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IN THE ABSENCE OF A CHARTER, THE GENERAL LAWS OF THE STATE MUST PREVAIL IN GOVERNING A MUNICIPALITY—WHERE THE CITY CHARTER DOES NOT AUTHORIZE A COMBINED FIRE AND POLICE DEPARTMENT OR GIVE AUTHORITY TO AN AGENT OR OFFICER TO ESTABLISH SUCH A COMBINATION, THE COMBINING OF SUCH DEPARTMENTS' IS ILLEGAL—IF A MUNICIPALITY ADOPTS ONE OF THE PLANS OF GOVERNMENT IN THE REVISED CODE IT MAY ESTABLISH A COMBINED POLICE AND FIRE DEPARTMENT IN ACCORDANCE WITH THE PROVISIONS OF SAID CHAPTER APPLICABLE TO THE PLAN—OPINION 819, O.A.G., 1959, ARTICLE XVIII, §2, O.G., ARTICLE XVIII, §7, O.G.

SYLLABUS:

1. In the absence of the establishment by charter of a framework through which a municipality may exercise the powers of local self-government, the general laws of the state governing the framework through which such powers may be exercised must prevail.

2. Where pursuant to Section 7 of Article XVIII, Ohio Constitution, a city has adopted a charter which does not provide for a combined fire and police department, and which does not grant authority to some officer or agency of the city government established pursuant to said charter to determine whether the police and fire departments should be combined, the police and fire departments of such city may not be combined.

3. A municipality which has adopted one of the plans of government set forth in Chapter 705., Revised Code, may, in accordance with the provisions of said chapter applicable to the plan of government which such municipality has established, combine the police and fire departments.

Columbus, Ohio, June 28, 1962

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

"Several municipalities in Ohio are considering the problems involved in operating a combined fire and police department under Ohio law. Opinion No. 819 for the year 1959 indicates that a municipality operating under the general statutory form of government may not combine the police and fire departments for a number of reasons. The question now arises with respect to charter municipalities and the optional statutory forms of municipal government found in Chapter 705, Revised Code.

"Assuming in the case of a charter city that the charter itself does not provide for a combined fire and police department, and giving consideration to Chapter 705, Revised Code, with respect to optional statutory forms of government, may municipalities operating under such a charter or under one of the optional statutory forms of government combine the fire and police departments into one integrated department? In either event, the combination would be accomplished by ordinance of the municipal council."

The syllabus of Opinion No. 819, Opinions of the Attorney General for 1959, page 513, reads as follows:

"A non-charter city is without authority under the constitution and laws of Ohio, to merge the police and fire departments

into a common unit performing the duties of both, and such departments are subject to the provisions of Sections 737.05 to 737.09, inclusive, Revised Code; nor can a practical merger of such departments be accomplished by indirection by failing to establish a fire department and by assigning purely fire protection duties to members of the police department."

The above conclusion was reached after a determination that a non-charter city was required to maintain those departments which are established by state law. The maintenance of said departments was determined therein to be essentially a matter dealing with the form of government of a municipality as opposed to a problem which would cause a diminution of the power of local self-government in a municipality. It was pointed out in said opinion that the power of local self-government granted in Section 3 of Article 18, Ohio Constitution, is a power which must be carried out through a particular form of local government.

In the case of *The State ex rel., City of Toledo* v. *Lynch, Auditor,* 88 Ohio St., 71, the Supreme Court of Ohio considered the forms of government which are permissible under the Ohio Constitution. The first paragraph of the syllabus of the *Lynch* case, *supra,* reads as follows:

"The provisions of the eighteenth article of the constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following, and thereafter until changed in one of the three modes following: (1) By the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article."

The constitutional provisions referred to in the above quoted paragraph of the syllabus of the *Lynch,* case are Sections 2 and 7 of Article XVIII, Ohio Constitution, which provisions read as follows:

Section 2:

"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."

Section 7:

> "Any 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."

It will be noted that Section 2, *supra,* provides that general laws shall be passed to provide for the government of cities and villages, and that, unless a city or village determines by election to establish one of the so-called optional plans of government which are set forth in Chapter 705., Revised Code, such general laws are those through which the non-charter city or village will operate. Said optional forms of government were established by the General Assembly pursuant to the authority found in the latter part of Section 2 of Article XVIII, *supra.*

Subsequent to the issuance of Opinion No. 819, *supra,* the Supreme court of Ohio had before it a question dealing with the authority of a non-charter city to adopt, under the homerule amendment to the constitution (Section 3 of Article XVIII) an ordinance prescribing the method of selecting a police chief, such ordinance being at variance with the provisions of Section 143.34, Revised Code, on that subject. In the case of *The State ex rel., Petit et al.,* v. *Wagner,* 170 Ohio St., 297, the court determined that the municipality did not have such authority. As to the authority of non-charter municipalities, beginning at page 302 of that decision, the court said:

> " 'It is conceded by the relators that the city of North College Hill could have provided for the selection of its police chief in the manner here attempted if it had been a charter city and had the subject ordinance been authorized by such charter. Such action would have been squarely within the decisions in the *Lynch* and *Canada cases, supra.* However, in the absence of a charter, the court reached the opposite conclusion.
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> " 'The case of *Morris* v. *Roseman,* 162 Ohio St., 447, 123 N.E. (2d), 419, involved the validity of an emergency zoning ordinance, adopted by a non-charter municipality, which was at variance with the provisions of a general law requiring the holding of a public hearing and the giving of notice of the time and place of the hearing on proposed zoning ordinances. In that case, the court said:
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> " ' "In the case of *Village of Perrysburg* v. *Ridgway, a Taxpayer,* 108 Ohio St., 245, 140 N.E., 595, it was held that such section (Section 3, Article XVIII, Constitution) is self-executing, and

that the power of local self-government is inherent in all municipalities regardless of enabling legislation and the existence of municipal charters.

" ' "* * *

" ' "But how and in what manner is such power to be exercised?

" ' "The Constitution of Ohio provides two ways. By Section 2, Article XVIII, a mandatory duty is placed upon the General Assembly to enact laws for the incorporation and government of cities and villages, and Section 7, Article XVIII, grants a municipality the option of determining its own plan of local self-government by framing and adopting a charter. *If a municipality adopts a charter it thereby and thereunder has the power to enact and enforce ordinances relating to local affairs, but, if it does not, its organization and operation are regulated by the statutory provisions covering the subject.*" ' "

(Emphasis supplied)

" 'Section 3 confers upon all municipalities "authority to exercise all powers of local self-government" but, as pointed out in *Morris* v. *Roseman, supra,* does not state "how and in what manner" such powers are to be exercised. Section 2 specifically authorizes "general laws * * * to provide for the * * * government of" municipalities. It is apparent therefore that, by what they said, the people expressed an intention that, in the absence of the adoption of a charter pursuant to Section 7 or of the adoption of any "additional laws * * * for the government of municipalities adopting the same" pursuant to Section 2, the "general laws * * * for the * * * government of" municipalities authorized by Section 2 were to control a municipality in the *exercise* of the powers of local self-government conferred upon it by Section 3. Where a charter is adopted, then, under Section 7, the municipality "may, subject to the provisions (i.e., limitations) of Section 3 (not Sections 2 *and* 3) * * * exercise thereunder (i.e., under the charter instead of under general *laws* all powers of local self-government." The only limiting provision then applicable is that specified in Section 3, that "local police, sanitary and other similar regulations" shall "not * * * conflict with general laws." (Paragraph four of syllabus of *State, ex rel., Canada,* v. *Phillips, supra.*)

" 'This court has thus clearly recognized the distinction between the powers of charter and non-charter municipalities. Clear evidence of the intention that such a distinction should exist is found in the very fact that the two provisions of the Constitution hereinabove cited were adopted as separate sections; if an identical extent of authority had been intended to have been conferred, a single section would have abundantly sufficed. By these two sections, the Constitution confers upon charter cities

and villages some greater degree of power not here required to be defined but limits the general area of non-charter municipal authority. * * *' "

A determination of whether a charter municipality which has not provided in its charter for the combination of fire and police departments has the authority to combine said departments, depends upon whether the establishment of a charter under Section 7 of Article XVIII, Ohio Constitution, abrogates all of the general laws established under Section 2 of Article XVIII, Ohio Constitution, under which such municipality would otherwise be governed. Considering the language and reasoning of the court in the *Wagner* case, *supra,* as to the meaning of Sections 2, 3, and 7 of Article XVIII, Ohio Constitution, I am of the opinion that, as stated therein by the court, "when a charter is adopted * * * the municipality may * * * exercise thereunder * * * all powers of local self-government." The powers of local self-government are therefore exercised in accordance with the terms of the charter. Obviously, if a charter were to provide that a municipality must maintain a police and fire department, such municipality would be without authority to combine said departments. By the same token, if a charter is silent as to the maintenance of such departments and fails to grant authority to some agency or officer within the municipal government through which such a determination could be made, then it must naturally follow that there being under said charter no provision for said departments, the general laws of Ohio must control. In other words, the provisions of Section 7, *supra,* granting to a municipality the right to adopt a charter whereunder it may establish its own manner of carrying out the powers of local self-government, do not *ipso facto* abrogate the general laws on the subject relating to the manner in which such powers will be carried out. Such charter must contain some provision which would cause said laws to be non-applicable. To hold otherwise would be to disregard the provisions of Section 2 of Article XVIII, Ohio Constitution. It must be remembered that in charter cities the charter has the effect of replacing the provisions of general law as the basic instrument under which the government will be operated. Where the charter is silent, if the general laws were not to prevail, then there would be no legal framework through which the powers of local self-government could be exercised.

With respect to a municipality operating under one of the optional plans of government prescribed by Chapter 705., Revised Code, I am of

the opinion that in accordance with the reasoning of the court in the *Wagner* case *supra,* and in accordance with Opinion No. 819, *supra,* the powers of local self-government of a municipality adopting one of said plans of government must be exercised through the framework set forth in the statutes which establish each of said forms of government.

Chapter 705., Revised Code, provides for the adoption of three distinct plans of government. The commission plan is provided by Sections 705.41 to 705.48, inclusive, Revised Code. Pursuant to the provisions of Section 705.47, Revised Code, the commission may create and discontinue departments, offices, and employments. Accordingly, in a municipality which has adopted a commission plan of government pursuant to the provisions of Chapter 705., Revised Code, said commission would have the authority to combine the police and fire departments.

The city manager plan is established by Sections 705.51 to 705.60, inclusive, Revised Code. Under the provisions of Section 705.57, Revised Code, the council in a city manager plan of government may create and discontinue departments, offices, and employments. Therefore, in a municipality which has adopted a city manager plan of government pursuant to Chapter 705., Revised Code, the council could combine the police and fire departments.

The federal plan of government is provided for in Section 705.71 to 705.86, inclusive, Revised Code. Section 705.83, Revised Code, provides for the department of public safety in a federal plan municipality. The director of said department is charged by said section with control of police, fire, health, charity, correction, and building inspection of the municipal corporation. However, I do not find any requirement that in such a plan of government there need be a separate police and fire department. Furthermore, under Section 705.76, Revised Code, the council of a municipality which has adopted the federal plan of local government may create and discontinue departments and offices other than those provided by Chapter 705, Revised Code. Since there is no provision in Chapter 705., Revised Code for separate departments for police and fire, it must follow that in a municipality which has adopted the federal plan of government pursuant to Chapter 705., Revised Code, the city council could consolidate the police and fire departments.

In accordance with the foregoing, I am of the opinion and you are advised:

1. In the absence of the establishment by charter of a framework through which a municipality may exercise the powers of local self-government, the general laws of the state governing the framework through which such powers may be exercised must prevail.

2. Where pursuant to Section 7 of Article XVIII, Ohio Constitution, a city has adopted a charter which does not provide for a combined fire and police department, and which does not grant authority to some officer or agency of the city government established pursuant to said charter to determine whether the police and fire departments should be combined, the police and fire departments of such city may not be combined.

3. A municipality which has adopted one of the plans of government set forth in Chapter 705., Revised Code may, in accordance with the provisions of said chapter applicable to the plan of government which such municipality has established, combine the police and fire departments.

Respectfully,
MARK MCELROY
Attorney General