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MUNICIPALITY—WITHOUT POWER TO PAY MEMBERSHIP DUES TO LOCAL CHAMBER OF COMMERCE—PAYMENT WOULD CONSTITUTE MINGLING OF PUBLIC FUNDS WITH PRIVATE FUNDS—VIOLATION OF ARTICLE VIII, SECTION 6, CONSTITUTION OF OHIO—PAYMENT WOULD CONSTITUTE EXPENDITURE OF PUBLIC FUNDS FOR OTHER THAN A PUBLIC PURPOSE.

SYLLABUS:

A municipality is without power to pay membership dues to a local chamber of commerce for the reasons: (a) that such payment would constitute a mingling of public funds with private funds in violation of Section 6 of Article VIII of the Constitution of Ohio, and (b) that such payment would constitute the expenditure of public funds for other than a public purpose.

Columbus, Ohio, December 30, 1952

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your request for my opinion, reading as follows:

> "We enclose herewith a request received from the City Manager of P——, for an official ruling on the legality of an expenditure of electric light plant funds for membership in the local Chamber of Commerce. We also enclose the opinion rendered by the Solicitor for the City of P——.
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> "Please examine the letters carefully and furnish us with your opinion in answer to the following questions:
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> > "1. Is it legal for a municipality to become a member of the local Chamber of Commerce in view of the provisions of Article VIII, Section 6 of the Ohio Constitution?
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> > "2. If the answer to question number one is in the affirmative, may the city legally pay membership dues to the local Chamber of Commerce from either the electric light revenue fund or the city general fund?"

Section 6 of Article VIII, of the Constitution, in so far as pertinent, reads as follows:

> "No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: * * *"

One of my predecessors, in Opinion No. 1452, Opinions of the Attorney General for 1930, page 171, expressed the opinion that if it were sought to use municipal funds for membership dues in any organization formed for the purpose of profit, such expenditure would clearly be illegal. The opinion did not state that the expenditure would be lawful if the organization is not for profit, although that inference naturally arises. However, that distinction does not seem to me to be important. The question is whether the municipality may without violating the constitutional provision, contribute money to an "association" with which the latter is to pay the expenses of its operation and carry out its objectives.

The dues would ordinarily be small in an organization such as a chamber of commerce, but it is obvious that if a municipality can contribute a small amount, it might by the same right contribute a larger sum, even to the extreme of underwriting the entire budget of the organization.

The sweeping scope and intent of the constitutional provision in question is indicated by the statement of the Supreme Court, in Walker v. Cincinnati, 21 Ohio St., 15:

> "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever."

In Markley v. Mineral City, 58 Ohio St., 430, 438, the court used similar language:

> "And that this interdict applies as well to the case of an individual as to the aggregations named, is without question. It is intended to prevent the union of public and private capital in any enterprise whatever."

For a city to contribute even a small amount of money along with private individuals and firms for the maintenance of an organization such as a chamber of commerce, is certainly a union of public and private capital in a business enterprise, and clearly violative of the letter and spirit of the constitutional provision above noted.

In the case of State ex rel. McClure v. Hagerman, 155 Ohio St., 320, the court upheld the right of a city to join other municipalities in an organization known as the Municipal Finance Officers Association, formed "for the purpose of improving the administration of the fiscal affairs of the municipal governments of Ohio * * * by the concerted effort to obtain the formation of a planned and stable program of financing municipal governments." I shall discuss that case more fully later on in this opinion. The question may arise, why did not the court in the Hagerman case, apply this constitutional bar to the organization there under consideration? The constitutional provision was not mentioned in the opinion. The reason is obvious. There was there involved no proposed union of public and private capital; the several organizations proposing to form the Municipal Finance Officers Association of Ohio, were exclusively public bodies, and the proposed organization had none of the characteristics or purposes of a private organization.

The question of violation of the constitutional provision in question does not appear to have been raised, and the court evidently did not consider that it had any place in the case.

2. While my answer to your first question might make it unnecessary to discuss your second, I deem it worth while to do so, as it appears to me that wholly independent of the constitutional bar, the city would exceed its powers if it undertook to use its funds in payment of membership dues in a chamber of commerce. This leads to a careful examination of the case of State ex rel. McClure v. Hagerman, supra.

Prior to the decision of the Supreme Court in that case, the policy of the law of Ohio was definitely against the allowance of the expenditure of municipal funds for dues in an organization, even though it was definitely designed to improve the quality of municipal administration of local government. The case of State, ex rel. Thomas, v. Semple, 112 Ohio St., 559, turned upon the efforts of a city to join and pay membership dues in the Conference of Ohio Municipalities, the purpose and object of which, as stated by the court was "to serve as an agency of common action in all matters of common concern to municipalities of Ohio." The court held that such would be an illegal expenditure of public funds.

However, in the Hagerman case, the Supreme Court followed a completely different train of thought and charted a course that was a radical departure from the previous decision. The Semple case was expressly overruled.

Inasmuch as my discussion will largely revolve about the Hagerman case, I am quoting its syllabus in full:

> "1. The legislative body of an Ohio municipality has the power and authority under the Home Rule Amendment to the Constitution of Ohio, adopted in 1912, unless it has adopted a charter containing a specific prohibition against such expenditure, to determine whether payment of the cost of membership in an association of municipal finance officers out of municipal funds is for a public purpose, and its decision will not be overruled by this court unless it clearly appears that there was an abuse of discretion or that as a matter of law such expenditure is not for a public purpose.
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> "2. The objectives, purposes and activities of the Municipal Finance Officers Association of Ohio as disclosed by the evidence in this case are not such as to justify this court in holding that the commission of the city of Dayton as the legislative body of the

city abused its discretion in directing an expenditure for a membership in that association."

In the opinion the court indicated that the primary test for determining the legality of an expenditure of the kind there sought, was the determination whether the proposed expenditure is for a public purpose, and one reasonably related to the operation of the municipal government. It was said at page 323 of the opinion:

> "The charter contains no provision which would prohibit the expenditure in question and none which would specifically authorize it. Therefore, the authority to make the expenditure, if such authority exists, is inherent as an incident of the powers of the municipality under the provisions of the Constitution, adopted in 1912. It must be considered well settled that the funds of a municipality can be expended *only for public purposes.* The object to be achieved or promoted by the expenditure *must be reasonably related to the operation of the municipal government.* The rule is stated in 38 American Jurisprudence, 86, Section 395, as follows:
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> > 'It is well settled that if the primary object of an expenditure of municipal funds is to subserve a public purpose, the expenditure is legal although it may also involve as an incident an expenditure which, standing alone, would not be lawful.' " (Emphasis added.)

The court quoted from 37 American Jurisprudence, 734 as follows:

> "Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose. The phrase 'municipal purpose' used in the broader sense is generally accepted as meaning public or governmental purpose as distinguished from private."

The court also laid emphasis upon the proposition that the determination of what constitutes a public purpose is primarily a legislative function, and that the court would not substitute its own judgment for that of the legislative body and would not reverse the action of the legislative body *except* where its action was clearly arbitrary and *an abuse of discretion.*

The court further speaks of the trend of judicial thought throughout the nation, saying at page 326 of the opinion:

> "This problem is not unique to Ohio. In one form or another it has been faced in all sections of the nation. With changing conditions and increasing complexity of government, the tendency of the courts has been toward greater liberality with respect to approval of expenditures by municipalities, which at an earlier date might not have been considered as being for public purposes."

The court cites a number of cases decided by the courts of last resort in various states, illustrative of the objects which have been defined as "public purposes."

In the case of City of Glendale v. White, 67 Ariz., 231, the Arizona court approved the payment of dues in the Arizona Municipal League.

In People, ex rel, Schlaeger, v. Coal Company, 392 Ill., 153, the court approved payment by the city of Chicago of $3,000 as dues in the Illinois Municipal League and $3,000 as dues in the United States Conference of Mayors.

In Hays v. City of Kalamazoo, 316 Mich., 443, payment of $517 as dues in the Michigan Municipal League was approved.

In City of Roseville v. Tulley, 55 Cal. App. (2d) 601, payment of the expenses of two city councilmen, the city clerk and the city attorney as delegates to the annual conference of the League of California Cities, was approved.

In Tousley v. Leach, 180 Minn., 293, the court approved payment by the city of expenses of the city's aldermen and other officers in attendance upon a meeting of the Mississippi Valley Association at St. Louis, a meeting of the Rivers and Harbors Congress at Washington, D. C., and a meeting of the Asphalt Association at New Orleans.

In the light of the holding and the reasons advanced by our Supreme Court for its conclusion, it might appear that except for the provisions of Section 6, Article VIII of the Constitution of Ohio, there would be no room for argument as to the right of the city council in the case you present, to provide for membership by the city in the chamber of commerce. However, I would call especial attention to the language of the court in the first quotation which I have made:

> "It must be considered well settled that the funds of a municipality can be expended *only for public purposes.* The object to

be achieved or promoted by the expenditure *must be reasonably related to the operation of the municipal government.*"

(Emphasis added.)

The question then arises whether membership in a chamber of commerce is "reasonably related to the operation of the municipal government." It is to be noted that in the Hagerman case and in each of the cases above referred to arising in other jurisdictions, the expenditure which was approved by the court was not only for a public purpose but was for a purpose that was directly and solely concerned with the administration of the municipal government, and that each of the organizations referred to, were concerned solely with the study and solution of questions directly involved in the municipal government, and it appears to me that membership in these organizations and attendance at those conventions was justified and approved by reason of this direct connection between the problems of municipal government and the organizations which presumably would furnish the officers of the cities the means for improving and perfecting their administration. In no case did they refer to an organization of citizens or business firms organized manifestly for the primary purpose of promoting business and industry.

Light will I think be thrown upon this central and essential purpose by referring more particularly to the case of City of Glendale v. White, supra, which was referred to with approval by our court. I quote the following paragraphs from the syllabus of that case:

"7. In determining whether a proposed expenditure of public funds is valid as devoted to a public use or purpose, each case must be decided with reference to object to be accomplished and to degree and manner in which that object affects the public welfare.

"11. Expenditures of municipal funds for a membership in Arizona Municipal League is a reasonable effort by municipal authorities to learn the manner in which complex municipal problems, arising from operations involving both governmental and proprietary capacities of municipality, are being solved in sister cities, thereby improving quality of service it renders its own taxpayers, is for a 'public purpose.' "

I call particular attention to syllabus No. 11 above quoted, whereby the court indicates its approval of such membership because it is "a reasonable effort by municipal authorities to learn the manner in which complex

municipal problems * * * are being solved in sister cities, thereby improving the quality of service it renders its own taxpayers." Can it be said that membership in a chamber of commerce, however laudable the purposes of such organization may be, will afford the officers of the municipality an opportunity to learn how better to solve the problems of municipal government, and thereby render better official service to their own city? It is my opinion that it was not intended by the Supreme Court in the Hagerman case, to open the way for municipalities to join any or all private organizations, merely because the council of the municipality determines that membership therein would be for a public purpose. To do so would open the way for abuses. Municipal councils might be tempted to join divers and sundry organizations of a private character, each of which might have worthy objects for the betterment of their members or even for the betterment of the community and the conduct of the citizens. Inasmuch as our Supreme Court has made a radical, though very sensible departure from the former adjudications on the subject of sanctioning membership in an organization of the character involved in the Hagerman case, I do not feel justified in going any farther than the court has gone, and applying the principle there laid down to membership in an organization which is definitely not organized for the purpose of promoting better municipal government, however laudable its purpose may be in promoting the business prosperity and general welfare of the citizens of the municipality. The argument of the city solicitor that the chamber of commerce can be of great assistance to the city in encouraging new industries and thereby bringing new customers to the city's light plant, and also in cultivating good public relations with its customers, and furnishing the city with valuable information, is persuasive, but these are services which every well managed chamber of commerce performs for its city in its own interest as well as the city's and do not in my opinion enlarge the city's power.

I am of the opinion that a municipality is without power to pay from its funds membership dues in a chamber of commerce.

The proposition is strongly urged that the city might join the chamber of commerce, and pay the membership dues out of the revenues of its light plant. This is on the theory that the city in the operation of its utilities is operating in a proprietary capacity. I readily recognize that our Supreme Court has repeatedly laid down the rule that in the operation of such utility a municipality has broad powers to operate it as a private corporation or an individual would do. The leading case on this proposition is

The Travelers Insurance Company v. Village of Wadsworth, 109 Ohio St., 440, where it was held:

> "2. The power to establish, maintain and operate a municipal light and power plant, under the Constitution and statutes aforesaid, is a proprietary power, and in the absence of specific prohibition, the city acting in a proprietary capacity may *exercise its powers* as would an individual or private corporation."
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> (Emphasis added.)

Note that the court says that "the city, acting in a proprietary capacity, may *exercise its powers* as would an individual or private corporation." It seems to me clear that the court had reference merely to the manner in which a city may exercise the powers which it has, but that it was not intended to concede to a city the right to exercise any and every power which it may see fit to take unto itself. It does not follow, from this declaration of the law, that a city has all the liberty that might belong to a private utility corporation. There are many limitations on the power of a city, established by the constitution and by the statutes as well, and there are limits inherent in the organization of a municipal corporation that are not expressly stated in either the Constitution or the statutes, and these limitations apply whether the city is acting in its governmental or proprietary capacity.

It will hardly be contended that because a private utility company can spend its funds in any way it sees fit, may buy and sell as it pleases, etc., that, therefore, a municipality in operating its utility would be freed from the statutes requiring an appropriation by council, advertisement for bids, and certificate of the fiscal officer as to the availability of funds; nor would it be contended that it is free to withhold its current funds from the custody of the treasurer or to deposit or not deposit them as it sees fit. It would hardly be contended that it may match the contribution of the private utility to philanthropic organizations such as those covered by the Community Fund.

A privately owned utility can join trade associations, enter into combinations with other like companies or become either a controlling or subsidiary member of a holding organization. But certainly a municipal utility can do none of these things.

We are not warranted in considering a city's light plant or waterworks, or other utility as being an entity separate from the city itself; nor its

revenues as being other than city funds. The question we are considering is not whether the light plant can join the organization in question and pay membership dues, but rather, can the city do so?

In arriving at the conclusion above set forth, I do not consider that I am in any degree usurping the province of the courts which, as stated in Judge Middleton's opinion, will only overrule the determination of the legislative body if it finds that there has been an abuse of discretion. If such legislative action has been taken and a court so finds, it would have the power to enforce its finding by injunction or other appropriate remedy. I have, of course, no power of enforcement. I am not overruling any legislative action taken by the City of P....., as I do not understand that any has been taken. But having been asked by your Bureau to give my opinion as to the legality of a proposed procedure, I consider it my right and duty to express such opinion as to the judgment which I believe a court would render, leaving it to the court in a proper case to pronounce and enforce its judgment.

In specific answer to your inquiry, it is my opinion that a municipality is without power to pay membership dues to a local chamber of commerce for the reasons (a) that such payment would constitute a mingling of public with private funds in violation of Section 6 of Article VIII of the Constitution of Ohio, and (b) that such payment would constitute the expenditure of public funds for other than a public purpose.

Respectfully,

C. WILLIAM O'NEILL
Attorney General