

OPINION NO. 89-050

Syllabus:

1. When an amendment to a municipal charter, adopted pursuant to Ohio Const. art. XVIII, §§7 and 9, provides for the recall of elected municipal officers and further directs that "the procedure for such recall shall be that provided by the laws of the State of Ohio," the amendment incorporates only the provisions of R.C. 705.92.
2. The procedure set forth in R.C. 705.91 for the adoption of the recall procedures of R.C. 705.92 applies only to cities exercising one of the optional statutory plans of government set forth in R.C. 705.41 to 705.86 and has no application to a charter municipality which chooses to incorporate statutory recall procedures into its charter pursuant to Ohio Const. art. XVIII, §§7, 8 and 9.

To: William F. Schenck, Greene County Prosecuting Attorney, Xenia, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 25, 1989

I have before me your request regarding whether the charter of the City of Fairborn effectively provides a procedure for the recall of members of city council. You describe the issues which give rise to your question as follows:

[T]he citizens of the City of Fairborn, on November 8, 1988 approved an amendment to the city charter, proposed by a group of citizens, by adding Section 2.07(d) to the Charter, which reads as follows:

"2.07(d) Recall. Any member of Council may be removed from office before the expiration of his term by the qualified voters of the city. The procedure for such recall shall be that provided by the laws of the State of Ohio."

....

From our review of the statutes, the only section which deals with recall of municipal officers is Ohio Revised Code Section 705.92. However, in reading Ohio Revised Code Section 705.92 in conjunction with 705.91, it is apparent that Section 705.92 of the Revised Code shall be submitted, with each plan of government, provided in Section 705.41 to 705.86 to the electors of the municipal corporation as prescribed in Section 705.03 of the Revised Code and shall go into effect and form a part of any such plan of government only to the extent to which such section has been adopted under Section 705.03 of the Revised Code.

The amendment to the charter of the City of Fairborn was not adopted under Section 705.03 of the Ohio Revised Code, but was adopted pursuant to the provisions of Article XVIII, Section 9, of the Ohio Constitution.

You question the effect of the language of the charter amendment, which incorporates the procedure provided by the laws of Ohio, because the only procedure for recall in the Revised Code appears to require adoption by a procedure other than that used by the city. In light of these expressed concerns, I have rephrased the specific question presented by your letter as follows:

When an amendment to a municipal charter, adopted pursuant to Ohio Const. art. XVIII, §§7 and 9, provides for the recall of elected municipal officers and further directs that "the procedure for such recall shall be that provided by the laws of the State of Ohio," which, if any, provisions of the Revised Code are thereby incorporated into such charter?¹

¹ I note that although the answer to this question involves interpretation of a municipal charter provision governing a purely municipal election

In order to answer this question, it is necessary to understand the difference between charter and non-charter municipalities with respect to their authority to adopt recall as part of their governing structure. Charter municipalities may define their own governmental structure. Ohio Const. art. XVIII, §7 ("[a]ny 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"). The constitution further establishes specific procedures for framing and adopting a charter, Ohio Const. art. XVIII, §8, and for amending it, Ohio Const. art. XVIII, §9. These procedures, along with any provisions of the municipal charter itself which do not conflict, are "not only mandatory, but they are also exclusive, that is, they are controlling as against any statutory enactment or departure therefrom." *Switzer v. State ex rel. Silvey*, 103 Ohio St. 306, 314, 133 N.E. 552, 554 (1921). It has long been established that municipalities have the authority to provide for the recall of elected officials in a properly adopted municipal charter. In *State ex rel. Hackley v. Edmonds*, 150 Ohio St. 203, 80 N.E.2d 769 (1948) (syllabus, paragraph one), the court held:

Section 7 of Article XVIII of the Constitution of Ohio vests in a municipality adopting a charter pursuant thereto the power to prescribe the manner of selecting the members of its council, to fix the terms of such members, and to so restrict the tenure of office of such members as to make such tenure dependent upon the will of the electors.

In comparison, non-charter municipalities are bound by the governmental structures established in statutes by the General Assembly. Ohio Const. art. XVIII, §2 provides that:

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.

See Village of Wintersville v. Argo Sales Co., 35 Ohio St. 2d 148, 299 N.E.2d 269 (1973) (syllabus, paragraph one) ("municipality which has not adopted a charter...must, in the passage of legislation, follow the procedure prescribed by statutes enacted pursuant to the mandate of Section 2 of Article XVIII"). Thus, there are two categories of statutory municipal governments: the form established by general laws and the optional forms of government which may be adopted by the electors of the municipality. The general laws providing statutory forms of government for non-charter villages and cities are found at R.C. Chapters 731 and 733. Three additional forms of statutory government which may be adopted by the

matter, the duty of the board of elections to accept and examine any recall petitions presented for filing depends upon whether or not the recall procedures of R.C. 705.92 have been incorporated into the Fairborn Charter. *See* R.C. 705.92(A) ("[a] petition...shall be filed with the board of elections....The form, sufficiency, and regularity of any such petition shall be determined as provided in the general election laws"); R.C. 3501.11(K) ("board of elections...shall: (K) Review, examine, and certify the sufficiency and validity of petitions"); *see also State ex rel. Rose v. Ryan*, 119 Ohio App. 363, 374-376, 200 N.E.2d 668, 678 (Franklin County 1963) (the provisions of R.C. Title XXXV "quite clearly and wisely" require a county board of elections to conduct a municipal election whenever authorized to do so). Since, pursuant to R.C. 309.09, you are required to advise the county board of elections I find that I may properly respond to your request. R.C. 109.14 (attorney general shall advise county prosecutor with respect to statutory duties). *See also* 1988 Op. Att'y Gen. No. 88-008 (attorney general may advise requestors only to the extent of their duties).

electors of a municipality are provided in R.C. Chapter 705.² The provisions of R.C. Chapter 705 were expressly adopted as "additional laws" pursuant to Ohio Const. art. XVIII, §2. See 1913 Ohio Laws 767 (H.B. 522, passed April 28, 1913) (enacting the predecessor of current R.C. Chapter 705 "to provide optional plans of government for municipalities and permitting the adoption thereof by popular vote in accordance with article XVIII, section 2, of the constitution of Ohio").³

No provision for recall is included in the general statutory form of government for either a village or a city. See R.C. Chapters 731 and 733. See generally *State ex rel. Lockhart v. Boberek*, 45 Ohio St. 2d 292, 294, 345 N.E.2d 71, 72 (1976) ("[r]emoval of officials in non-chartered villages is governed by R.C. 733.34 through 733.39; in municipal corporations, generally, by R.C. 733.72 through 733.77....No provision for a recall is contained in any of those statutes"). A recall provision is provided, however, for municipalities choosing one of the statutory-option plans of government. R.C. 705.92 describes in detail the procedures for the petition, setting and holding the election, nomination of candidates to succeed the officer who is the subject of the recall, the ballots, and several additional matters. Unlike the other components of the statutory-option plans, the recall procedures of R.C. 705.92 do not go into effect automatically as part of the chosen plan. R.C. 705.91 provides:

All laws pertaining to the initiative and referendum in municipal corporations shall apply to and become a part of each plan of government provided in sections 705.41 to 705.86, inclusive, of the Revised Code. Section 705.92 of the Revised Code shall be submitted, with each such plan, to the electors of the municipal corporation as prescribed in section 705.03 of the Revised Code, and shall go into effect and form a part of any such plan of government only to the extent to which such section has been adopted under section 705.03 of the Revised Code. (Emphasis added.)

From this brief review, it can be seen that R.C. 705.91 establishes R.C. 705.03 as the mandatory and exclusive procedure for making recall part of a statutory-option plan of government. Charter municipalities may not use the procedures of R.C. 705.91 to establish or add a recall provision as part of their charter-described plans of government. *Switzer, supra* (syllabus, paragraphs one through three) (constitutional procedures for charter amendments are exclusive; R.C. Chapter 705 provisions for adoption of optional plans by referendum vote inapplicable to charter municipalities). Nonetheless, charter municipalities have constitutional authority, independent of R.C. 705.91, to enact recall procedures as part of their plan of government. *Hackley, supra* (syllabus, paragraph one). It does not follow, therefore, that a charter municipality, acting pursuant to its constitutional authority, is prohibited by R.C. 705.91 from adopting the same recall procedure that is available to municipalities with statutory-option plans.

The first sentence of Fairborn Charter art. II, §2.07(d) establishes the recall as a part of Fairborn's charter government: "Any member of Council may be removed from office before the expiration of his term by the qualified voters." The framers of the amendment had no need to look to statutes for either the authority to add such a provision to the charter or the procedure for adding it, as both are derived from the Ohio Constitution and the charter itself. Ohio Const. art. XVIII, §§7, 8, 9; Fairborn Charter art. II, §2.06 (ballots for charter amendments) and art. IX, §9.03 (procedure for charter amendments). Thus, the words of the second sentence of Fairborn Charter, art. II, §2.07(d), "the procedure for such recall shall be

² The optional statutory plans of government are the commission plan, R.C. 705.41-48, the city manager plan, R.C. 705.51-60, and the federal plan, R.C. 705.71-86.

³ I note that except for recodification, most of the provisions of R.C. Chapter 705 have not changed significantly since their enactment in 1913. In particular, R.C. 705.91 and R.C. 705.92 are nearly identical to their predecessor statutes in the General Code. See 1913 Ohio Laws at 784-86.

that provided by the laws of the State of Ohio," clearly were intended to incorporate only such statutory provisions as describe how to conduct a recall.

In the current Revised Code, procedures for recall are found only in R.C. 705.92. R.C. 705.91 contains no such procedures; rather, it describes a method of adopting recall procedures. It is beyond question that the framers of the charter amendment could have copied the procedures of R.C. 705.92 verbatim into the text of the amendment. The language of incorporation is equally effective for this purpose. I see no reason to interpret the words "as provided in the laws of the State of Ohio" as incorporating additional provisions of the Revised Code, which are neither intended nor necessary to accomplish the purpose of the amendment. See *generally Hayslip v. Akron*, 21 Ohio App. 3d 165, 166, 486 N.E.2d 1160, 1162 (Summit County 1984) ("[i]n interpreting a city charter provision, the general principles of statutory construction will be applied...[t]he objective is to give effect to the intention behind the provision...[f]urther, in construing a charter provision, a court should be guided by common sense and reason, giving each word some meaning") (citations omitted). I note additionally that when provisions of the Revised Code are incorporated into city charters, they must be interpreted within the context of the charter rather than of the Revised Code. *State ex rel. Rose v. Ryan*, 119 Ohio App. 363, 370, 200 N.E.2d 668, 674 (Franklin County 1963) (citing *Reed v. City of Youngstown*, 173 Ohio St. 265, 181 N.E.2d 700 (1962)) ("a charter can, and in practice many do, adopt and incorporate substantial portions of the state statutes....As applied to municipal affairs the statute then derives its efficiency as law from the charter and not from the authority of the General Assembly"). See also *Fraternal Order of Police Youngstown Lodge No. 28 v. Hunter*, 49 Ohio App. 2d 185, 189, 360 N.E.2d 708, 711 (Mahoning County 1975), *cert. denied*, 424 U.S. 977 (1976); *State ex rel. Hauck v. Bachrach*, 107 Ohio App. 71, 76, 152 N.E.2d 311, 315 (Hamilton County 1958), *aff'd*, 168 Ohio St. 268, 153 N.E.2d 671 (1958); *State ex rel. Horvath v. Haber*, 102 Ohio App. 425, 429, 128 N.E.2d 865, 868 (Cuyahoga County 1955) (incorporation of R.C. 3503.11 into city charter did not require incorporation of definitions applicable to R.C. 3503.11 found elsewhere in the Code). Thus, when R.C. 705.92 is incorporated into the Fairborn Charter because it provides the procedures for recall, it is no longer dependent upon the other statutes in R.C. Chapter 705 for its effectiveness.

Therefore, it is my opinion and you are hereby advised that:

1. When an amendment to a municipal charter, adopted pursuant to Ohio Const. art. XVIII, §§7 and 9, provides for the recall of elected municipal officers and further directs that "the procedure for such recall shall be that provided by the laws of the State of Ohio," the amendment incorporates only the provisions of R.C. 705.92.
2. The procedure set forth in R.C. 705.91 for the adoption of the recall procedures of R.C. 705.92 applies only to cities exercising one of the optional statutory plans of government set forth in R.C. 705.41 to 705.86 and has no application to a charter municipality which chooses to incorporate statutory recall procedures into its charter pursuant to Ohio Const. art. XVIII, §§7, 8 and 9.