OPINION NO. 85-089

Syllabus:

1. The state use law, R.C. 4115.31-.35, is not applicable to cities, except to the extent that it is made applicable to various city bodies and personnel by references appearing in R.C. 715.18, R.C. 735.05, R.C. 737.03, R.C. 749.31, and R.C. 755.11.

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2. In instances in which the state use law, R.C. 4115.31-.35, is not, by statute, made applicable to cities, a chartered city, by charter or ordinance, or a nonchartered city, by ordinance, may elect to purchase products and services for its use pursuant to the state use law, rather than in compliance with competitive bidding requirements, provided that the competitive bidding requirements are not found to be matters of such statewide concern as to prevail over the power of municipal self-government.

To: Richard W. Schuricht, Executive Secretary, State Use Committee, Ohio Rehabilitation Services Commission, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 26, 1985

I have before me your request for my opinion, in which you ask the following questions:

1. Is the Ohio Use Law, R.C. 4115.31-.35, applicable to cities in Ohio?

2. If the Ohio Use Law is not applicable to cities, may a city voluntarily elect to comply with it in spite of competitive bidding requirements?

Your request describes the use law and its operation as follows:

> The Law creates a state use committee for the purchase of products and services of the severely handicapped. The Committee is required to approve products and services provided by nonprofit workshops for severely handicapped individuals in Ohio; establish a fair market price for the items and services; and authorize publication of a procurement list of all the approved items and services.
>
> Under Revised Code 4115.33 the above-mentioned list is to be distributed to "all purchasing officers of state agencies, political subdivisions, and instrumentalities of the state." If any of the aforementioned entities intend to purchase any product or service on the list, Revised Code 4115.34 requires that it be purchased from the nonprofit agency on the list which offers the product or service regardless of any laws requiring the purchase be made by competitive bidding.

You have indicated that numerous cities throughout Ohio have sought the Committee's advice on the questions you have posed, since they would like, if possible, to purchase services and products from the qualified nonprofit agencies for the severely handicapped found on the procurement list. You have also asked that I address any differences regarding the application of the use law to chartered and nonchartered cities.

Before addressing your specific questions, I will describe the general operation of the use law. R.C. 4115.32 provides for the creation of a state committee for the purchase of products and services of the severely handicapped, and R.C. 4115.33 sets forth the duties of the committee. R.C.

4115.33(A) provides that the state committee "shall determine the price of all products manufactured and services provided by the severely handicapped and offered for sale to state agencies, political subdivisions, or instrumentalities of the state that the committee determines are suitable for use." R.C. 4115.33(A) further provides that the committee "shall revise the prices in accordance with changing cost factors and adopt rules regarding specifications, time of delivery, authorizing a central nonprofit corporation to facilitate the distribution of orders among the participating qualified nonprofit agencies, and relevant matters of procedure necessary to carry out the purposes of [R.C. 4115.31-.35]."

R.C. 4115.33(B) provides for the approval and distribution by the state committee of a procurement list as follows:

> The committee shall approve a publication provided by the central nonprofit corporation which shall list all products and services produced by any qualified nonprofit agency that the committee determines are suitable for procurement by agencies of this state pursuant to division (A) of this section. This procurement list and revisions thereof shall be distributed to all purchasing officers of state agencies, political subdivisions, and instrumentalities of the state.

R.C. 4115.34(A) provides as follows with respect to the purchase of products and services on the procurement list by state agencies, political subdivisions, and instrumentalities of the state:

> If any state agency, political subdivision, or instrumentality of the state intends to procure any product or service, it shall determine whether the product or service is on the procurement list published pursuant to section 4115.33 of the Revised Code; and it shall, in accordance with rules of the state committee for the purchase of products and services of the severely handicapped, procure such product or service at the price established by the committee from a qualified nonprofit agency, if the product or service is on the procurement list and is available within the period required by that agency, notwithstanding any law requiring the purchase of products and services on a competitive bid basis. Sections 4115.31 to 4115.35 of the Revised Code do not apply in any cases where the products or services are available for procurement from any state agency, political subdivision, or instrumentality of the state and procurement therefrom is required under any law in effect on the effective date upon original enactment of this section.

Thus R.C. 4115.34(A) requires that any state agency, political subdivision, or instrumentality of the state that intends to procure any product or service must first determine whether the product or service is on the procurement list, and if the product or service is on the procurement list and is available within the period required by that agency, then it must procure such product or service from the qualified nonprofit agency. Purchases from the list are to be made notwithstanding any law requiring the purchase of products and services on a competitive bid basis.

R.C. 4115.34(C) reiterates that any competitive bidding requirements established under state law do not apply to purchases of products and services on the procurement list from qualified nonprofit agencies for the severely handicapped:

> Notwithstanding any other section of the Revised Code, or any appropriations act, that may require a state agency, political subdivision, or instrumentality of the state to purchase supplies, services, or materials by means of a competitive bid procedure, state agencies, political subdivisions, or instrumentalities of the state need not utilize the required bidding procedures if the supplies, services, or materials are to be purchased from a qualified nonprofit agency pursuant to sections 4115.31 to 4115.35 of the Revised Code.

Turning now to your first question, whether cities must comply with R.C. 4115.31-.35, I note initially that R.C. 4115.34(A) expressly names any "state agency, political subdivision, or instrumentality of the state" as an entity required to purchase products or services found on the procurement list from qualified nonprofit agencies for the severely handicapped. Unless a particular governmental body or entity is a state agency, political subdivision, or instrumentality of the state, that governmental body or entity is not required to purchase products or services found on the procurement list from qualified nonprofit agencies for the severely handicapped. Your first question, therefore, requires me to determine whether a city is a state agency, a political subdivision, or an instrumentality of the state for purposes of R.C. 4115.31-.35.

R.C. 4115.31 defines several terms for purposes of the state use law. In particular, R.C. 4115.31(D) states that, "'[p]olitical subdivision' means a county, township, village, school district, or special purpose district." The maxim expressio unius est exclusio alterius embodies a principle of statutory construction that the naming of a class of persons or things excludes all those not expressly included. Craftsmen Type, Inc. v. Lindley, 6 Ohio St. 3d 82, 451 N.E.2d 768 (1983); State ex rel. Boda v. Brown, 157 Ohio St. 368, 372, 105 N.E.2d 643, 646 (1952); Green, Inc. v. Smith, 40 Ohio App. 2d 30, 32, 317 N.E.2d 227, 229 (Pickaway County 1974). R.C. 4115.31(D) is an example of the operation of this particular principle, inasmuch as that section defines a political subdivision as any one of five distinct governmental entities, and yet a "city" is not included as one of the five governmental entities so named. It has been stated, furthermore, that the "General Assembly's own construction of its language, as provided by definitions, controls in the application of a statute.... This definition will be given great weight against any claim that application of the statutory definition defeats the general purpose of the statute." Ohio Civil Rights Commission v. Parklawn Manor, Inc., 41 Ohio St. 2d 47, 50, 322 N.E.2d 642, 644 (1975) (citations omitted). Since the General Assembly did not include "city" within the definition of political subdivision, as set forth in R.C. 4115.31(D), it must be presumed that it intended "city" to be excluded from that definition. Cf. R.C. 9.82(B) (as used in R.C. 9.82-.83 "political subdivision" means "county, city, village, township, park district, or school district"); R.C. 3501.01(T) (as used in Revised Code sections relating to elections and political communications, "political subdivision" means "'county,' 'township,' 'city,' 'village,' or 'school district'"); R.C.

5915.01(F) (as used in R.C. 5915.01-.99 "political subdivision" includes "a county, township, city, or village").[1] This is so particularly since R.C. 4115.31(D) does include villages, which, like cities, are municipal corporations. Ohio Const. art. XVIII, §1; R.C. 703.01.

R.C. 4115.31(E) defines "instrumentality of the state" to mean any "board, commission, authority, public corporation, college, university, or other educational institution, or any other entity supported in whole or in part by funds appropriated by the general assembly." Even as it is concluded above that a city is not a political subdivision for purposes of R.C. 4115.31(D), I believe that it must also be concluded that a city is not an instrumentality of the state, as that term is used in R.C. 4115.31(E). While a city does receive some funds that are raised pursuant to statutory enactments of the General Assembly, see, e.g., R.C. 5747.03(A)(1) (providing for allocation of a percentage of state income tax revenue to the local government fund); R.C. 5747.50 (providing for apportionment of local government fund to counties and municipal corporations), I do not believe that a city may fairly be included among entities that are supported in whole or in part by funds appropriated by the General Assembly. See, e.g., Am. Sub. H.B. 238, 116th Gen. A. (1985) (eff. July 1, 1985) (containing appropriations for the biennium beginning July 1, 1985). Further, cities are considered to be political subdivisions for many purposes. See, e.g., R.C. 9.82(B); R.C. 3501.01(T); R.C. 5915.01(F). See also R.C. 5705.01(A). Had the General Assembly intended to include them among the entities that are subject to R.C. 4115.31-.35, the logical place to have included them would have been within the definition of "[p]olitical subdivision" appearing in R.C. 4115.31(D).[2] The absence of cities from that definition, which includes other municipal corporations, indicates that cities are not to be included within the coverage of R.C. 4115.31-.35 under the definition set forth in R.C. 4115.31(E) for "instrumentality of the state."

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[1] While it may be argued that the legislature inadvertently omitted "city" from the definition of "political subdivision" set forth in R.C. 4115.31(D), since in other instances it has designated a city as a political subdivision, e.g., R.C. 9.82(B); R.C. 3501.01(T); R.C. 5915.01(F), in construing a particular statutory provision a court will not read into a statute words that are not there. Dougherty v. Torrence, 2 Ohio St. 3d 69, 70, 442 N.E.2d 1295, 1296 (1982); Wheeling Steel Corp. v. Porterfield, 24 Ohio St. 2d 24, 28, 263 N.E.2d 249, 251 (1970); Columbus-Suburban Coach Lines, Inc. v. Public Utilities Comm'n, 20 Ohio St. 2d 125, 127, 254 N.E.2d 8, 9 (1969). See also R.C. 1.42.

[2] My predecessor provided a general definition of "political subdivision" and "instrumentality of the state" in 1972 Op. Att'y Gen. No. 72-035. The syllabus to Op. No. 72-035 reads as follows: "A political subdivision of the state is a limited geographical area wherein a public agency is authorized to exercise some governmental function, as contrasted to an instrumentality of the State, which is a public agency with state-wide authority." Op. No. 72-035 at 2-133.

I conclude, similarly, that a city is not a "state agency" for purposes of R.C. 4115.31-.35. The term "state agency" is not defined by statute for purposes of those provisions. Therefore, the commonly accepted meaning of the term is to be applied. R.C. 1.42; Baker v. Powhatan Mining Co., 146 Ohio St. 600, 606, 67 N.E.2d 714, 718 (1946); Carter v. City of Youngstown, 146 Ohio St. 203, 207, 65 N.E.2d 63, 65 (1946). In the past the courts have sometimes spoken of municipalities as agents of the state, see, e.g., City of Wooster v. Arbenz, 116 Ohio St. 281, 284-85, 156 N.E. 210, 211 (1927); City of Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 212-213, 65 N.E. 885, 888 (1902), but only in the sense that municipalities have undertaken to perform those governmental duties that are imposed upon the state as obligations of sovereignty, such as protection from crime or fire, or preserving the peace and health of citizens and protecting their property. The meaning of "state agency," as that term is used in R.C. 4115.34(A), does not appear to encompass such a use, especially since R.C. 4115.34 makes a distinction between a state agency and a political subdivision or an instrumentality of the state. It appears, rather, that, as used in R.C. 4115.34(A), a "state agency" is appropriately understood as a governmental body or unit that exercises a function of state government on behalf of the state. See, e.g., R.C. 1.60 (recently enacted by Sub. H.B. 201, 116th Gen. A. (eff. July 1, 1985)) (defining "state agency" as used in R.C. Title I as "every organized body, office, or agency established by the laws of the state for the exercise of any function of state government"); R.C. 126.12 (formerly R.C. 126.21, but renumbered and amended by Sub. H.B. 201) (defining "state agency" as used in R.C. 126.13-.19, which provide for the management of forms utilized by state agencies, as including "every department, bureau, board, commission, office, or other organized body established by the constitution and laws of the state for the exercise of any function of state government, but [not including] any state-supported institution of higher education, the general assembly or any legislative agency, the attorney general, the auditor of state, the secretary of state, the treasurer of state, any court or judicial agency, or any political subdivision or agency thereof"). In contrast the Ohio Constitution provides for the establishment of municipal corporations as independent self-governing entities, separate and apart from the state itself. Ohio Const. art. XVIII, §§2, 3, 7. A city, therefore, exercises governmental functions on its own behalf, rather than on behalf of the state, and may not reasonably be included as a state agency for purposes of R.C. 4115.34.

I conclude, therefore, that a city is not a political subdivision of the state, a state agency, or an instrumentality of the state for purposes of R.C. 4115.34(A). Hence the state use law, R.C. 4115.31-.35, is not directly applicable to cities. I note, however, that there are several instances in which statutory references make the provisions of R.C. 4115.31-.35 applicable to various city bodies or personnel.

R.C. 4115.31-.35 were enacted by 1975-1976 Ohio Laws, Part I, 916, 920 (Am. S.B. 430, eff. Aug. 13, 1976). Am. S.B. 430 also amended several provisions that had required various state departments and local governmental units to utilize competitive bidding when entering into certain contracts for the purchase of products and services. Am. S.B. 430 amended those sections to provide an express exception to the normal competitive bidding requirements when those departments and governmental units purchase equipment, services, materials or supplies

available from a qualified nonprofit agency pursuant to R.C. 4115.31-.35. In this regard the following sections were amended: R.C. 125.07 (Department of Administrative Services); R.C. 125.11 (same); R.C. 306.43 (board of trustees of a regional transit authority); R.C. 307.86 (board of county commissioners); R.C. 308.13 (board of trustees of a regional airport authority); R.C. 731.14 (legislative authority of a village); R.C. 731.141 (village administrator); R.C. 735.05 (director of public service of a city); R.C. 749.31 (board of trustees of a municipal hospital); R.C. 5119.31 (Department of Administrative Services); R.C. 5120.24 (same). See also R.C. 5155.06 (county home).

Thus, while R.C. 4115.31-.35 do not by their express terms apply to cities, statutory provisions were amended to provide exceptions to competitive bidding requirements when a city's director of public services or board of hospital trustees purchases equipment, services, materials, or supplies which are available pursuant to R.C. 4115.31-.35. See R.C. 735.05; R.C. 749.31. R.C. 735.05 now provides as follows:

> The director of public service [of a city] may make any contract, purchase supplies or material, or provide labor for any work under the supervision of the department of public service involving not more than five thousand dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five thousand dollars, such expenditure shall first be authorized and directed by ordinance of the city legislative authority. When so authorized and directed, except where the contract is for equipment, services, materials, or supplies to be purchased under section 5513.01 of the Revised Code or available from a qualified nonprofit agency pursuant to sections 4115.31 to 4115.35 of the Revised Code, the director shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city. (Emphasis added.)

Similarly, R.C. 749.31 now provides, in pertinent part, as follows:

> Except where the contract is for equipment, services, materials, or supplies available from a qualified nonprofit agency pursuant to sections 4115.31 to 4115.35 of the Revised Code, the board of hospital trustees [of a municipal corporation] shall enter into a contract for work or supplies where the estimated cost exceeds five thousand dollars with the lowest and best bidder. (Emphasis added.)

In addition, several other provisions for the letting of contracts and the making of purchases by city authorities, by reference to R.C. 735.05, provide that those authorities shall disregard competitive bidding and act pursuant to R.C. 4115.31-.35. R.C. 715.18, for example, provides for the establishment by a municipal corporation of a department of purchase, construction, and repair, to be managed by the director of public service, who shall purchase all materials, supplies, tools, machinery, and equipment. With respect to such purchases, the second paragraph of R.C. 715.18 provides as follows:

> No such purchase, construction, alteration, or repair shall be made except upon requisition by the director, the officer at the head of the department for which it is to be made or done, or upon the order of the legislative authority of the municipal corporation, nor shall any purchase, construction, alteration, or repair for any of such departments be made or done except on authority of the legislative authority and under sections 735.05 to 735.09 of the Revised Code, if the cost thereof exceeds five thousand dollars.

Because R.C. 715.18 provides that purchases in excess of five thousand dollars are to be made under R.C. 735.05, the exception of R.C. 735.05 with respect to purchases made pursuant to R.C. 4115.31-.35 must apply to such purchases. See Beach v. Beach, 99 Ohio App. 428, 434, 134 N.E.2d 162, 167 (Montgomery County 1955) (statutes that refer to each other are in pari materia and shall be construed together to determine the legislative intent). Thus, the director of public service, in making purchases in excess of five thousand dollars under R.C. 715.18, is not to follow the competitive bidding procedure of that section where the equipment, services, materials, or supplies are available from a qualified nonprofit agency pursuant to R.C. 4115.31-.35.

A similar result obtains in the case of R.C. 737.03 and 755.11. With respect to a city's board of park commissioners, R.C. 755.11 states that, "[t]he board of park commissioners, in the letting of contracts, shall be governed by sections 735.05 to 735.09, inclusive, of the Revised Code." R.C. 737.03 governs the making of contracts and purchases by a city's director of public safety with reference to certain institutions such as police stations, fire houses, and hospitals. The second paragraph of that section now provides in part that, "[i]n making, altering, or modifying such contracts, the director shall be governed by sections 735.05 to 735.09 of the Revised Code...." Thus a city's board of park commissioners and director of public safety, in making purchases under R.C. 755.11 and 737.03, respectively, are not to employ a competitive bidding procedure where the equipment, services, materials or supplies to be purchased are available from a qualified nonprofit agency pursuant to R.C. 4115.31-.35.

It, therefore, appears that in the five instances just enumerated, the city officials and bodies named therein are directed to disregard normal competitive bidding procedures when they wish to purchase or contract for equipment, services, materials, or supplies that are available from a qualified nonprofit agency pursuant to R.C. 4115.31-.35. To that extent, the state use law is, by statutory reference, made applicable to cities. As discussed more fully below, cities may, in appropriate circumstances, adopt local provisions that prevail over provisions of state statutes. For the purpose of this opinion, I am assuming that no local provisions have been adopted that would seek to exempt a particular city from the operation of the state use law as prescribed by R.C. 715.18, R.C. 735.05, R.C. 737.03, R.C. 749.31, and R.C. 755.11.

I shall now consider your second question, in which you ask whether, when cities are not directed by statute to comply with the state use law, they may voluntarily comply with it and, in so doing, disregard competitive bidding provisions. Your request does not indicate which competitive bidding provisions you have in mind, but I am assuming that you mean any bidding

requirements imposed upon cities by R.C. Title 7. See, e.g., R.C. 715.011 (contract for lease-purchase of building, structure, or other improvement by municipal corporation shall be awarded to lowest and best bidder); R.C. 723.52 (contracts in excess of five thousand dollars for street construction, reconstruction, widening, resurfacing, or repair shall be submitted to competitive bidding procedure before work is done by force account or direct labor); R.C. 727.24 (contract for public improvement authorized by legislative authority of municipal corporation to be awarded to lowest and best bidder); R.C. 749.14 (municipal corporation's board of hospital commissioners shall enter into a contract for work or materials for the erection of a hospital with the lowest responsible bidder); R.C. 755.33 (municipal corporation's board of park trustees shall enter into any contract for the performance of any work exceeding five thousand dollars in cost with the lowest responsible bidder). Whether a city may choose to disregard such statutory competitive bidding requirements and elect to make its purchases and award its contracts in accordance with R.C. 4115.31-.35 requires a consideration of whether the city in question is a chartered municipality or a nonchartered municipality.

Several provisions of the Ohio Constitution define the powers of municipal corporations. Ohio Const. art. XVIII, §2 provides that "[g]eneral laws shall be passed to provide for the incorporation and government of cities and villages...." Ohio Const. art. XVIII, §3, states: "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." Ohio Const. art. XVIII, §7 authorizes a municipality to adopt a charter: "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 authority of a chartered municipality to exercise the powers of local self-government has been described as follows:

> A charter municipality's authority under Section 3 of Article XVIII of the Constitution of Ohio is not. . .unlimited. Under Section 3 of Article XVIII, the words "as are not in conflict with general laws" place a limitation upon the power to adopt "local police, sanitary and other similar regulations," but do not restrict the power to enact laws for "local self-government." State ex rel. Canada v. Phillips (1958), 168 Ohio St. 191, 151 N.E.2d 722 (paragraph four of the syllabus); State ex rel. Petit v. Wagner (1960), 170 Ohio St. 297, 164 N.E.2d 574.

Dies Electric Co. v. City of Akron, 62 Ohio St. 2d 322, 325, 405 N.E.2d 1026, 1028 (1980). Accord, Mullen v. City of Akron, 116 Ohio App. 417, 419-20, 188 N.E.2d 607, 609 (Summit County 1962). In Dies Electric Co. the court determined that a chartered city, with respect to contracts let for improvements to municipal property, could enact an ordinance at variance with the retainage provisions prescribed by R.C. 153.13, holding that the retainage of funds to guarantee work executed on such contracts is a matter within the field of local self-government. Thus in the case of a chartered municipality, a charter provision or ordinance dealing with a matter of purely local self-government will ordinarily prevail over

contrary provisions of state law. It has, however, been recognized by the Ohio Supreme Court that "pursuant to the 'statewide concern' doctrine, a municipality may not, in the regulation of local matters, infringe on matters of general and statewide concern." State ex rel. Evans v. Moore, 69 Ohio St. 2d 88, 89-90, 431 N.E.2d 311, 312 (1982). Under this doctrine, if an enactment of the General Assembly is found to demonstrate genuine statewide concern, based on considerations that transcend local boundaries, a city will not be permitted to exempt itself, pursuant to its local self-government or police powers, from compliance with that enactment. State ex rel. Evans v. Moore. Thus, to determine whether a chartered city may, by charter or ordinance, choose to exempt itself from competitive bidding provisions of state statutes and comply, instead, with the state use law, it is necessary to determine whether a city taking such action would be exercising a power of local self-government, and also whether the state statute from which it seeks exemption constitutes a matter of such statewide concern that it should prevail over the city's effort to provide for its self-government.

I turn first to the question whether the decision to comply with the state use law, rather than with competitive bidding provisions, may be viewed as a matter of local self-government. I am unaware of any cases that consider this precise issue. The power to convey property no longer needed for municipal purposes has, however, been recognized as a power of local self-government under Ohio Const. art. XVIII. See Young v. City of Dayton, 12 Ohio St. 2d 71, 72, 232 N.E.2d 655, 656 (1967); Babin v. City of Ashland, 160 Ohio St. 328, 337, 116 N.E.2d 580, 586 (1953); City of Steubenville ex rel. Blackburn v. Targoss, 3 Ohio App. 2d 21, 27, 209 N.E.2d 486, 492 (Jefferson County 1965); Hugger v. City of Ironton, 83 Ohio App. 21, 28, 82 N.E.2d 118, 121 (Lawrence County 1947), appeal dismissed, 148 Ohio St. 670, 76 N.E.2d 397 (1947). It has, in fact, been held that the power of a chartered municipality to exercise local self-government includes the power to convey property without complying with the competitive bidding provisions of R.C. 721.03.[3] State ex rel. Leach v. Redick, 168 Ohio St. 543, 546, 157 N.E.2d 106, 109 (1959) ("[m]unicipalities, which, under their charters, have full power to exercise local self-government, may convey property

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[3] R.C. 721.03 provides as follows:

> No contract, except as provided in section 721.28 of the Revised Code, for the sale or lease of real estate belonging to a municipal corporation shall be made unless authorized by an ordinance, approved by a two-thirds vote of the members of the legislative authority of such municipal corporation, and by the board or officer having supervision or management of such real estate. When the contract is so authorized, it shall be made in writing by such board or officer, and, except as provided in section 721.27 of the Revised Code, only with the highest bidder, after advertisement once a week for five consecutive weeks in a newspaper of general circulation within the municipal corporation. Such board or officer may reject any bids and readvertise until all such real estate is sold or leased.

without resort to the exactions required by state statutes"). See generally 1984 Op. Att'y Gen. No. 84-054, n.3.

If the power of a chartered municipality to convey property is one of local self-government, thereby relieving the municipality of any need to comply with the requirements of state statutes governing such conveyance, then it appears by implication that a chartered municipality would be exercising a power of local self-government in the purchase of property, either real or personal, and in contracting for various services. See generally McDonald v. City of Columbus, 12 Ohio App. 2d 150, 152, 231 N.E.2d 319, 321 (Franklin County 1967) (finding that the provision of parks and recreational facilities constitutes an exercise of the power of local self-government); Mulcahy v. City of Akron, 27 Ohio App. 442, 446, 161 N.E. 542, 544 (Summit County 1924) (involving the failure of a chartered municipality to follow statutory bidding requirements for the letting of municipal contracts and holding that building a municipal improvement or improving municipal property is a matter of local self-government, thereby rendering state procedures for contracting subordinate to charter procedures); Massa v. City of Cincinnati, 110 N.E.2d 726, 730 (C.P. Hamilton County 1953), appeal dismissed, 160 Ohio St. 254, 115 N.E.2d 689 (1953) (involving G.C. 4328, G.C. 4329 and G.C. 4331, the statutory predecessors to R.C. 735.05, R.C. 735.06 and R.C. 735.07, and holding that the making of municipal improvements to local streets constitutes an exercise of the power of local self-government); City of Columbus ex rel. Falter v. Columbus Metropolitan Housing Authority, 67 N.E.2d 338, 345 (C.P. Franklin County 1946), aff'd, 68 N.E.2d 108 (App. Franklin County 1946) (holding that a city could enter into a contract for providing temporary housing for World War II veterans since acquiring and using municipal property for this purpose was within the power of municipal local self-government).

It may, further, be inferred from the decision in State ex rel. Cronin v. Wald, 26 Ohio St. 2d 22, 268 N.E.2d 581 (1971), that the general power of a municipality to contract is one of local self-government. In Wald the court found that the state's power over municipal debt did not extend beyond control over the aggregate amounts of debt that a municipality might incur; thus it did not include the power to prescribe the monetary amount above which councilmanic approval of a municipal contract is required. The second paragraph of the syllabus of Wald states:

> Where a city charter provision authorizes a municipal official to enter into a contract without councilmanic approval, where the amount of money designated in such provision is in conflict with state law, and where the expenditure arising from such obligation is within the municipality's aggregate indebtedness, the charter provision prevails. (Paragraph two of the syllabus in Phillips v. Hume, 122 Ohio St. 11, overruled.)

See also Youngstown v. Park & Recreation Commission, 68 Ohio App. 104, 108, 39 N.E.2d 214, 216 (Mahoning County 1939) (chartered city may by provision in its charter relieve itself from the requirements of G.C. 4328, now R.C. 735.05).

Based upon the foregoing, I conclude that a chartered city that seeks to make purchases pursuant to the state use law, rather than under state competitive bidding provisions, is

exercising a power of local self-government, and that provisions adopted by the city, in its charter or in an ordinance, to implement such a policy will prevail over state statutes to the contrary, unless the statutory competitive bidding requirements are found to constitute a matter of such statewide concern that municipalities will not be permitted to infringe upon them. A determination as to whether a particular statutory scheme demonstrates such genuine statewide concern may be made only on a case-by-case basis. See, e.g., State ex rel. Evans v. Moore (holding that the prevailing wage law manifests genuine statewide concern and that a city may not exempt itself from compliance with such law); Northern Ohio Patrolmen's Benevolent Association v. City of Parma, 61 Ohio St. 2d 375, 383, 402 N.E.2d 519, 525 (1980) (holding that the state's interest in stimulating enlistment and maintenance in the armed reserves is not sufficient to interfere with a municipality's fiscal decision as to the wages paid to its employees when they are on military leave of absence); State ex rel. Corrigan v. Barnes, 3 Ohio App. 3d 40, 45, 443 N.E.2d 1034, 1039 (Cuyahoga County 1982) (holding that a statute concerning the punishment of felony offenders involves a matter of statewide concern and is applicable to persons holding municipal office); Wray v. Urbana, 2 Ohio App. 3d 172, 440 N.E.2d 1382, 1383 (Champaign County 1982) (holding that the Minimum Fair Wage Standards Act is a general law involving statewide concern and that it preempts any conflicting local ordinance). While I am unable to predict with certainty which interests a court may recognize as matters of such statewide concern, I note that, by enactment of the state use law, the General Assembly has, in a number of instances, subordinated statutory competitive bidding provisions to the promotion of the purchase of products and services from the severely handicapped. This fact suggests that the policy underlying competitive bidding requirements would not be found to be of such statewide concern as to impose any restrictions upon municipal self-government. In any event, until competitive bidding requirements are found to constitute matters of such statewide concern, it appears that a chartered city may, by charter or ordinance, elect to disregard them and apply instead, the provisions of the state use law.

I, therefore, conclude that a chartered municipality, in making purchases and entering into contracts, may, under its powers of local self-government, by charter provision or ordinance, disregard any bidding requirements set forth in state statutes and elect instead to make its purchases and award its contracts in accordance with R.C. 4115.31-.35, the state use law.

I shall now consider whether a nonchartered municipality may elect, by enactment of an ordinance, to comply with the state use law, R.C. 4115.31-.35, in making purchases and entering into contracts, thereby disregarding statutory competitive bidding requirements.

The authority of a nonchartered municipality to govern its own affairs, pursuant to the provisions of Ohio Const. art. XVIII, was considered in Northern Ohio Patrolmen's Benevolent Association v. City of Parma, wherein the court stated, in the first paragraph of the syllabus:

> An Ohio municipality which has not adopted a charter for its government, as authorized by Section 7 of Article XVIII of the Constitution of Ohio, must, in the passage of legislation, follow the

> procedure prescribed by statutes enacted pursuant to the mandate of Section 2 of Article XVIII of the Constitution. (Paragraph two of the syllabus in Morris v. Roseman, 162 Ohio St. 447, and paragraph one of the syllabus in Wintersville v. Argo Sales Co., 35 Ohio St. 2d 148, approved and followed.)

Thus, Northern Ohio Patrolmen's Benevolent Association v. City of Parma recognizes that a nonchartered city must comply with statutes that prescribe procedures for its government. The Parma case also expressly states, however: "A non-chartered municipality may enact an ordinance which is at variance with state law in matters of substantive local self-government." 61 Ohio St. 2d at 378, 402 N.E.2d at 522. It has, thus, been established that a nonchartered municipality is not bound by state statutes that deal with substantive matters of local self-government. See Village of Bellville v. Beal, 7 Ohio App. 3d 291, 292, 455 N.E.2d 683, 685 (Richland County 1982).

Based upon the principles discussed above, it appears that it is necessary to determine whether the competitive bidding requirements of state statutes are substantive or procedural. If they are considered to be substantive, a nonchartered city may disregard those competitive bidding requirements in making purchases and entering into contracts for products and services available under the state use law. If, however, they are considered to be procedural, a nonchartered city must comply with them, and it may not elect to make purchases and enter into contracts pursuant to the state use law.

Again, I have found no cases that consider this precise question. In Northern Ohio Patrolmen's Benevolent Association v. City of Parma, the court determined that the power of a nonchartered municipality to decide the compensation to be paid its employees who are on leaves of absence as members of the armed forces is one of substantive local self-government under Ohio Const. art. XVIII, §3. According to the court's opinion in Parma, a procedural matter of local self-government has to do with the organization of local government and the methods to be utilized by a municipality in exercising its substantive powers. 61 Ohio St. 2d at 382, 402 N.E.2d at 524. A requirement that a municipality utilize competitive bidding when making purchases of goods and services and entering into contracts, therefore, would not appear to be a matter of procedure as understood by the Parma case. Clearly a competitive bidding requirement is unrelated to the organization of local government. Cf. R.C. Chapter 705 (providing a variety of plans for local government); R.C. Chapter 707 (providing for the incorporation of villages and municipal corporations); R.C. Chapter 731 (providing for the organization of villages and cities). Similarly, a competitive bidding requirement would not appear to constitute a method by which a municipality would exercise one of its substantive powers. The court in Village of Bellville v. Beal, 7 Ohio App. 3d at 292, 455 N.E.2d at 685, noted as methods imposed upon nonchartered municipalities in the exercise of their substantive powers "the procedure by which they must go about the enactment of ordinances (such as, by way of illustration but not limitation, three separate readings unless the rule is dispensed with by a three-quarter vote, publication, and signature of the mayor)." See R.C. 731.17; R.C. 731.21; R.C. 731.27. Similar procedural provisions appear throughout R.C. Title 7. See, e.g., R.C. 719.05 (ordinance providing for the appropriation of land by a municipal corporation shall be enacted by a two-thirds vote of all the members of the

municipality's legislative authority); R.C. 721.03 (providing that a contract for the sale or loan of real estate belonging to a municipal corporation shall not be made unless authorized by an ordinance, approved by a two-thirds vote of the legislative authority of such municipal corporation, and by the board of officers having supervision or management of such real estate); R.C. 731.45 (no expulsion of a member of a municipal corporation's legislative authority shall take place without the concurrence of two thirds of all the members elected).

Competitive bidding, on the other hand, is a concomitant aspect of a municipality's substantive power to contract for goods and services and to purchase materials and supplies. In this regard a municipality's substantive power to contract for goods and services and to purchase materials and supplies also includes the power to determine the terms upon which those goods, services, materials, and supplies shall be acquired. It is true that competitive bidding provisions set forth procedures that are to be followed and may, in that sense, be said to constitute procedural requirements. It is, however, clear that the power to acquire, own, and dispose of property is a basic substantive right of a city, and that the imposition of procedural restrictions on such power may impede the ability of a city to make such purchases as it deems appropriate. See generally Hugger v. City of Ironton.

As noted above, I am aware of no situation in which a court has considered whether the power to purchase without following competitive bidding provisions constitutes a substantive or procedural power of local self-government, and I am, of course, unable to predict with certainty what result a court might reach in this regard. It is, however, my judgment that the authorities discussed above provide a basis upon which a city may determine that the purchase of products and services for the use of the city is a matter of substantive local self-government, and that on such a basis a nonchartered city may enact an ordinance that provides that it shall make purchases pursuant to R.C. 4115.31-.35, rather than in compliance with statutory competitive bidding requirements.

I note, as discussed above, that the authority of a city, whether chartered or nonchartered, to exercise its power of local self-government may be restricted in instances in which the General Assembly has legislated on matters of statewide concern. See State ex rel. Evans v. Moore. Unless particular competitive bidding procedures are found to constitute such matters, it appears, however, that a nonchartered city may, by ordinance, elect to disregard them and apply, instead, the provisions of the state use law.

It is, therefore, my opinion, and you are hereby advised, that:

1. The state use law, R.C. 4115.31-.35, is not applicable to cities, except to the extent that it is made applicable to various city bodies and personnel by references appearing in R.C. 715.18, R.C. 735.05, R.C. 737.03, R.C. 749.31, and R.C. 755.11.

2. In instances in which the state use law, R.C. 4115.31-.35, is not, by statute, made applicable to cities, a chartered city, by charter or ordinance, or a nonchartered city, by ordinance, may elect to purchase products

and services for its use pursuant to the state use law, rather than in compliance with competitive bidding requirements, provided that the competitive bidding requirements are not found to be matters of such statewide concern as to prevail over the power of municipal self-government.