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## SYLLABUS:

1. Industrial and economic development does not fall within the grant of local self-government nor grant of police powers under Article XVIII, Section 3 and Section 7 of the Ohio Constitution, but is a matter of state-wide concern in which the state is supreme and the state has not conferred the power upon a municipality, including a charter city, to hire a private corporation to conduct a survey or engage in a program of industrial and economic development for which public funds are to be expended.

2. The survey proposed by the City of Springfield does not meet the test of a public purpose for the expenditure of public funds and the finding of a public purpose would not serve to extend the functions of local government beyond that granted by the Ohio Constitution and legislature, and

3. A municipality may be aided by a community improvement corporation and/or a development corporation, if organized and available, and may receive aid from the Ohio Department of Industrial and Economic Development for purposes of bringing new business and industry to the community.

Columbus, Ohio, June 6, 1963

Hon. Roger W. Tracy  
Auditor of State  
State House  
Columbus 15, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Officials of a charter city have inquired of this office as to the authority of the city to contract for the services of a private corporation in conducting an industrial survey of the municipality, and to pay for such services out of duly appropriated municipal funds. I enclose for your reference a photocopy of the proposal which the corporation presented to the municipality. The proposal outlines in some detail the nature of work which the corporation offers to perform under a proposed contract with the city.

“In *City of Cleveland v. Artl*, 62 Ohio App. 210 (1939), the Court of Appeals for Cuyahoga County looked to the decision of the Supreme Court in *Phillips v. Hume*, 122 Ohio State 11 (1930), as support for the following statement found at p. 214 in the appellate opinion:

“Municipal corporations in their public capacity, where they act in respect to the expenditure of

moneys raised by taxation, possess only such powers as are expressly granted them by constitutional provision or legislative acts, and only such implied powers as are necessary to carry into effect powers which are expressly granted.'

"The closest prior determination of the Attorney General, which our research reveals, is that found in 1927 O.A.G. No. 393 (p. 678). This Opinion concluded that a charter city may appropriate money to pay for a municipal exhibit in an industrial exhibition, which served to promote the welfare and prosperity of the city.

"Three sections of the Charter of the city in the present situation contain provisions relating to the applicability of general laws, the charter and city ordinances, in establishing the powers of the city and its legislative authority. These provisions read in pertinent part as follows:

" 'POWERS OF THE CITY'

"Section 1. \* \* \* (The City) \* \* \* shall have and may exercise all powers which now or hereafter it would be competent for this charter specifically to enumerate, as fully and completely as though said powers were specifically enumerated herein; and no enumeration of particular powers by this charter shall be held to be exclusive.

" 'THE CITY COMMISSION'

" 'Creation and Powers.

"Section 2. There is hereby created a City Commission \* \* \*

"All the powers of the city, except such as are vested in the Board of Education and in the Judge of the Police Court, and except as otherwise provided by this charter or by the constitution of the state, are hereby vested in the city commission; and, except as otherwise prescribed by this charter or by the constitution of the state, the city commission may by ordinance or resolution prescribe the manner in which any power of the city shall be exercised. In the absence of such provision as to any power, such power shall be exercised in the manner now or hereafter prescribed by the general laws of the state applicable to municipalities.

" 'MISCELLANEOUS PROVISIONS'

" 'General Laws to Apply.

“Section 84. All general laws of the state applicable to municipal corporations, now or hereafter enacted, and which are not in conflict with the provisions of this charter, or with ordinance or resolutions hereafter enacted by the city commission, shall be applicable to this city; provided however, that nothing contained in this charter shall be construed as limiting the power of the city commission to enact any ordinance or resolution not in conflict with the constitution of the state or with the express provisions of this charter.’

“Your conclusions will be of considerable interest to municipal officers throughout the state. Therefore, we request your formal opinion in response to the question stated above.”

Under Article XVIII of the Ohio Constitution the powers of local self-government are conferred upon all municipalities. The pertinent provisions of Article XVIII, *supra*, are herein set forth:

“Section 3. 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.

“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.”

The City of Springfield has adopted a charter which under Section 2 thereof vests all legislative power in the city commission “subject to the exceptions and limitations in the charter and Constitution.” Section 1 of the charter confers on the commission not only such powers as designated therein but all powers “it would be competent for the charter to specifically enumerate.” Section 84 provides that all general laws of the state not in conflict with the provisions of the charter or ordinances shall be applicable to the city. Such general laws thereby have the same force and effect as city ordinances. *Mulcahy v. Akron*, 27 Ohio App. 442.

The charter apparently does not contain a provision empowering or prohibiting the commission to contract for the proposed survey services. However, the silence of the charter is not of itself

controlling of the limits of legislative power. *State ex rel. McClure v. Hagerman*, 155 Ohio St., 320; Opinion No. 393, Opinions of the Attorney General for 1927, 678. In the light of the broad language of Section 1 of the charter, the question is whether the charter could have vested the authority in the commission to conduct the proposed survey for industrial and economic development either by ordinance or resolution.

In the absence of any apparent charter limitation it is necessary to consider the limitations imposed upon municipalities by the Ohio Constitution. The general prohibition against government aid and promotion of private industry or business was incorporated in Article VIII, Section 6, Constitution of Ohio, as follows:

“No laws shall be passed authorizing any \* \* \* city \* \* \*, 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: \* \* \*”

In Opinion No. 2185, Opinions of the Attorney General for 1952, 802, this constitutional limitation was the basis for prohibiting a municipality from contributing dues to a local chamber of commerce. The Opinion concluded that the union of public funds with private funds primarily held for promotion of business and industry violated the letter and spirit of the Constitution. The Attorney General ruled that the fact the chamber of commerce was of assistance in encouraging business and supplying valuable information did not enlarge the powers of the municipality as defined under the Constitution, *supra*. Although there are numerous cases and opinions pertaining to Article VIII, Section 6, *supra*, this opinion presents a more analogous fact situation to the one presently under consideration.

The Ohio Constitution further provides under Article XIII, Section 6, and Article XVIII, Section 13, that the legislature shall restrict the local government in the exercise of its power of taxation, assessments, borrowing, contracting and loaning credit. A municipality by adopting a charter cannot escape from such limitations imposed by the general assembly. *State ex rel. City of Dayton v. Bish*, 104 Ohio St., 206. The legislature has not specifically

prohibited an expenditure as you have proposed. However, there is the expression in Section 743.29, Revised Code, that a municipality may make a survey of water works, sewerage systems and other public works which is done in response to some "contemplated" construction, operation or repair "authorized" by law.

In reviewing and discussing the applicable constitutional limitations it is necessary at this point to consider whether industrial and economic development is a function of municipal government and if it is within the terms "local self-government."

The Supreme Court of Ohio has held that the conflict provision of Article XVIII, Section 3, *supra*, applies only to police, sanitary and similar regulations and not to the grant of local self-government. *State ex rel. Canada v. Phillips*, 168 Ohio St., 191. These regulations relate to concern of the state for the peace, health, and safety of all its people such as morals, purity of food, protection of streams, safety of buildings and other safeguards. *Fitzgerald v. City of Cleveland*, 88 Ohio st. 338, 359. It is apparent that the survey you propose does not fall within the category of police, sanitary or similar regulations of the municipality. The fact that the welfare of the community would be promoted does not make this a police power. Community welfare would be merely incidental to the general act of providing for industrial development which is an entirely different function of government. This basis for distinction was brought out by Judge Wanemaker in his concurring opinion in *Fitzgerald v. City of Cleveland*, *supra*, pages 367 and 368.

The interpretation that the conflict provision of Article XVIII, Section 3, *supra*, does not apply to the grant of local self-government is indicative of the broad, unlimited powers conferred upon the municipality. Although there is a broad grant of power, the area of local self-government is manifestly limited to matters of purely local and municipal concern. *Fitzgerald v. City of Cleveland*, *supra*. No power is thereby granted to legislate upon or interfere in any way with the affairs of state government and the authority of the state is supreme over matters not embraced within local self-government. 38 Ohio Jurisprudence 2d, Section 71, 425. There have been numerous cases which have discussed the distinction between

state-wide concern and local self-government.

In *State ex rel Canada v. Phillips, supra*, the Supreme Court upheld the charter provision setting forth the procedure for appointment of municipal police officers notwithstanding the state statute to the contrary. The manner of regulation, internal organization and appointive procedures were held peculiarly a matter of municipal concern. The court held "the mere interest of concern of the state which may justify the state in providing similar police protection did not justify the state's interference with the municipality's exercise of local self-government."

There is no doubt that police protection is a matter of state-wide concern, but under Article XVIII, Section 3, the Ohio Constitution expressly confers upon the municipality the power to act in this area as long as its enactments are not in conflict with general laws. This grant of authority is in addition to the grant of local self-government. *City of Akron v. Scalera*, 135 Ohio St., 65. The legislature also conferred power upon the municipality to maintain its own police department under Section 715.05, Revised Code.

In this area of state-wide concern the state is supreme and the municipality can not act unless the state has delegated such authority to the municipality as an arm or agent of the state. Only in the limited area of police, sanitary, and other similar regulations does the municipality have any power to act in a matter of state-wide concern without a grant of power from the state legislature. This power is, of course, limited by the conflict provision of Article XVIII, Section 3, *supra*.

In *Schultz v. City of Upper Arlington*, 88 Ohio App. 281, the court considered a charter provision providing for annexation and its submission to the electors for approval. The court held that matters involving annexation are not purely local matters, that such are of a general nature and state-wide in scope and, therefore, not a proper function of local self-government. The charter provisions were declared void and the City was held to the general law of the state.

In 1959, the general assembly created the Department of Industrial and Economic Development which superseded the Ohio

Development and Publicity Commission established in 1939, 118 Ohio Laws, 378. The primary purpose of the Commission was to collect and disseminate information and to undertake such programs as would attract and retain industries. Legislation has extended the function of the state in this area of development.

Section 105.71, Revised Code, of the present law, provides:

“The department of industrial and economic development shall, with approval of the governor, conduct research studies on the means of advancing industrial and economic development of individual local areas or political subdivisions, *upon request of such local areas or political subdivisions*, and shall, upon request, submit factual information to civic organizations and governmental agencies of local areas or political subdivisions.”

(Emphasis added)

Section 105.72, Revised Code, provides that the department may act as a state planning commission and may receive grants for assistance to governmental agencies or political subdivisions. “Such planning assistance may be rendered with respect to surveys” and the department may contract with the municipal subdivision to carry out the purposes of the grant. The 105th General Assembly is presently considering Substitute House Bill No. 270 which would reorganize the Department of Commerce and set up several new agencies pertaining to industrial and economic development. Particular note is given to the fact that the present and proposed legislation stresses state coordination of development programs.

The Ohio legislature has considered industrial and economic development of state-wide concern. The general laws pertaining to municipal corporations under Chapter 713, Revised Code, on planning commissions, Chapter 715, Revised Code, on general powers and Chapter 717, Revised Code, on specific powers, do not provide any authority running to the municipality to engage in industrial and economic development.

It is my opinion that industrial and economic development is not a matter of purely local concern nor a police power of the municipality. Industrial and economic development is a matter of state-wide concern and the city of Springfield has not been granted any power to conduct a survey or engage in industrial or economic

development, and therefore, can not expend public funds for such purposes. The City may request and receive assistance under Sections 105.71 and 105.72, *supra*.

This conclusion may be supported by the fact that in 1961 the General Assembly created the Development Corporation under Chapter 1726, Revised Code, and the Community Improvement Corporation under Chapter 1724, Revised Code. These corporations organized with private funds serve to give the real impetus to development projects and can give financial assistance otherwise prohibited under Article VIII, Section 6, *supra*.

A representative number of states have met the problems of industrial and economic development by granting the municipality the powers similar to those which the Ohio legislature has vested in the development corporations. 70 Yale Law Journal 789. In these jurisdictions some of the courts have taken a more conservative approach and have required that municipal aid depend upon the showing of an underlying economic condition to render the project essential for public welfare. *Dyche v. City of London*, Court of Appeals, Kentucky, 288 SW (2d) 648. Other courts have held location of industry is by its very nature a public purpose for which funds can be expended, *City of Frostburg v. Jenkins*, 215 Md. 9, 136 A (2d) 852. The public purpose doctrine in these jurisdictions is used to by-pass the constitutional prohibitions against government aid to private enterprise where the legislature has specifically granted such powers to the municipality.

Although the discussion of the public purpose doctrine is only supplemental to my conclusion that a municipality does not have the power to expend public funds for economic and industrial development, I feel some comment will be helpful to this opinion. Even with a grant of power to the municipality or if acting within the grant of local self-government, the City of Springfield would have to support the survey as a proper public purpose for which public funds could be expended. Within the enlarged powers enjoyed under a home rule charter, the powers are not so broad as to include an expenditure for a non-public purpose.

Although there are many definitions of public purpose, they convey little meaning until applied to a given fact situation. The

difficulty in reviewing authority in this area is that the grounds for finding a public purpose are seldom clearly articulated. Such is the case in Opinion No. 393, Opinions of the Attorney General for 1927, 678, to which you refer in your letter of request. An exhibition, however, may be distinguished from a survey in that it represents a present enjoyment, education, and incentive to the community and all sectors of community life. This has been recognized as a proper function of local government. *City of Cleveland v. Coughlin*, 16 NP(NS) 468.

Opinion No. 668, Opinions of the Attorney General for 1937, 1188 ruled that funds expended for a committee for retention of industry was a violation of Article VIII, Section 6, *supra*. Cited in the Opinion was the following excerpt from McQuillan Municipal Corporations, Vol. 6 (2nd Ed) 343.

“And it may be safely stated that no decision can be found sustaining taxation by a municipal corporation where its principal object to promote the trade and business interests of the municipality and the benefit to the inhabitants is merely indirect or incidental.”

There is no doubt that there are innumerable benefits that a community may receive from industrial and economic development but these benefits must always be measured against the value given by the local government and increased services that may be required.

Opinion No. 668, *supra*, also denied the expenditure of funds to reimburse committee expenses for study of recreational facilities of other communities. This decision was based upon the general rule that quests for information unrelated to a definite, contemplated undertaking did not qualify as a public purpose. See also Opinion No. 2002, Opinions of the Attorney General for 1930, page 1091, supported by this rule. The remoteness of the act from an actual public benefit prohibits the act from qualifying as a proper public purpose. This apparently is the basis for the limitation on public surveys in Section 743.29, *supra*, to which I have referred.

In *State ex rel. McClure v. Hagerman*, *supra*, the Supreme Court recognized that the modern complexities of government necessitate a more liberal and pragmatic approach to the doctrine of public purpose. The Court overruled *Thomas v. Semple*, 112 Ohio

St., 559, and held membership fees in a municipal finance association could be paid from public funds. Improvement of the internal operation of the municipal government was a proper function of local government and a proper public purpose. However, the Court acknowledged that municipal powers could not be extended beyond the capacity and function of government. It was further stated that the right of the public to receive and enjoy the benefit of use determines whether the use is public or private.

The purpose of the proposed survey for the City of Springfield, is threefold:

1) a study of all community factors influencing economic development; 2) a determination of the kinds of economic activities to be encouraged to expand and move to the city; and 3) a realistic program of coordination for the achieving of economic development. As stated in the prospectus of the consulting corporation, "in order for the survey to become truly effective, the community must commit itself to a long range program of implementation." Such a program was not indicated.

From a public purpose standpoint it is my opinion that the survey standing alone would fail under any circumstances. First, the survey is too remote from any public benefit. Second, the benefits, if any, to the public have not been shown to be the primary purpose for the survey or future development or in proportion to the value to be given to the city. This discussion brings me again to my conclusion that industrial and economic development is not a function of local government. In the absence of a legislative grant of power and in light of the limitations imposed under Article VIII, Section 6. *supra*, the finding of a related public purpose could in no event serve to extend the capacity and functions vested in the City of Springfield.

Under the present Ohio law the procedure to be followed by the City of Springfield is to request assistance from the Department of Industrial and Economic Development as set forth in Section 105.71, *supra*.

Therefore, it is my opinion and you are advised:

1. Industrial and economic development does not fall within

the grant of local self-government nor grant of police powers under Article XVIII, Section 3 and Section 7 of the Ohio Constitution, but is a matter of state-wide concern in which the state is supreme and the state has not conferred the power upon a municipality, including a charter city, to hire a private corporation to conduct a survey or engage in a program of industrial and economic development for which public funds are to be expended.

2. The survey proposed by the City of Springfield does not meet the test of a public purpose for the expenditure of public funds and the finding of a public purpose would not serve to extend the functions of local government beyond that granted by the Ohio Constitution and legislature, and

3. A municipality may be aided by a community improvement corporation and/or a development corporation, if organized and available, and may receive aid from the Ohio Department of Industrial and Economic Development for purposes of bringing new business and industry to the community.

Respectfully,  
WILLIAM B. SAXBE  
Attorney General