Municipal Home Rule and Charters

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Article XVIII Ohio Constitution gives Cities and villages the ability to carry out functions that affect them on a daily basis whether or not they have adopted a home rule charter. **Failure to update charters may prove to disadvantage the operations** of a municipality. This article covers:

(1) **Events** leading to the adoption of the home rule amendment in Ohio;

(2) **Basic provisions** of that amendment, other than municipal utility powers (since utility powers deserve an article of their own); and

(3) **Reasons** why a charter will really make a difference in the operations of a city.

(4) **Review and Revise** existing charter provisions to get the full benefit of home rule.

PRIOR TO HOME RULE

Dillon's Rule

Ohio's local governments, including municipal corporations, were governed by "Dillon's Rule" 1 Dillon, Municipal Corporations 449 (5th ed. 1911), Ravenna v. Pennsylvania Company (1887), 45 Ohio St. 118. **Under Dillon's Rule**, a municipal corporation possesses powers:

(i) Expressly **granted** by statute,

(ii) That may be **implied** from the express powers, and

(iii) **Which are essential** to carry out the express powers. Under the early common law, there was no inherent power. Except as to incidental powers such as are essential to the very life of the municipality, the presumption was that the state had granted all it intended to in clear and unmistakable terms. Doubtful claims to powers were to be resolved against the exercise of power by the municipal corporation or other unit of local government.

Legislative Charters – Population Classifications

Early municipal corporations were individually chartered by law by the Ohio General Assembly. The Ohio General Assembly controlled local municipalities' powers and their structures and forms of government. As would be expected, **abuses (political and otherwise) arose**, at least in the view of municipal supporters and the people of the state. The **Ohio Constitution of 1851** enacted:

Section 1 of Article XIII: **"The General Assembly shall pass no special act conferring corporate powers."**

Section 6 of Article XIII: ordained: "The **General Assembly shall provide** for the **organization of cities and incorporated villages,** by the general laws…"

Later, the individual charter practice gave way to classifications of municipal corporations by population.

Two cases decided in 1902, State. Ex rel. Knisely v. Jones, , this reformed municipal statutes that were **based upon population classifications to be invalid as special acts**.

Thiscase in validated many of the **municipal statutes** were invalidated by these cases, so the Ohio Supreme Court **suspended the execution** of its order in Beacom for a little more than **three months.**

During that period, the **municipal code of 1902 was adopted by the General Assembly**. With extensive amendments, the 1902 municipal code **serves as the basis for today's structure of government and procedures for non-charter municipal corporations**.

THE HOME RULE AMENDMENT

The Constitutional Convention of 1912- Adoption of Article XVIII

The second most **far reaching reform** was brought about by a constitutional convention that **resulted in the adoption of Article XVIII of the Ohio Constitution in 1912, better known as the "home rule amendment."** It is this amendment (amended slightly) that has persisted since 1912. The reasons most often attributed for adopting the home rule amendment are:

(i) To **free municipalities from** control by the General Assembly and **state officials** with respect to **local affairs** (powers of local self-government);

(i) To allow the **adoption of municipal charters** to provide for the **structure and organization** of the municipal government.

(i) To **facilitate** the ownership and **operation of utilities** by municipalities.

This article will be to discuss the powers flowing from **Sections 1, 2,3,7,8 and 9 of Article XVIII** that provide for:

(i) classification into cities and villages (5,000 population mark, the only population-based classification permitted),

(ii) powers of local self-government,

(iii) police power and the adoption and amendment of charters.

Home Rule Powers Self-Executing

Ohio's home rule powers are self-executing and do not require implementation by statute or by the adoption of a Charter. Perrysburg v. Ridgway (1923), 108 Ohio St. 245.

POWERS OF LOCAL SELF-GOVERNMENT

Article XVIII, **Section 3.**contains three clauses:

(1) power to exercise **all powers** of local self-government.

(2) power to exercise **police powers concurrently** with the state.

(3) conflict clause, consistently been held to **modify** only clause 2, **the grant of police powers.**

clause 1 generally has been held to **stand alone,** not modified by clause 3 (the conflict clause).

The Section 2 – 3 vs. the Section 3 – 7 Analysis: Procedural Powers of Local Self-Government vs. Sustantive Powers of Local Self-Government.

Section 2 provides - **general laws** passed shall provide for incorporation and government of cities and villages…

Section 3 grants municipalities **authority to exercise all powers of local self-government**…,

Section 7 authorizes adoption of municipal charters and exercise of local self-government (**clause 1** in Chapter 3.01 above). It may be summarized this way:

1) If a **non-charter** municipality is involved, you **look to Section 2** of Article XVIII and the **statutes enacted by the General Assembly** with respect to "**the government" of the municipality.** In other words, powers of local self-government which are **procedural** (form or structure of government and procedures) **are controlled by Sections 2 and 3 of Article XVIII** and the **state law prevails** as to those **procedural powers** of local self-government granted to non-charter municipalities by Section 3 of Article XVIII. See Morris v. Roseman (1954), 162 Ohio St. 447.

2) if a **charter municipality** is involved, the **charter adopted** pursuant to **Section 7 , rather than the statutes, that prevails** with respect **to procedural powers** of local self-government (structure and form of government and procedures).

3) If a **substantive power** (**not a matter of procedure or form or structure** of government), of local self-government is involved then regardless of whether a charter or non-charter municipality is involved, the **municipal exercise of "substantive" powers of local self-government prevails over the state laws.** See Benevolent Assn. v. Parma (1980), 61 Ohio St. 2d 375.

4) Of course, **if there is not collision** between a municipality's exercise of procedural powers **of local self-government and the state law**, the **non-charter municipality may exercise** its **procedural powers** of local self-government as **determined locally**.

The Statewide Concern Doctrine

A **question** is whether the municipal exercise of power is a **power of local self-government or a matter of statewide concern.** If the matter involved **does not have extra-territorial impact**, then the power is a **power of local self-government**. If there is **extra-territorial impact**, then a **court** will look to see if the **municipality or the state has the predominant interest,** and

(i) will decide the matter to be a **power of local self-government** if the **municipality's interests are predominant**

(ii) determine the matter to be a matter of **statewide** concern if **state's interests are predominant**. In other words, if there is extra-territorial impact, then the court will apply a balancing test, **balancing the interests of the municipality against the interest of the state**.

Examples of Powers of Local Self-Government

The following are examples of matters the courts have held to be **powers of local self-government** under **Section 3 of** Article XVIII, Ohio Constitution: (i) **power to tax,** Angell v. Toledo (1950), 153 Ohio St. 179; (ii) **power to incur debt** State. Ex rel. Gordon. V. Rhodes (1952), 158 Ohio St. 129; (iii) **urban renewal**, including **eminent domain,** State Ex rel. Brustle. V. Rich (1953), 159 Ohio St. 13; and (iv) many others, including **structure and form** of government, Fitzgerald v. Cleveland (1913), 88 Ohio St. 338, and **salaries,** Mansfield v. Endly (1931), 38 Ohio App. 528. See Chapter 5 of the text of Gotherman and Babbit, Ohio Municipal Law (2nd ed. 1975).

Examples of Statewide Concern

The following are examples of matters the courts have held to be matters of **statewide concern**: (i) **sewage treatment,** Bucyrus v. Dept. of Health (1929), 120 Ohio St. 426; (ii) **detachment of territory,** Beachwood v. Board of Elections (1958), 167 Ohio St. 369, (iii) **cross-country electric transmission lines,** Cleveland Electric Illumination Co. v. Painesville (1968), 15 Ohio St. 2d 125; (iv) **prevailing wage law,** State ex rel. Evans v. Moore (1982), 69 Ohio St. 2d 88;

and (v) **labor relations generally,** Kettering v. State Emp. Relations Bd. (1986), 26 Ohio St. 3d 50.

The Rocky River Case

Ohio **Supreme Court held state law** --- public sector labor relations, definition of **"supervisors," – was statewide concern** therefore, **local ordinance defining supervisors for collective bargaining purposes was not a valid exercise of powers of local self-government** under Section 3 of Article XVIII of the Ohio Constitution.

Municipalities won a temporary **victory** with respect to the **collective bargaining law** when the **Supreme Court held** that establishment of **compensation was a power of local** self-government under **Section 3** ---and provision of **state public sector law** that required **binding arbitration for municipal safety employee compensation was unconstitutional. See Rocky River** v. State Emp. Relations Bd. (1988), 39 Ohio St. 3d 196 ("Rocky I").

A motion for **rehearing was denied** on **December 13, 1988** ("Rocky III"). A motion **to reconsider** the **Rocky II** decision to **deny a rehearing** was **granted on February** 10, 1989 ("Rocky III"). On **May 10, 1989**, the **Ohio Supreme Court reversed Rocky I** and **held that the state law** requiring mandatory and **binding arbitration is valid** and --**state law** prevails over an exercise of powers of **local self-government**, since the **statutory provision is within the General Assembly's authority to enact employee welfare legislation pursuant to Section 34, Article** II, Ohio Constitution.

All decisions, Rocky I, Rocky II, Rocky III and Rocky IV were **decided by a 4 to 3 vote** of the Court. **Between the decisions in Rocky I and Rocky II and Rocky III and Rocky IV**, an election occurred and the Court's **composition changed by one member.**

POLICE POWER

Section 3, municipal corporations the **right to exercise police powers concurrently with the state so long as the exercise of the local police power does not conflict with the state's exercise of its police powers.** See Struthers v. Sokol (1923), 108 Ohio St. 263; Fondessy Enterprises, Inc. v. Oregon (1986), 23 Ohio St. 3d 213.

Conflict Test

In Struthers v. Sokol, Supra the **Court held** that the usual **test for conflict** is a matter of "**determining…**whether the **ordinance permits or licenses that which the statute forbids and prohibits, and vice versa."** 108 Ohio St. 263, Syl. Para. 2. See also the following cases with respect to the conflict test: Auxter v. Toledo (1962), 173 Ohio St. 444; Cleveland v. Raffa (1968), 13 Ohio St. 2d 112; and Fondessy Enterprises, Inc. v. Oregon (1986), 23 Ohio St. 3d 213.

General Laws Must Create the Conflict

Only **general laws may create a conflict** under Section 3 of Article XVIII, Ohio Constitution. Youngstown v. Evans (1929), 121 Ohio St. 342; West Jefferson v. Robinson (1965), 1 Ohio St. 2d 113. **A law that purports to authorize or prohibit the exercise of police power is not a general law**. To be a **general law** that will be **recognized to create a conflict** under Section 3 of Article XVIII, the **state law must be a substantive exercise of the state's police power.**

MUNICIPAL CHARTERS – PROCESS

Constitutional Power to Adopt a Charter

Section 7 of Article XVIII of the Ohio Constitution is a primary interest to those interested in charter government. It simply states that a municipality may adopt and amend a charter for its government, and subject to the provisions of Section 3 of Article XVIII of the Constitution, may exercise under the charter all powers of local self-government.

Action to Initiate a Charter

Procedure for the adoption of a charter involves two steps. The first step is the placing of the Question of whether or not a commission shall be chosen to frame a charter on the ballot. This is done by either a two-thirds vote of council, or the council must submit the issue upon a petition of ten percent of the electors.

Election to Select a Commission

The question of selecting a charter commission is to be submitted at the next regular municipal election if one occurs not less than

Sixty nor more than one hundred twenty days after passage of the ordinance; otherwise it is to be submitted at a special election to be called and held within a period of not less than sixty nor more than one hundred twenty days after passage of the ordinance. The ballot is to be non-partisan and provides for voting on the question of whether or not a charter commission is to be chosen and to provide for the election of fifteen members of the charter commission from the municipality at large. While the electors vote on both the question of whether or not a commission shall be chosen and for members of the charter commission, the members of the charter commission are elected only if the vote on the question of whether a charter commission is to be chosen is favorable to the selection of a commission.

Election to Adopt a Charter

The second step, after the work of the charter commission is completed and it has prepared a legal document known as the proposed charter, is the submission of the issue of whether or not the particular charter proposed by the charter commission shall be adopted. The election on the adoption of the charter will be held at a date fixed by the charter commission which may be a

general, primary or a special election, but it must be within one year after the election of the charter commission.

NATURE OF CHARTER

The Charter as the Basic Law of Municipality

The charter document is a legal instrument which may be compared roughly to a constitution. It will be the framework for the municipal government of the city for many years to come.

Charter Specifies the Form of Government

The charter will contain a form of government whether it be a strong mayor, weak mayor, city member or some other form of government. **It usually does not attempt to solve all the detailed administrative or legislative policy matters forever;** rather, it usually leaves a great deal of policy making power to council and gives it a degree of flexibility in meeting the needs of the municipality as they arise. A good charter, like a constitution, does not attempt to cover all situations specifically; rather, **charters are usually a statement of fundamentals.**

The Charter as a Means of Local Self-Determination

Charters may be drafted to strengthen the democratic processes and to give a more efficient government than is available under the statutory form. Under Article XVIII, Section 3 of the Ohio Constitution, all municipalities have all powers of local self-government. So, we see that at least in theory that a charter does not confer power or enlarge the scope of municipal powers; rather, it **distributes powers among the various elected and appointed officials and bodies and between the city officials and the citizens**. In this respect, a charter should be more responsive to local needs and wants than the statutory form of government, since **the citizens will provide for the distribution of municipal powers as they see fit,** rather than relying upon the General Assembly as is the case under the general statutory form of government.

Charter as Expanding or Restricting Home Rule Powers

Even though the theory of charter government is not to enlarge municipal powers, recent court decisions in Ohio appear to confer greater power upon charter municipalities as contrasted with non-charter cities and villages. However, a charter may expressly restrict municipal powers, and often is used for that purpose. Some scholars believe that all home rule powers under Article XVIII should exist without respect to the presence of a charter. Under that view, a charter is purely an instrument of limitation. This author's view is not so naïve as to believe that our courts will subscribe to such a view, and therefore, this author believes that as the cases are decided over time, the charter will continue to be a source of expanded home rule powers.

WHY A CHARTER

The Size Issue

Often village officials do not consider a charter because they believe; the village is too small; they like to keep village government simple; it will cost too much to have a charter; they don't want to change the structure of government; a charter means political parties; and many other ideas which are not accurate. Let's examine some of the reasons village officials don't consider a charter.

Population size has nothing to do with efficient operations. In many respects the smaller villages suffer because of lack of clean-cut authority and lines of demarcation. The village statutory plan of government is full of unanswered questions. If the village is large enough to undertake municipal functions, then it needs a structure of government that will clear up what powers the mayor and council have and who exercises them. The charter can decide the questions of a separate council clerk, fiscal officer (including both the functions of chief fiscal manager and treasurer), No doubt population size will control the structure required, but to be sure, a charter can be clearer and more flexible than laws passed by 99 House members and 33 Senators in Columbus.

Keep the village government simple. That is exactly what a charter can do. Ask any village solicitor whether the statutory law governing villages is clear and simple. I believe they will agree with this author that the application of "village law" is a murky matter, full of uncertainties. A charter can fix that problem. By the way, if the people don't like the charter they can change it by a simple vote. Compare that process to convincing the General Assembly to make a change in the law

The argument is often made that it will cost too much to have a charter. I submit that you can't afford to be without a charter. Money mishandled, programs not completed, personal battles among the official without clear answers to their respective responsibilities result in ineffective governmental operations and citizen dissatisfaction. The cost of a charter is small compared to inefficiency. You get what you pay for.

If you don't want to change the structure of government, you don't have to; but you can tweak it so that it is more responsive to the citizens, so that it answers the question of who is clearly responsible for the functions to be performed and to make sure that your officials have the ability to take the simplest, most effective course of action. A charter can give you the necessary guide posts to cause the current or slightly modified structure to function better.

When you have a charter you have the choice as to whether you have a partisan or non-partisan primary and election to choose municipal officials. Regardless of what a charter provides, political parties exist. The nature of the municipality will decide if you have one or more active political parties at the municipal level.

One final comment, statutory plan cities would be better off if they adopted a charter, even if they don't change any part of their governmental structure. Court decisions often, no, nearly

always treat municipal powers better if a charter is involved. Besides the people will control their government since they, not the General Assembly, will make the final decisions on many issues by way of the charter and the ability to amend the charter. ***John E. Gotherman****, Counsel to the Ohio Municipal League and General Counsel to the Ohio Municipal Attorneys Association, is a leading authority on Municipal Home Rule and Charters*

WHY CHARTER REVIEW & REVISION

It's tempting to answer the question of "why do we need charter review and revisions" with a simple statement that "things change," and to stop right there. If you operate a computer, you must update your programs to achieve the best results. If you are operating your city or village with a 1918 charter you probably have some serious problems. But the charter can be of a much later vintage and need revisions.

Most charters did not entirely reinvent the municipal "wheel" when the charter was adopted. For example, many charters simply took the statutory procedures and installed them as a part of the charter. Later the General Assembly revised the procedures to ease restrictions and to facilitate more efficient government. At an earlier time statutory plan cities and villages were required to read ordinances and resolution in full three times unless the rule was disposed with. The current state allows for readings by title only. A big time saver for legislative bodies. Another example is when the nature of the municipality changes. It may well be that because of the changed characteristics of the community, the people will be better served by at-large rather than ward council members or visa versa. Things change with the passage of time, and so should charters.

Many charters provide for a formal charter review or revision commission or committee to be appointed from time to time (every five to ten years for example). The Constitution allows either the people or the legislative authority to place charter amendments on the ballot for their approval or rejection.

Often the mayor and/or the council will appoint a committee to review and recommend changes in the charter either where the charter does not call for a review commission, or as an additional review. Sometimes a particular area of the charter, such as civil service, is singled out for review. This author has worked with all the possible alternatives to charter review. These are just as good as the persons who serve as the reviewers. All can be extremely useful. Occasionally a review body will recommend truly unusual changes. If the review body is formalized through the charter, it may be that the charter directs that "recommendations shall be placed on the ballot" or that recommendations are merely made to the council and that body decides whether to place the issue on the ballot.

This author had the privilege of representing the City of Bedford in the case of State ex. Rel. Bedford v. Coyahoga Cty. Bd of Elections, 62 Ohio St. 3d 17, 577 N.E. 2d 645, (1991). Bedford's review commission recommended that the city manager form of government be changed to a mayor/council form. The city council decided to approach the issue on a two step basis. They proposed to first place the following question on the ballot: "Should subsequent

charter amendments be made for the submission to the voters which change the Charter of the City of Bedford, Ohio to a Mayor-Council form of government?" The Board of Elections refused to place the issue on the ballot. The City of Bedford filed a mandamus to compel an advisory election on an amendment to the Bedford Charter. The Supreme Court of Ohio allowed the Writ of Mandamus since it agreed with Bedford that the council had the power to call the advisory election without a specific enabling charter provision or statute because…"municipal elections on matters of local concern are within the powers of local self government conferred by Section 3, Article XVIII of the Ohio Constitution, and …these powers are self-executing." The election was held and the issue passed. The city then proceeded to draft specific amendments to the charter to change from a City Manager form to a Mayor-Council form of government. Those amendments were place before the others and they failed to pass. Local self government at its best.

CONCLUSION

The argument set forth in this article is twofold:

(1) Cities and villages who have not adopted a charter are missing out on the ability to have local autonomy, and

(2) Cities and villages that have adopted a charter need to review and revise, if desirable, the charter document to keep current with the municipality's needs.

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