have full and free access to the books, records and papers pertaining to the pari-mutuel or certificate system of wagering and to the enclosure or space where the pari-mutuel or certificate system is conducted at any horse racing meeting to which he shall be assigned for the purpose of ascertaining whether or not the holder of such permit is retaining the proper amount of commission as provided in this act."

Section 1079-14, General Code, which relates to the holding of local option elections for the purpose of determining whether horse racing meetings licensed as provided by the act, should be permitted, contains no provision which excludes a county agricultural society conducting a horse racing meeting for which a permit is required from the Racing Commission, from the results of an election held pursuant to that section. In other words, the tenor of the entire act is to place a county agricultural society conducting a horse racing meeting at which the pari-mutuel or certificate system of wagering or betting is allowed, in the same category as any other person, corporation or association engaged in conducting similar horse racing meetings. There is nothing in the act, express or implied, which would justify the State Racing Commission to consider the granting of a permit to a county agricultural society for the racing of horses where the form of betting as now allowed by law is to take place, as an exception, under the provisions of the Horse Racing Act. The fact that a county agricultural society under the laws of this state can receive public money for certain purposes (section 9880, General Code), does not make such a society an arm of the state government or a public corporation nor is such a society divested of its private corporate character merely because it receives public funds. Opinions of the Attorney General for 1922, page 40; Opinions of the Attorney General for 1930, page 1791; Opinions of the Attorney General for 1933, pages 30, 32, 362; and *Dunn* vs. *Agricultural Society,* 46 O. S. 93, 99. Thus, the provisions of the Horse Racing Act are just as applicable to a county agricultural society conducting a horse racing meeting at which legalized betting is allowed, as they are to other persons, corporations and associations engaged in conducting similar horse racing meetings.

Specifically answering your inquiry, it is my opinion that the State Racing Commission, in assigning dates for a horse racing meeting at which the pari-mutuel or certificate system of wagering is to be allowed, must take into consideration the dates assigned for the same track by the Racing Commission to a county agricultural society to conduct a horse racing meeting at which the pari-mutuel or certificate system of wagering was allowed.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3598.

POLICE PENSION BOARD—ACTION OF CITY COUNCIL IN ELECTING TWO TRUSTEES THEREOF DISCUSSED—DEFINITION OF "CHOOSING" UNDER SECTIONS 4616, 4617, GENERAL CODE.

SYLLABUS:

1. *Where a council of a city at a regular meeting, approved a motion to*

adopt a recommendation of the police pension board of such city that two designated members of the said council be chosen to sit on the board of trustees of the police relief fund as the two representatives from council, such action constituted a "choosing" of such two designated members of council, within the provisions of sections 4616 *and* 4617 *of the General Code.*

2. *The action such as was taken by a city council as set forth in syllabus one may not legally be rescinded by the said council at a later regular meeting and two different representatives of the council may not be legally chosen at said later meeting.*

COLUMBUS, OHIO, December 8, 1934.

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

GENTLEMEN:—I am in receipt of your recent communication as follows:

"We are inclosing a letter received from Mr. Phil D. Butler, City Solicitor of Chillicothe, also copies of the minutes covering meetings of council of the city on September 10 and September 24, 1934, relating to the selection of members of council to act as trustees of the Police Relief Fund under the provisions of section 4616, G. C., and ask that you submit this Department an opinion on the questions involved, which questions appear to be as follows:

Question 1. Did the action of council as shown by the minutes of the meeting held September 10, 1934, in approving a recommendation from the Police Relief Board of Trustees, constitute a legal selection of the two council members of said Trustees, under the provisions of section 4616 G. C.?

Question 2. If the answer to the first question is in the affirmative, could such action be legally rescinded by council at its next regular session, and two different members of the council be selected as Trustees of the Police Relief Fund?"

The letter inclosed with your communication reads as follows:

"A difference of opinion has arisen among certain of the city officials with respect to the validity of certain appointments to the Police Pension Board of the city.

The dispute is as to whether James McCoy and Oscar Anthony are members, or whether James Keating and O. J. Hayes are the legally appointed members.

The rules of the Police Pension Board provide that two members of this board shall be appointed by council from among its membership, and that these two council members shall choose a third citizen member.

At the regular council meeting of September 10, 1934, the communication, a copy of which is enclosed, was brought before council by its president Mr. Harold H. Brown and read by the clerk. The excerpt from the minutes of this meeting enclosed herewith show the motion which was made and acted upon with respect to this communication. It is admitted by all parties that the action in so far as it pertained to the attempted appointment of Ernest Schwarzler as citizen member was

a nullity. At the next meeting of council, September 24, further action was taken to rescind the former action and appoint James Keating and O. J. Hayes in the place of McCoy and Anthony, as shown by the enclosed excerpt from the minutes of that meeting.

Although it does not appear in the minutes, the fact is that both McCoy and Anthony were nominated as members of the Police Pension Board at the meeting of September 24, 1934, after Keating had been nominated, but both McCoy and Anthony declined the nomination and Hayes was then nominated and he and Keating appointed.

It is the contention of those favoring the side of Messrs. McCoy and Anthony that the attempted reconsideration and rescission of their appointment on September 24, was impossible, and beyond the power of council, because they had not, up to that time, declined to accept the appointment, and that therefore the purported action of council in appointing Messrs. Keating and Hayes was a nullity.

The proponents of Messrs. Keating and Hayes, on the other hand, take the position that the council was not authorized to act as it did in the meeting of September 10, in attempting to appoint council members to the pension board as suggested in the letter from the police members of the board, and that in any event, council's action on this communication was so vague and ambiguous as not to amount to a valid appointment.

It appears now that both citizen appointees are claiming the right to act as members of the pension board, that in consequence of this, two different persons are claiming to be the rightfully appointed clerk of the pension board and have presented vouchers to the City Treasurer for payment of pension claims and perhaps other expenses, and the City Treasurer is, of course, undecided as to which of these to recognize.

I have therefore been asked by Mr. Keating to determine which of these council members, Messrs. Keating and Hayes, or Messrs. McCoy and Anthony are entitled to act as members of the Police Pension Board.

Some examination of the law has not yielded any precedent decisive of the questions involved in so far as I am able to find, and being uncertain as to the correct answer to this inquiry, I am taking the liberty of requesting your advice. I trust that your decision as to which members, if any, should be recognized as members of this board, will be determinative of the matter, and I should therefore appreciate a reply when convenient."

The excerpts from the minutes of the meeting of council on September 10, 1934, enclosed with the City Solicitor's letter, are as follows:

SEPTEMBER 10, 1934.

REGULAR SESSION—COUNCIL CHAMBER

Council met in regular session with President Brown in the chair, and the following members present: Anthony, Delong, Hayes, Keating, McCoy and Starr; absent Edinger.

The following communication was received from the Police Pension Board, which reads as follows:

'Mr. Harold H. Brown,
President, City Council,
Chillicothe, Ohio.
Dear Sir:

In accordance with Section 4616 of the General Code of Ohio, there will be two members from the City Council and one civilian member to represent Council on the Police Pension Board. Would appreciate your appointing James McCoy and Oscar Anthony, Councilmen, and Ernest Schwarzler as citizens' representative.

Thanking you in advance for your past cooperation, we remain

Yours respectfully,
(Signed) Homer Rinehart
Layton Cravens"

It was moved by McCoy, seconded by Delong that the recommendation be adopted. Upon calling the roll, Delong, Hayes, Keating, McCoy and Starr voted yea. Anthony voted no. The motion carried.

Attest: Louis A. Hibbler, Clerk of Council.

Harold H. Brown, President of Council.

Sections 4616 and 4617, General Code, as last amended in an act passed by the legislature on April 3, 1929, effective July 12, 1929, provide for the establishment of a board of trustees of the police relief fund of a city, and provide, so far as pertinent to a consideration of your question, as follows:

"Sec. 4616. In any municipal corporation, having a police department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a police relief fund. Thereupon a board of trustees who shall be known as 'trustees of the police relief fund' shall be created, which shall consist of six members, who shall be chosen in the following manner: Two members shall be chosen by the city or village council, or other legislative body, from among its own members; * * *"

"Sec. 4617. * * *

The two members of the municipal council, or other legislative body, to be chosen as members of the board of trustees as provided for in the next preceding section, *shall be chosen by the members of the municipal council,* or other legislative body, at their first regular meeting after the taking effect of this act for a term of one year beginning on the second Monday of September and thereafter members of the board shall be chosen annually to assume office on the second Monday of September and to serve for one year or until their successors have been duly chosen and qualified." (Italics mine.)

From the foregoing, it is the duty of a city council in a city establishing a police relief fund to choose two of its members to sit on the board of trustees of the police relief fund, yearly, and such members assume office on the second Monday of September for a term of "one year or until their successors have

been duly chosen and qualified." The statutes do not appear to regulate in detail just how the two members are chosen by the members of the council. There is nothing in the statutes providing for the recommendation by the Police Pension Board to the council of the two members of council whom the said police pension board desire as representatives of council on the board, and then council voting on such recommendation, which procedure seems to have been followed by the police pension board in the instant situation. Ordinarily in choosing the two members, a motion to adopt a resolution electing two named members of council as board members should be presented by a council member and seconded, and a vote had on such motion. However, as the statutes are silent as to just how the two members shall be chosen, it appears to me that the procedure followed by the council in the present case was within its rights and that the motion to adopt the recommendation of the police pension board, which was carried, constituted a "choosing" by the members of the council, within the purview of sections 4616 and 4617, General Code, supra. Although the letters and data forwarded in connection with the question at hand does not specifically so state, I presume that the two members of council designated in the recommendation, properly qualified and commenced their terms, after the council meeting of September 10, 1934.

The records of a city council should not be judged too strictly. If the intent of council can be gathered from the face of the record, a court, in passing on the force and effect of the proceedings of the council, will be governed by the apparent will of the council, even though by a strict application of the principles of parliamentary law another result would be reached.

In State ex rel. vs. *Evans, et al.,* 90 O. S. 243, at page 251, Judge Wanamaker said:

> "Obviously the proceedings of boards of education, of county commissioners, township trustees and the like must not be judged by the same exactness and precision as would the journal of a court."

See also to same effect *McQuillin on Municipal Corporations,* 2nd Edition, section 636; *Madden* vs. *Smeltz,* 2 O. C. C. 168.

Hence, it appears to me, in answer to the first question submitted, that the action of the city council, as shown by the minutes of the meeting held September 10, 1934, in approving the recommendation from the police pension board constituted a legal choosing of the two members of council as members of the board of trustees of the police relief fund.

Coming now to your second question, I may call attention to the Ohio Supreme Court case of *State ex rel. Calderwood* vs. *Miller,* 62 O. S. 436. The two paragraphs of the syllabus of such case read as follows:

> "1. Where all of the members of a city council, in a city of the second class, vote to elect a city clerk, and one of the candidates voted for receives a plurality of the votes cast, such candidate is duly elected, and a formal declaration of the result is not necessary to fix his right to the office; and thereafter it is not within the power of any member of the council to change the result by changing his vote.
>
> 2. When a choice has been made on such vote, it is not essential that the mayor as the presiding officer of the council shall declare the

result. In such case the mayor has no duty whatever to perform as to the election. He can take part only in case of a tie vote."

In this case the question was presented as to whether or not a council after voting on the election of a city clerk, and obtaining a plurality of the votes cast in favor of a certain candidate, can reconsider the action electing such person. The facts in the case before the court are well set forth in the opinion of the court and it is therefore profitable to quote almost all of the court's opinion. The court stated at pages 444, 445 and 446:

"The undisputed facts, or at least such of them as are necessary for our present purpose, are, that the council numbered eight members; that all of the members were present at the meeting on the 17th day of April, 1899; that the mayor presided at that meeting; that an election was then held for the office of city clerk; that four votes were cast for the relator, two votes for the defendant, and two votes for a third person, and that the clerk announced the result of the vote. Thereupon, after some parley, the two members who had voted for the third candidate changed their votes to the defendant causing a tie, and the mayor then cast his vote for the defendant and declared him to be elected. Whether the mayor did, or did not declare the relator elected, before the change of votes, is a disputed question and not very material. The statute (Revised Statues, sec. 1676) declares that the *members* of the city council shall elect the clerk and other officers. It is provided that in cities of the second class the mayor, by virtue of his office, shall preside at the organization of the council; but he is not a member of the city council, and it is not provided that he shall participate in the election, except in case of a tie vote. That contingency did not arise in this case, unless the two members who changed their votes to the defendant, might lawfully do so after a vote had been taken and the result ascertained.

But the vote having been cast, and the result having been announced to the council by the clerk, by which it was apparent that the relator had received a plurality of the votes cast, the function of the council was discharged. *State ex rel. Attorney General* vs. *Anderson,* 45 Ohio St., 196. The election was complete. The formality of a declaration by the presiding officer of the council could neither add to, nor detract from, the thing which had already been done. The right of the relator to qualify and to be inducted into the office was fixed co instante.

The council was engaged in the duty of electing officers, a duty imposed on the members thereof, not on the body as a council. They were not engaged in the deliberative business which is the ordinary work of the council; but in the election of a city officer. They were not acting under parliamentary law; but were casting their votes and making their choice as required by a specific statute. They could make this choice but once. Having done so they could not reconsider it. Much less, could some of them against the protest of a plurality, under the suggestions or invitations of the presiding officer or sua sponte, change their votes. This would give to the minority the power of defeating the choice of a plurality which had already been legally made and ascertained.

See *Reg.* vs. *Donoghue,* 15 U. C. C. B., 454; and *Hopkins* vs. *Swift,* 37 S. W. Rep., 155.

The relator was duly elected city clerk and must be inducted into the office."

It appears to me that the foregoing case is directly in point here on your second question. Section 4617, General Code, provides that two members of the board of trustees of the police relief fund "shall be chosen by the *members* of the municipal council," from among its own members, just as the Supreme Court pointed out Revised Statute 1676 provided for the election of the city clerk and other officers. It is true that in the Miller case the statute under consideration provided for the election of officers to be held in connection with council, and in the matter at hand the position of member of the board of trustees of the police relief fund is a position independent of council, yet it appears to me that the court's opinion is broad enough to apply to all cases where the special statute gives power to the members of council to elect any particular officers and employes, regardless of whether or not the particular office is connected with council. In a recent annotation in Volume 89 American Law Reports, pages 132-164, on the matter of "Reconsideration of appointment, or confirmation of appointment, to office", it is stated at page 135:

"Although there are circumstances under which an appointment to office may be reconsidered and revoked, it may be stated as a general rule that an appointment once made is irrevocable and not subject to reconsideration. This view represents the great weight of authority."

The annotation then lists cases from twenty-three states and cases from the United States and Canada in support of such statement. The cases of *State ex rel., Goodin* vs. *Este,* 7 Ohio, Pt. I, page 134, and *State ex rel., Calderwood* vs. *Miller,* 62 O. S. 436, are cited from Ohio in support of the statement. Further on in the annotation, at page 143, under the topic "appointment distinguished from ordinary business", the annotation says:

"In denying the right of a collective body to reconsider its appointments, a distinction has been observed between the exercise of the power of appointment and other business."

After quoting from the cases of *Weir* vs. *State,* 96 Ind., 311, and *State ex rel. Calderwood* vs. *Miller,* 62 O. S. 436, the annotator then ends the comment under the aforementioned topic, with the following observation:

"It would seem, therefore, that the fact that the collective body ordinarily has the power to reconsider resolutions passed by it does not necessarily mean that it has the power to reconsider appointments."

Thus having determined in the preceding portion of this opinion that the action of council in the case at hand constituted a "choosing" of the two members of council as members of the board of trustees of the police relief fund, it

follows from the language of the court's opinion in the Miller case that the members of council could not reconsider the choice made at the meeting of September 10, 1934.

Hence, I am of the opinion, in specific answer to your second question, that the action of council in choosing the two members of the police relief fund on September 10, 1934, could not legally be rescinded by the council at its next regular session held on September 24, 1934, and two different members chosen for such membership on the board of trustees of the police relief fund.

Respectfully,
JOHN W. BRICKER,
Attorney General.

3599.

DISAPPROVAL, BONDS OF STRATTON VILLAGE SCHOOL DISTRICT, JEFFERSON COUNTY, OHIO—$1,007.84.

COLUMBUS, OHIO, December 8, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

Re: Bonds of Stratton Village School District, Jefferson County, Ohio, $1,007.84.

GENTLEMEN:—I have examined the transcript of the proceedings relating to the above bond issue.

From the information furnished me, this district has outstanding bonds issued under the provisions of Amended Substitute Senate Bill No. 175 of the 90th General Assembly in the sum of $3,333.00. Since the tax duplicate as shown by said transcript amounts to $641,377.00, it is seen that over $2,500.00 of said bonds are actually in excess of the indebtedness limitation for unvoted bonds.

Since section 4 of House Bill No. 11 of the third special session of the 90th General Assembly provides for the issuance of bonds under said act in the sum of the net floating indebtedness of said district as of July 1, 1934, as certified by the Auditor of State, less the amount of any bonds which may have been issued under the provisions of any act passed by the 90th General Assembly which are actually in excess of the debt limitations, it follows that this district cannot issue any bonds under said act.

Respectfully,
JOHN W. BRICKER,
Attorney General.