4565.

APPROVAL, BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, $23,000.00 (LIMITED).

COLUMBUS, OHIO, August 21, 1935.

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

4566.

APPROVAL, NOTES OF NEW CONCORD UNION RURAL SCHOOL DISTRICT, MUSKINGUM COUNTY, OHIO, $9,993.00.

COLUMBUS, OHIO, August 21, 1935.

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

4567.

HEALTH—MAJORITY VOTE TO ESTABLISH HEALTH AGENCY IN COUNTY CHARTER UNDER SEC. 5, S. B. NO. 114, 91ST GENERAL ASSEMBLY.

SYLLABUS:

A county charter provision establishing a county department or agency for the administration of public health services as provided by section 5 of Senate Bill No. 114 of the 91st General Assembly, will become effective if it shall have been approved by a majority of the electors voting thereon as prescribed by section 4 of Article X of the Ohio Constitution.

COLUMBUS, OHIO, August 21, 1935.

HON. WALTER H. HARTUNG, *Director of Health, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads as follows:

"Section 5 of Senate Bill 114 of the 91st General Assembly,

passed April 4, 1935, provides that the electors of any county may establish, by charter, a county department or agency for administration of public health service.

This section further provides that the health organization provided for in the charter shall succeed to all the powers and duties which heretofore have been vested in or imposed upon the health authorities of city or general health distircts.

The question has been raised with this department, by a charter commission, as to whether a county charter provision setting up a health organization for the county, as specified in Section 5, supra, will require a majority vote of all residents of the county or if it will require the special majorities set forth in Section 3, Article X of the Constiution.

In view of the decisions of the courts relative to the status of a city health district as a municipal service, it has appeared to this department that as this provision for a county health organization is not taking from a municipal corporation a municipal service, that only a majority vote in the county would be required."

Section 5 of Senate Bill No. 114 of the 91st General Assembly reads as follows:

"The electors of any county may establish by charter provision a county department or agency for the administration of public health services. Thereafter, the authorities provided in accordance with the county charter shall exercise all the powers and perform all the duties which may by law be vested in, or imposed upon, the authorities of city or general health districts. All health districts shall thereupon be abolished within the county, and the county shall succeed to the property, rights and obligations thereof. The state department of health shall have the same powers with respect to a county health department or agency as it may possess with reference to a general health district. A county health department or agency shall be entitled to participate in any state grants for the expenses of local health administration on the same basis and to the same degree as a general health district would participate."

Section 4 of Article X of the Ohio Constitution reads in part as follows:

"* * * Except as provided in section 3 of this article, every charter or amendment shall become effective if it shall have been

approved by the majority of the electors voting thereon. * *"

Section 3 of Article X reads as follows:

"Any county may frame and adopt or amend a charter as provided in this article. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. No charter or amendment vesting any municipal powers in the county shall become effective unless it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality)."

The term "any municipal powers", as used in the last sentence of this section, apparently means the powers referred to in the fourth sentence of this section, namely, any "powers vested by the constitution or laws of Ohio in municipalities". In other words, the majorities required by the last sentence of this section are necessary before a charter or amendment to a charter can be effective which vests in the county any powers vested by the Constitution or laws of Ohio in municipalities. It must be determined therefore whether any powers relating to public health or sanitation as included in Section 5 of said Senate Bill No. 114 are vested by the Constitution or laws of Ohio in municipalities.

Section 3 of Article XVIII of the Constitution 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."

As held in *Bucyrus* vs. *Department of Health,* 120 O. S. 426:

> "The provisions of Article XVIII of the Constitution of Ohio do not deprive the state of any sovereignty over municipalities in respect to sanitation for the promotion or preservation of the public health which it elects to exercise by general laws."

The court further said:

> "The surrender of the sovereignty of the state to the municipalities by that article was a partial surrender only, and, with reference to sanitary regulations, was expressly limited to such sovereignty as the state itself had not or thereafter has not exercised by the enactment of general laws. With respect, then, to local sanitary regulations, the municipalities are in no different situation since the adoption of Article XVIII than they were before, except that before the adoption of that article they had such power to adopt local sanitary regulations as had been conferred upon them by the legislature of the state, and since the adoption of that article they have such power to adopt local sanitary regulations as has not been taken away from them by the Legislature in the enactment of general laws."

Consequently, by virtue of the Constitution, all powers relating to health and sanitation within municipalities which are not taken away by the Legislature are vested in such municipalities.

Section 5 of said Senate Bill No. 114 provides that if a county department or agency for the administration of public health services is established by charter provisions, the authorities provided for in the charter shall exercise all the powers vested in the authorities of city and general health districts. Such a county health department or agency is simply to take the place of city and general health districts and to have only such powers as are vested therein. The question therefore arises as to whether the powers which are exercised by city health districts are municipal powers as referred to in the above constitutional provision.

The state is divided into health districts by the Hughes and Griswold Acts. 108 O. L. Pt. 1, 236; 108 O. L. Pt. 2, 1085. Each city constitutes a health district known as a city health district and the townships and villages in each county are combined into a general health district. Section 1261-16, General Code. Provision is also made for a union of two general health districts or of a general and a city health district. Sections 1261-20 and 1261-21, General Code. The members of a board of health of a city health district are appointed by the mayor and confirmed by council except where a city charter provides otherwise. Section 4404, General Code. The city treasurer and

auditor act as treasurer and auditor of the district. Section 1261-38. With the exception of those provisions and the fact that the territory comprising a city health district is the same as that of a city, such a district is separate and apart from the city. Section 1261-30 provides that boards of health of city health districts shall exercise all the powers theretofore conferred upon municipal boards of health. Prior to the enactment of the Hughes Act, a city board of health was purely a municipal body. Now a board of health of a city health district is a separate entity, the powers and duties of which are delegated directly to it by the state. The Director of Health and the public health council are given certain authority over the members of such board and its health commissioner. Sections 1261-25 and 4405, General Code.

In *Opinions of the Attorney General for* 1932, Vol. I, page 549, the following is stated:

> "From the language of both the 'Hughes Act' (108 O. L. 236) and the 'Griswold Act' (108 O. L. 236) now forming Sections 1245, 1246, Sections 1261-16 to 1261-43 and 4404 to 4413, inclusive, General Code, it is clearly evident that the intent of the legislature was to provide a uniform plan of administration of health laws, and for that purpose it created a State Department of Health and certain general health districts and municipal health districts. The general administration of health regulations throughout the state was placed in the State Department of Health and the local matters of administration in the district boards under the supervision of the State Director of Health. It is evident from the language of Section 1261-16, supra, that the legislature has, for the purpose of administration of the health laws, created a separate and distinct district authority, the territorial jurisdiction of which may be co-extensive with the limits of the county." (Pages 550-551)

In *Opinions of the Attorney General for* 1930, Vol. II, page 1348, it is said at pages 1348, 1349:

> "It appears from an examination of these sections and other related sections that a municipal health district is a separate political entity. This view was recently expressed by me in an opinion rendered to you under date of February 4, 1930, in which I held that an ordinance passed by a municipality to the effect that any appointee receiving pay from the city must be a bona fide resident of the city, has no application to appointees of city health districts. In this opinion it was stated by me that a city health district is a separate entity, from the municipal government, although it embraces the same territory. This view is supported by an opinion of a former Attorney

General, found in *Opinions of the Attorney General,* 1920, Vol. 1, page 133. In the course of this opinion the then Attorney General, commenting upon the Hughes act, 108 O. L. (part 1), 236, Sections 1261-16, et seq., and the Griswold act, 108 O. L. (part 2), 1085, which amended it, says:

'In the division of the state for health purposes, the district was made the unit and city and county lines were adopted for its territorial definition.

What might be termed a new quasi-political subdivision was created somewhat analogous to school districts, or, so far as a city of the required population was concerned, it might be said that it then had a dual interlocking capacity. It constituted a municipal health district and its city council was empowered to establish a municipal health district board of health, while the duty and method of raising the necessary funds for this health district was not changed by the act, showing the interdependent character of the district and the municipality. The idea of separate identity is further indicated by the fact that by Section 1261-38 the treasurer and auditor of the city are specifically designated as the treasurer and auditor of the health district.'

It may be urged that a city health district is merely a division of the state for administrative purposes, that is, that the employes of a district perform ministerial duties in the performance of state functions. The statutes dealing with health districts clearly provide distinct and independent functions for the district boards of health from those of the state department of health. The state department of health is only authorized to perform the duties imposed by statute upon a district board of health when the district board of health fails or neglects to perform its duties. The district board of health is in the same category as school districts and metropolitan park districts and is distinguished from districts which are provided for the purpose of performing administrative functions for the state in a particular locality."

In the case of *Board of Health* vs. *State, ex rel.,* 40 O. App. 77 (motion to certify overruled by the Supreme Court), in which it was held that employes of a board of health of a city health district are not municipal employes, the court said:

"It appears from an examination of Section 4404 of the General Code, as the same existed prior to the enactment of the Hughes Act on April 17, 1919, 108 Ohio Laws, pt. 1, 236, that it provided in part that 'the council of each municipality shall establish a board of

health.' And by this act it is plain that the state in the exercise of its police power delegated some of its power to municipal corporations, that is, that a city might create a municipal board of health, which board was then no doubt a part of the municipal government.

And now considering the first provision of the Hughes Act, which is Section 1261-16, General Code, we find that it provided that 'for the purposes of local health administration the state shall be divided into health districts. Each city shall constitute a health district and for the purposes of this act shall be known as and hereinafter referred to as a city health district. The townships and villages in each county shall be combined into a health district and for the purposes of this act shall be known as and hereinafter referred to as a general health district. As hereinafter provided for, there may be a union of two general health districts or a union of a general health district and a city health district located within such district.'

Again referring to Section 4404, General Code, as it now stands, amended by the Hughes Act, we note the injection of a new phrase in the first line thereof which is of much significance. The section now reads: 'The council of each city constituting a city health district, shall establish a board of heatlh * * *.' And from the repealing section of the Hughes Act, it appears that there was no saving clause with reference to existing municipal health boards, and we remark that the act further provided: 'The district board of health hereby created shall exercise all the powers and perform all the duties now conferred and imposed by law upon the board of health of a municipality.' Examination of Section 4405, General Code, discloses that if a municipality should fail or refuse to establish a health board, the state commissioner of health, with the approval of the public health council, may appoint a health commissioner therefor. From Section 1261-39, General Code, it is apparent that it was contemplated that municipal and general health districts were to be organized; and in fact from an examination of the whole act it is plain that the state retains an enlarged control over the districts and that many new powers and duties are reposed in the district board.

It therefore seems clear to this court that it was the intention of the Legislature to wtihdraw the power previously granted to cities in health matters; and well knowing that the health of any municipality was of vital concern to the whole state, and recognizing the fact that the matter of health administration had been indifferently administered in certain localities, it was intended to reserve that power to the state itself and to abolish the municipal boards of health as previously established."

The following is said in *State, ex rel.* vs. *Board of Health,* 47 O. App. 114:

> "Board of health of city health district is governmental agency separate and distinct from municipality and not subject to its jurisdiction (Sections 1261-16, 1261-30 and 4413, General Code)."

In this case the court said in its opinion:

> "We find no provision of law making a board of health of a city health district subject or amenable in any way to the government of the municipality with which the district is coextensive, except that appointments of members of the board are made by the mayor of such municipality, and such board, under the law, constitutes a governmental agency separate and distinct from such municipality and not in any way subject to the jurisdiction of the municipality. It is said in 20 *Ohio Jurisprudence,* 572, that: "Local health officers in the exercise of the power delegated to them are plainly engaged in a purely public service in the performance of strictly governmental duties. They cannot in any sense be considered as the agents of the corporation, which is, accordingly, not liable for their negligence or misdoings.' "

See also *State, ex rel.* vs. *Zangerle,* 103 O. S. 566.

It would seem therefore that the state has reserved to itself through the health district which have been created by the legislature the powers which have been conferred upon such districts, and since the county department or agency contemplated by section 5 of said Senate Bill No. 114 can exercise only such powers as are vested in boards of health of general and city health districts, I am of the view that a charter provision which establishes such a county department or agency would not vest in the county any municipal powers as that term is used in Section 3 of Article X of the Constitution.

Answering your inquiry, I am therefore of the opinion that a county charter provision establishing a county department or agency for the administration of public health services as provided by section 5 of Senate Bill No. 114 of the 91st General Assembly, will become effective if it shall have been approved by a majority of the electors voting thereon as prescribed by section 4 of Article X of the Ohio Constitution.

Respectfully,

JOHN W. BRICKER,

Attorney General.