

# Municipal Home Rule and Charters

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## INTRODUCTION

### **Purpose of Article**

The ability to carry out functions are affected on a daily basis by the fact that cities and villages have or have not adopted a home rule charter pursuant to Article XVIII Ohio Constitution. Even those municipalities that have adopted a charter discover that they may be disadvantaged in the operations because they have failed to update the charter's provisions. This article is designed to cover just three areas: (1) To explain, briefly, the events leading to the adoption of the home rule amendment in Ohio; (2) to discuss the basic provisions of that amendment, other than municipal utility powers (since utility powers deserve an article of their own); and (3) the reasons why a charter will really make a difference in the operations of a city or village, as well as why it is essential to review and revise existing charter provisions to get the full benefit of home rule.

## PRIOR TO HOME RULE

### **Dillon's Rule**

Like other states, 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 (i) powers that are expressly granted by statute, (ii) powers that may be implied from the express powers, and (iii) powers 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. Later, the individual charter practice gave way to classifications of municipal corporations by population. In any event, 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 providing: “The General Assembly shall pass no special act conferring corporate powers.” In addition, Section 6 of Article XIII of the 1851 Ohio Constitution ordained: “The General Assembly shall provide for the organization of cities and incorporated villages, by the general laws...”

Two cases decided in 1902, State. Ex rel. Knisely v. Jones, 66 Ohio St. 453, and State. Ex rel. Attorney General. v. Beacom, 66 Ohio St. 491, set the stage for reform by declaring the municipal statutes that were based upon population classifications to be invalid as special acts.

Since many of the municipal statutes were invalidated by these cases, 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. Article XVIII is better known as the “home rule amendment.” It is this amendment (amended only slightly over the years) that has persisted since 1912. The reasons most often attributed for adopting the home rule amendment are:

1. To free municipalities from control by the General Assembly and state officials with respect to local affairs (powers of local self-government);
2. To allow the adoption of municipal charters to provide for the structure and organization of the municipal government.
3. To facilitate the ownership and operation of utilities by municipalities.

The scope of this article will be to discuss the powers flowing from Sections 1, 2,3,7,8 and 9 of Article XVIII. Those sections provide for (i) limited classification into cities and villages (at the 5,000 population mark, the only population-based classification that is 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.

Article XVIII, Section 3 contains three clauses:

1. The power to exercise all powers of local self-government.
2. The power to exercise police powers concurrently with the state.
3. The conflict clause, which has consistently been held to modify only clause 2, the grant of police powers.

Therefore, clause 1 generally has been held to stand alone and is 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. Sstantive Powers of Local Self-Government.**

Section 2 of Article XVIII provides that general laws shall be passed to provide for the incorporation and government of cities and villages...“Section 3 grants municipalities authority to exercise all powers of local self-government...,” Section 7 authorizes the adoption of municipal charters and the exercise thereunder 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) On the other hand, if a charter municipality is involved, it is the charter adopted pursuant to Section 7 of Article XVIII, rather than the statutes, that prevails with respect to procedural powers of local self-government (structure and form of government and procedures). See Morris v. Roseman (1954), 162 Ohio St. 447.
- 3) If a substantive power of local self-government is involved (not a matter of procedure or form or structure of government), 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 Threshold question is whether the municipal exercise of power is a power of local self-government or a matter of statewide concern. Generally speaking, 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 or (ii) determine the matter to be a matter of statewide concern if the 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

Following Evans, the Ohio Supreme Court held that the state law enacted with respect to public sector labor relations, as it pertained to the definition of "supervisors," was a matter of statewide concern and, therefore, a 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. Kettering v. State Emp. Relations Bd. (1986), 26 Ohio St. 3d 50. Municipalities then won a temporary victory with respect to the collective bargaining law when the Supreme Court held that the establishment of compensation was a power of local self-government under Section 3 of Article XVIII of the Ohio Constitution and that a provision of the 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 that the 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. See Rocky River v. State Emp. Relations Bd. (1989), 43 Ohio St. 3d 1 ("Rocky IV"). 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**

Article XVIII, Section 3, Ohio Constitution grants 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**

What is the nature of a charter? At this point, it is well to stop to consider just what a charter is and what it should attempt to do. 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.

#### **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. Cuyahoga 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.

*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. He has been engaged as an attorney-consultant in over sixty engagements relating to drafting and revising municipal Charters in Ohio. He has advised charter commissions on adoption of a charter, charter revision commissions or charter review commissions, municipal councils and administrative officials on charter amendments (both as to the process and drafting of amendment), and advising legislative and administrative officials about the meaning and interpretation of charter provisions. Mr. Gotherman is entering his forty-first year as a municipal lawyer. In the year 2000 he was awarded the “Charles S. Rhyme Lifetime Achievement in Municipal Law Award” by the International Municipal Lawyers Association. He has served as bond counsel at Peck, Shafer & Williams, in Cincinnati and Columbus, and Calfee, Halter & Griswold in Cleveland and Columbus.*