposition of municipally owned property?”

The provisions of Chapter 721, Revised Code, relating to the sale or lease of property by a municipality were in existence a great many years before the adoption in 1912 of Article XVIII of the Constitution. At the time these statutes were enacted and up until the adoption of that amendment municipalities were of course regarded purely as creatures of the legislature and had no powers except such as were granted by the legislature. *Ravenna v. Pennsylvania Co.*, 45 Ohio St., 118. Accordingly, we find numerous decisions holding municipalities strictly to the procedure laid down in the statutes, particularly Section 3699, General Code, 721.03 R. C., relating to the lease or sale of real estate, and Section 3703, General Code, 721.15 R. C., relating to the sale of personal property. Those sections provide as to each class of property that it can only be disposed of pursuant to certain advertisement and to the highest bidder.

In an opinion of one of my predecessors, to-wit, No. 5558, Opinions of the Attorney General for 1942, page 745, the then Attorney General reviewed at length his earlier opinion No. 996, Opinions of the Attorney General for 1939, page 1408, in which he had held that where the charter of a charter city authorized the council to sell, convey or lease city property the council could lease an auditorium owned by the city, not needed for such purpose, for such length of time and upon such terms as it determined. The later opinion went further and held that a municipality which had not adopted a charter had the same powers under the powers of home rule granted by Section 3 of Article XVIII of the Constitution, which in terms

gives to municipalities "all powers of local self-government". Reference was made to the case of *Village of Perrysburg v. Ridgeway*, 108 Ohio St., 245, which had held:

"The exercise of 'all powers of local self-government' as provided in Article XVIII, Section 3, is not in any wise dependent upon or conditioned by Section 7, of Article XVIII, which provides that 'a municipality may adopt a charter' etc." (To like effect see *State ex rel. Arey v. Sherrill*, 142 Oh. St., 574).

The Attorney General summarized his discussion by holding as shown by the first paragraph of the syllabus:

"1. A municipality, by virtue of the power granted to it by Section 3, Article XVIII, Constitution of Ohio, may sell personal property not needed by it, in such manner as may be prescribed by its charter, if any charter has been adopted, and in the absence of any charter provision in such manner as may be provided by ordinance, and need not comply with the provisions of Sections 3699 and 3703, General Code."

In the case of *Hugger v. Ironton*, 83 Ohio App., 21, the reasoning and conclusion of the opinion above cited was fully sustained. There, the City of Ironton by ordinance duly adopted, sold and delivered to the United States Department of Agriculture, Forestry Service, a tract of 8.4 acres, for a nominal sum of \$10.00. In addition to this consideration it was considered by the city that there were other substantial considerations growing out of the intended use of the land by the government. In the statement of facts it was shown that the city had, prior to this sale, undertaken to proceed under the statute and had received a bid of \$1500.00 from another party for the land as against a bid of \$5.00 from the Department of Agriculture, Forestry Service.

The court discusses at length the effect of the adoption of home rule, particularly Section 3, of Article XVIII of the Constitution, and pointed out that municipalities had by that amendment been freed from the domination of the legislature and were free to deal with their own property in such manner as they saw fit, presuming of course, good faith in the matter. This case was taken to the Supreme Court and the appeal dismissed, 148 Ohio St., 670.

In Opinion No. 1478, Opinions of the Attorney General for 1950, it was held:

"1. It is legal for either a charter or non-charter municipality to sell its real estate in a manner other than that provided in Section 3699, General Code."

In this opinion the 1942 opinion above mentioned was reviewed and followed as was the case of *Hugger v. Ironton*.

In *Babin v. Ashland*, 160 Ohio St., 329, decided in 1953, the *Hugger* case was referred to with apparent approval, although the precise question here under consideration was not involved. It was held as shown by the sixth paragraph of the syllabus:

"The power to convey property owned by a municipal corporation and no longer needed by it for municipal purposes is included within the powers of local self-government conferred by Article XVIII of the Ohio Constitution; and such power may be exercised to sell the land which is located in such municipal corporation \* \* \*."

In the opinion, at page 337, the court said:

"Ordinarily, a city has the power to convey property held by it for municipal purposes and no longer needed for such purposes. Such power is included within the powers of local self-government conferred by Article XVIII of the Constitution. *Hugger v. City of Ironton*, 148 Ohio St., 670, dismissing as involving no debatable constitutional question an appeal from a decision (83 Ohio App., 21) \* \* \* so holding. \* \* \*"

Your letter contains a statement that the village has not affirmatively adopted statutes of Ohio relating to municipalities, as a part of its basic law, and has adopted no specific ordinance establishing procedure for the sale or lease of its property. I can see no ground whatever for the implication arising from that statement, that the village is required to take either of those actions as a condition precedent to its exercise of the right of sale of its property, real or personal. Without any action whatsoever, the village is bound and governed by the statutes relating to the *organization* and *government* of a village although, as I have indicated, enjoying all the privileges of home rule, and an affirmative action on its part adopting those statutes would be meaningless. That procedure might have some bearing if the village adopted a charter of its own as provided in Section 7, of Article XVIII. Some municipalities in adopting such charters have seen fit to put in an affirmative declaration that except as otherwise provided in

this charter all the statutes of the State of Ohio shall be applicable to the municipality.

On the other hand I know of no reason why a village in order to exercise a free right of sale or lease of its property when it sees fit, must have adopted any specific ordinance establishing a mode of procedure. No ordinance of that character could become part of the basic law of the village, and could be repealed at the will of the council or repealed by implication by ordering an inconsistent procedure. The Hugger case, *supra*, seems to make it very clear that whenever a city or village which has not limited its powers by specifically adopting the provisions of the General Code as a part of its basic law by a charter provision, concludes to sell a piece of property, it has the full power to proceed in such manner as it sees fit. Of course, in all such cases, we must presume that the village is acting in good faith.

My attention has been called to the case of *Morris v. Roseman*, 162 Ohio St., 447, with the suggestion that it possibly lays down a rule contrary to the Hugger case. There the court had before it the action of a newly created municipality which without any notice to property owners or opportunity for hearing, adopted an emergency zoning ordinance effective immediately, restricting certain territory to residential use. Prior thereto, said territory had been zoned by the township for industrial purposes and the plaintiff who sought an injunction against the enforcement of the municipal ordinance, was in the act of building a foundry thereon. The court held:

“1. Section 3, Article XVIII of the Constitution of Ohio, conferring ‘home rule’ power, does not in and of itself empower an Ohio noncharter municipality to enact an emergency zoning ordinance effective immediately; and such noncharter municipality, in the enactment of a zoning ordinance, must comply with the provisions of Section 4366-11, General Code (Section 713.12, Revised Code), which requires the holding of a public hearing on such ordinance preceded by a 30-day notice of the time and place of such hearing.”

The court was doubtless right in its conclusion although it is to be doubted whether there would be any distinction between a charter municipality and one not having adopted a charter. The case plainly turned on the fact that zoning is in the nature of a police regulation, whereas the sale of property owned by a municipality does not in the least degree partake of that character. It seems wise to set out here the full text of Section 3 of Article XVIII of the Constitution. It reads:

“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)

The effect of this provision is that a municipality is given a free hand in dealing with its own property and affairs generally, but in the enactment of police regulations it must not go counter to the general laws.

A zoning regulation is clearly a police regulation, based on the protection of the public health and welfare, and the leading case of *Pritz v. Messer*, 112 Ohio St., 628, and the many other cases which have sustained the power of a municipality to enact zoning regulations clearly recognize this principle. A zoning regulation which prevents a landowner from using his land in any way he sees fit, is based entirely on the principle that in measures designed to conserve the public health or welfare private property rights must give way to the public right of regulation. The whole subject of zoning, its character as a police regulation and the rights of a private property owner affected thereby are extensively dealt with in the recent comprehensive treatise on *The Law of Zoning* by James Metzenbaum of the Ohio Bar. The *Morris* case holds, in effect, that an owner may not be deprived of the free use of his private property even in the interests of the public health or welfare, without due process and an opportunity to be heard and to protest.

It must be very evident that in the sale of municipal property, the principles relating to police regulations are completely absent. Such sale does not in any way affect any private property owner. The principles governing enactment and enforcement of such police regulations as zoning, are utterly foreign to the question here before us. I see nothing in the case of *Morris v. Roseman* which throws any doubt whatsoever on the conclusion which I have indicated in answering the question which you have submitted. The true basis and extent of the decision is shown by the following quotation from page 450 of the opinion:

“ \* \* \* This procedure is designed to safeguard property rights and to give property owners a fair opportunity to *enter a protest against an ordinance or regulation which may materially interfere with the use of their property or decrease its value.* \* \* \*”

(Emphasis added)

As a matter of fact that case, in my opinion, has no bearing whatsoever on the question presented by your letter, to-wit, the sale of municipal

property, and does not in any degree overrule or cast any doubt on the Hugger case.

Accordingly, in specific answer to your question it is my opinion that a municipality which has not adopted a charter limiting its powers by adopting the provisions of the statutes relative to the sale of its property, has authority under the power of home rule provided by Section 3 of Article XVIII of the Constitution, acting in good faith, to dispose of property belonging to it, in such manner and for such consideration as it deems proper without compliance with any of the provisions of Chapter 721 of the Revised Code.

Respectfully,  
WILLIAM SAXBE  
Attorney General