

ARTICLE XVIII

Sections 3 and 7

Present Constitution

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 power of local self-government.

Commission Recommendation

Section 3. No change.

Section 4. 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.

Commission Recommendation

The Commission recommends no change in Section 3 of Article XVIII and recommends only a change in the section number in Section 7 of Article XVIII, in order to place the sections in Article XVIII in better order, as follows:

Section 7 4. 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.

Background of Sections

Sections 3 and 7, considered together with Section 2, are the heart of the home rule provisions of the Constitution.

Section 3 authorizes municipalities to exercise all powers of local self-government and to adopt local police, sanitary and similar regulations that are not in conflict with general law. Section 7 permits any municipality to adopt a charter, and to exercise thereunder all powers of local self-government, subject to provisions of Section 3.

In order to understand the current status of the municipal home rule powers in Ohio, it is necessary to examine, briefly, home rule in its historical context.

Under the Ohio Constitution of 1802, municipalities were incorporated by special acts of the state legislature which granted charters establishing the form of government and enumerated the substantive powers of the chartered municipality. The first charter was granted to Chillicothe in 1804 and soon after the General Assembly chartered Steubenville, Dayton, Lancaster, St. Clairsville, Gallipolis and Springfield, each with powers that differed from the others in some respects. In 1817 the legislature passed a general law for the incorporation of municipalities, but in 1822 the precedent of passing special acts of incorporation in spite of the general law was set when Canton was incorporated by special act.¹⁰

During the next three decades, the use of special acts to grant municipal charters grew until dissatisfaction with the strict legislative control caused delegates to the Constitutional Convention of 1850-51 to recommend amendments prohibiting special acts of incorporation and requiring acts of a general nature to have uniform effect. The following speech, made by a convention delegate, indicates the degree of hostility special acts engendered, as well as the methods employed by the legislature to pass special acts of incorporation:

¹⁰. Walker, Harvey, "Municipal Government before 1912", Ohio State Law Journal, Vol. 9 (1948) pg. 5.

"It is well known that special charters are always 'got through' our legislature at will, and it must be evident that it will always be so in the absence of a constitutional provision. When was there ever an instance within the recollection of the oldest legislator on this floor, where a single special act of incorporation was defeated? It is but too generally known that these special acts are 'got through' by a log-rolling system as it is called, the friends of one bill voting for the bills of others in consideration of their aid when the final vote is taken upon their own. These acts will always pass a legislative body, the dignity and 'purity' of your own general assembly to the contrary notwithstanding."¹¹

The problem of special treatment for municipalities, however, soon emerged again, in spite of the provisions of the 1851 Constitution, by way of the legislature's use of the device of classification to deal legislatively with the special demands of municipalities throughout the state. An elaborate classification structure for municipalities grew up, with the General Assembly creating many classes of municipalities with varying powers and structures. Eventually, each of the 11 largest cities in the state was placed in a class by itself.¹²

The entire classification structure was invalidated by the Ohio Supreme Court in 1902,¹³ and the Municipal Code of 1902 emerged from a special session of the legislature to fill the gap in municipal law. (This code, as amended, remains the basis of Ohio statutory municipal law today.) The code provided for two classes of municipal corporations—cities and villages—and established one uniform plan of government for each.

Between 1902 and 1912, however, dissatisfaction with the Municipal Code grew, especially in the larger cities which felt constricted by the limited authority granted municipalities by the Code. Out of this dissatisfaction emerged Article XVIII as proposed by the 1912 Constitutional Convention. According to Professor Knight, who explained Article XVIII to the convention, it was intended to:

1. Empower each municipality to adopt a form of government of its own choosing;
2. Give each municipality authority to carry out municipal functions without statutory authority; and
3. Facilitate municipal ownership and operation of public utilities.¹⁴

Professor Knight told the convention delegates that the main purpose of the proposal "is to get away from what is now the fixed rule of law, seemingly also required by the constitution, that municipal corporations . . . shall be held strictly within the limits of the powers granted by the legislature to the corporation, and that no [municipal] corporation . . . may lawfully undertake to do anything which [it] has not been given specifically the power to do by the constitution or the lawmaking body. It has often been found under our present system, and would be found also in the future, that many things necessary from the standpoint of city life, which the city may need or urgently desire to do can not be done because of lack of power specifically conferred on the municipality itself. Therefore, this proposal undertakes pretty nearly to reverse that rule and to provide that municipalities shall have the power to do those things which are not prohibited."¹⁵

11. Galbreath, C. B., *Constitutional Conventions of Ohio* (1911), pg. 27.

12. Farrell, James W. Jr., "Municipal Public Utility Powers," *Ohio State Law Journal*, Vol. 21 (1960) pgs. 391-393.

13. *State ex rel. Knisely v. Jones, op. cit., State ex rel. Attorney General v. Beacom, op. cit.*

14. Constitutional Convention of 1912, *Proceedings and Debates*, pg. 1433.

15. *Ibid.*, pg. 1433.

Very soon after the adoption of Article XVIII, questions arose relative to the conflict clause in Section 3 and to the powers of local self-government as they pertain to noncharter municipalities. Early court cases often resulted in conflicting interpretations of the points involved, although the Supreme Court has consistently held that the conflict clause applies only to police and sanitary powers.¹⁶

A series of cases on the question of the powers of noncharter cities culminated in 1964 in the case of *Leavers v. Canton*,¹⁷ setting forth the following view regarding Section 3 as it applies to charter and noncharter municipalities:

1. Any ordinance dealing with police regulations passed by either a charter or a noncharter city, which is in variance with state law, is invalid.
2. An ordinance passed by a charter city, which is not a police regulation but deals with local self-government, is valid and effective even though it is at variance with a state statute.
3. An ordinance passed by a noncharter city, which is not a police regulation, is valid where there is no state statute at variance with the ordinance.
4. An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government, is invalid where such ordinance is at a variance with state statute.

The issue of what constitutes a conflict with general laws in the adoption and enforcement of "local police, sanitary, and other similar regulations" was spelled out in an early case.¹⁸ A conflict exists if (1) a municipality permits or licenses that which the state prohibits, or (2) the state permits or licenses that which the municipality prohibits. A conflict does not exist where (1) certain acts are omitted in an ordinance but covered by general laws, (2) certain acts made unlawful by the municipality are not covered by general laws, or (3) because there is a difference in penalties.

The Supreme Court, in several cases, has also made it clear that "all powers of local self-government" possessed by a municipality relate only to those matters which affect the municipality primarily and not those which are of more than merely local concern.¹⁹

Appendix A sets forth in more detail the development of the rationale of the home rule cases.

While it is clear from this brief discussion of home rule that its present interpretation is the result of a long and often conflicting history of judicial decisions, there has been a dearth of recent cases on the subject.

Comment

The Local Government Committee and the Commission, after long and careful study of the home rule provisions and their current interpretations, has concluded that no change should be made in present Sections 3 and 7.

The Commission believes that the state has sufficient power under the present interpretation of home rule powers to enact laws to solve the major urban problems facing Ohio municipalities in the areas of zoning,

16. *Fitzgerald v. Cleveland*, 88 Ohio St. 338, (1913); *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, (1958).

17. *Leavers v. City of Canton*, 1 Ohio St. 2d 33, 208 N.E. 2d 354, (1964).

18. *Struthers v. Sokol*, 108 Ohio St. 263, (1923), p. 265.

19. *Village of Willoughby Hills v. Corrigan*, 29 Ohio St. 2d 39, (1972); *Cleveland Electric Illuminating Company v. City of Fainesville*, 15 Ohio St. 2d 125, (1968); *City of Beachwood v. Board of Elections*, 167 Ohio St. 379, (1958).

land use and planning; transportation; crime and law enforcement; housing; pollution, water supply and waste disposal; welfare; recreation and parks; economic development and job opportunities; and health.

The Local Government Committee initially considered several language changes for Sections 2, 3 and 7 in order to clarify major questions that have arisen since adoption of Article XVIII in 1912. Appendix B sets forth the final committee draft. In seeking the opinions of municipal officials and others whose daily work brings them into close contact with the home rule sections, however, the committee found little sentiment for changing these sections.

As Daniel J. O'Loughlin, formerly Chief Counsel for the City of Cleveland, stated recently,

"After almost 60 years of interpretation since its adoption as a result of the Constitutional Convention of 1912, municipal home rule in Ohio has traveled an uncertain and sometimes curious path. However, a review of the case law decided during the past few years begins to evidence a pattern of change, and to some hopeful degree, consistency in construction."²⁰

It was the overwhelming opinion of the municipal officials that any attempt to change the language of Sections 3 and 7 would almost certainly lead to another long battle over reinterpretation, with no guarantee of the final result. The committee, therefore, made no recommendation to the Commission for changes.

The Local Government Committee also considered the home rule provisions of the Model State Constitution of the National Municipal League,²¹ based on Dean Jefferson B. Fordham's proposal, which only gives to a municipal corporation that adopts a home rule charter the power to exercise any power or perform any function which is not denied to the corporation by its home rule charter, and is not denied to all home rule charter municipalities by statute, and is within such limitations as may be established by statute. The committee recommended against adoption of such a home rule provision because it would be a step backward in Ohio home rule history, requiring a reduction in present home rule powers and an increase in state control of internal municipal affairs, which the committee did not believe would benefit municipal corporations or the state.

The committee considered strengthening the home rule provisions for noncharter municipalities so that the General Assembly would not have to concern itself with problems brought to it relating to details of governmental structure, but decided against such a recommendation. The committee's decision was based on four reasons: First, any change is likely to upset the present interpretation of home rule. Second, when the courts reconsider the constitutional sections dealing with noncharter municipalities, if they were rewritten, the result could be a return to the *Perrysburg* doctrine which held that all noncharter municipalities derive their powers of local self-government directly from Section 3 of the Constitution, thereby eliminating the General Assembly's present involvement in local self-government of noncharter municipalities. Third, the noncharter municipalities themselves have not expressed the view that this is an overriding concern to them. Finally, if a noncharter municipality feels that a problem does indeed exist in this area, it has recourse to a constitutional alternative, adoption of a charter.

20. *Reference Manual for Continuing Legal Education Program*, Ohio Legal Center Institute, Publication number 73-1972.

21. National Municipal League, *Model State Constitution*,

Section 8.02. *Powers of Counties and Cities*. A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied to counties or cities generally, and is within such limitations as the legislature may establish by general law. This grant of home rule powers shall not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent county or city power, nor shall it include power to define and provide for the punishment of a felony.

ARTICLE XVIII

Section 8

Present Constitution

Section 8. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter". The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

Commission Recommendation

Section 5. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of six per cent of the electors of the municipality, as certified by the election authorities having jurisdiction in the municipality, shall forthwith, provide by ordinance for the submission to the electors of the question, "Shall a commission be chosen to frame a charter?" The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next general election occurring not less than seventy-five days after certification of the ordinance to the election authorities, or at a special election to be called and held not less than seventy-five days after such certification. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question have voted in the affirmative.

Candidates for such commission shall be nominated by petition of one per cent of the electors of the municipality filed with the election authorities not less than sixty days prior to such election. Candidates shall be declared elected in the order of the number of votes received, beginning with the candidate receiving the largest number. The legislative authority shall appropriate sufficient sums to enable the charter commission to perform its duties and to pay all reasonable expenses thereof. The holding of a public office does not preclude any person from seeking or holding membership on a charter commission, nor does membership on a charter commission preclude any such member from seeking or holding other public office.

Any charter so framed shall be submitted by vote of a majority of the authorized number of members of the commission to the electors of the municipality at an election to be held at a time fixed by the charter commission and within nineteen months from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. The charter commission shall certify the proposed charter to the election authorities not less than seventy-five days prior to such election. Not less than thirty days prior to such election the charter commission shall cause to be mailed or otherwise distributed a copy of the proposed charter to each elector of the municipality as far as may be reasonably possible. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of the municipality at the time fixed therein. If such proposed charter is not approved by the electors, the charter commission may resubmit the same one time, in its original form or as revised by the charter commission and within thirteen months from the date of the first election on the proposed charter.

A charter commission may adopt rules for its organization and procedures and may fill any vacancy by majority vote of the remaining members of the commission.

Commission Recommendation

The Commission recommends the amendment of Section 8 of Article XVIII as follows:

Section 8 5. The legislative authority of any city or village may be a two-thirds vote of its members, and upon petition of ~~ten~~ SIX per centum CENT of the electors OF THE MUNICIPALITY, AS CERTIFIED BY THE ELECTION AUTHORITIES HAVING JURISDICTION IN THE MUNICIPALITY, shall forthwith, provide by ordinance for the submission to the electors of the question, "Shall a commission be chosen to frame a charter?" The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next

regular municipal GENERAL election if one shall occur OCCURRING not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid SEVENTY-FIVE DAYS AFTER CERTIFICATION OF THE ORDINANCE TO THE ELECTION AUTHORITIES, OR AT A SPECIAL ELECTION TO BE CALLED AND HELD NOT LESS THAN SEVENTY-FIVE DAYS AFTER SUCH CERTIFICATION. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative.

CANDIDATES FOR SUCH COMMISSION SHALL BE NOMINATED BY PETITION OF ONE PER CENT OF THE ELECTORS OF THE MUNICIPALITY FILED WITH THE ELECTION AUTHORITIES NOT LESS THAN SIXTY DAYS PRIOR TO SUCH ELECTION. CANDIDATES SHALL BE DECLARED ELECTED IN THE ORDER OF THE NUMBER OF VOTES RECEIVED, BEGINNING WITH THE CANDIDATE RECEIVING THE LARGEST NUMBER. THE LEGISLATIVE AUTHORITY SHALL APPROPRIATE SUFFICIENT SUMS TO ENABLE THE CHARTER COMMISSION TO PERFORM ITS DUTIES AND TO PAY ALL REASONABLE EXPENSES THEREOF. THE HOLDING OF A PUBLIC OFFICE DOES NOT PRECLUDE ANY PERSON FROM SEEKING OR HOLDING MEMBERSHIP ON A CHARTER COMMISSION, NOR DOES MEMBERSHIP ON A CHARTER COMMISSION PRECLUDE ANY SUCH MEMBER FROM SEEKING OR HOLDING OTHER PUBLIC OFFICE.

Any charter so framed shall be submitted BY VOTE OF A MAJORITY OF THE AUTHORIZED NUMBER OF MEMBERS OF THE COMMISSION to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year NINETEEN MONTHS from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. THE CHARTER COMMISSION SHALL CERTIFY THE PROPOSED CHARTER TO THE ELECTION AUTHORITIES NOT LESS THAN SEVENTY-FIVE DAYS PRIOR TO SUCH ELECTION. Not less than thirty days prior to such election the clerk of the municipality CHARTER COMMISSION shall mail CAUSE TO BE MAILED OR OTHERWISE DISTRIBUTED a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein OF THE MUNICIPALITY AS FAR AS MAY BE REASONABLY POSSIBLE. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such THE municipality at the time fixed therein. IF SUCH PROPOSED CHARTER IS NOT APPROVED BY THE ELECTORS, THE CHARTER COMMISSION MAY RESUBMIT THE SAME ONE TIME, IN ITS ORIGINAL FORM OR AS REVISED BY THE CHARTER COMMISSION AND WITHIN THIRTEEN MONTHS FROM THE DATE OF THE FIRST ELECTION ON THE PROPOSED CHARTER.

A CHARTER COMMISSION MAY ADOPT RULES FOR ITS ORGANIZATION AND PROCEDURES AND MAY FILL ANY VACANCY BY MAJORITY VOTE OF THE REMAINING MEMBERS OF THE COMMISSION.

Description of Changes and Comment

Section 8 was proposed by the Constitutional Convention of 1912 and was adopted in its present form by the voters that year. It provides the procedure for electing municipal charter commissions and for the framing and submission to the electors of proposed municipal charters.

Several amendments proposed to Sections 8 and 9 (Section 9 deals with amending municipal charters) closely parallel the proposed amendments to Article X, Section 4 (county charter commissions) recommended by the Constitutional Revision Commission. Inclusion of similar amendments in Section 8 and 9 provides consistency, where possible and appropriate, to portions of both articles which deal with similar matters. The Commission recognizes, however, that municipalities and counties are different entities, with some differing demands and requirements. Consistency in this matter is not an overriding standard in proposing constitutional amendments.

The Commission, through this amendment, reaffirms the charter commission method of proposing a charter as the only method that should be allowed by the Constitution. It is the Commission's belief that no group should be permitted, either by petition or through legislative action, to submit a charter directly to the electors, without going through the deliberative process inherent in the commission method.

Some of the amendments proposed for Section 8 are technical in nature and intended to remedy existing defects or ambiguities, while others represent significant departures from, or additions to, the existing provisions. Major substantive changes proposed are, in summary:

1. Reducing the percentage of petition signatures required to place the charter commission question on the ballot from 10% to 6%.
2. Establishing uniform procedures for electing charter commissioners.
3. Clearly establishing the municipality's obligation to provide funding for a charter commission.
4. Allowing persons who hold other public office to be charter commission members at the same time.
5. Clearly establishing procedures required for submission of a proposed charter to the electorate.
6. Allowing the charter commission to resubmit a defeated charter to the voters one time.

The proposed changes will be discussed, to the extent possible, in the order in which they occur.

1. The section number would be changed to Section 5.
2. The number of signatures on a petition to have the question of choosing a municipal charter commission placed on the ballot would be reduced from 10% to 6% of the electors. It was determined that 10%, especially in large municipalities, is too great an obstacle; 6% is a sufficient number to discourage frivolous attempts, and still is reasonably within the power of a serious group of citizens to attain. (The Commission recommended the same reduction in the county provisions.)
3. The responsibility for certifying whether a petition has a sufficient number of valid signatures is specifically given to the board of elections, which has the necessary facilities and personnel to perform this function. Under existing Section 8, the municipal legislative authority with which the petition is filed has the responsibility of determining its sufficiency. (The proposed amendment is identical in this respect to provisions recommended by the Commission in the county amendments.)
4. A regular municipal election is that general election held in November of odd-numbered years. The proposed amendment, substituting "general election" for "regular municipal election", would permit the charter question to be placed on the ballot at a general election in any year and, therefore, would lessen the likelihood or need for the question to be submitted at a special election, whether at the regular primary time or a specially-called election. The option of placing the commission question on the ballot at a special election, however, is retained.

5. The proposed amendment would require certification to the board of elections of the ordinance submitting the question of choosing a commission to frame a charter (the same procedure followed for tax levies and bond issues) not less than 75 days prior to the election, thus filling a gap in the present section. This is the same period of time required for filing with the Secretary of State of the ballot language and explanations relating to constitutional amendments proposed by the General Assembly. This amendment is similar to provisions in the county sections recommended by the Commission.

6. The present constitution makes minimal provision for procedures for electing municipal charter commission members. The proposed amendment would establish additional uniform procedures for electing such members. The amendment specifies the percentage of petition signatures necessary (1%) and the procedures for filing candidacies and determining who is elected. In this respect, the proposal is parallel to present constitutional provisions on county charter commissions. The original county provisions were placed in the Constitution twenty-one years after the municipal sections and were based substantially on the earlier municipal sections. However, some provisions were added to the county sections in order to fill gaps in the procedures that had become evident after enactment of the municipal sections. This amendment is intended to fill this gap in municipal procedures.

7. Controversy has arisen in some cases because there is no constitutional requirement clearly establishing the obligation of a municipality's legislative authority to provide the funds necessary for a charter commission to carry out its duties.²² A specific requirement to this effect in the Constitution would resolve any question concerning the existence of the duty to provide the funds for the charter commission to perform its assigned function. The proposal is identical in this respect to the proposed county provisions recommended by the Commission.

8. The amendment would allow a person holding other public office to be a member of a municipal charter commission at the same time.

9. The present Constitution is silent on the vote required by a charter commission for submission of a proposed charter. Because of this, problems may arise over the number of affirmative votes by commission members required before a charter can be placed on the ballot. The proposed amendment would require an affirmative vote of a majority of the total number of members authorized to be elected to the Commission. This number would remain constant even if the number of members on the commission was diminished by death, resignation or disqualification.

10. A technical problem has arisen over the present constitutional provision which requires that the charter framed by the commission must be submitted "within one year" of the commission's election.

"One year" has been interpreted to be 365 days (366 in leap year), which means that if the charter commission is chosen at one general election and the general election for the following year is more than 365 days in the future, which will occur, for example, in the case of the November 2, 1976 and November 8, 1977, elections, a special election to vote on the charter must be called. The proposed 19-month deadline would not only clear up this problem, but it would also give the charter commission adequate time to do a thorough job, and would allow time for public comment and study of the proposed charter.

11. The procedure for placing the proposed charter before the voters is presently unclear, and if it is interpreted to require action by the municipality's legislative body before being sent to the board of elections, the legislative body has an opportunity to delay its submission. The amend-

22. In *Merryman v. Gorman*, 69 O. L. Abs. 421 (1953) the court held that the city of Steubenville must appropriate funds for the mailing of charters to electors.

ment specifically provides for direct submission by the charter commission to the board of elections not less than 75 days before an election.

12. Because the proposed amendment provides for direct submission of the proposed charter to the board of elections, the charter commission, rather than the clerk of the municipality, is charged with the responsibility of distributing copies of the proposed charter to electors. Problems have arisen in the past over failure of the municipality to allocate money or personnel to mail copies of the charter to the electorate,²³ despite the duty to do so, which is made explicit in the proposed amendment. The proposed amendment is so worded as to allow the charter commission to be given assistance in the printing and distribution of the charter by volunteer civic groups.

13. Technical problems have arisen dealing with the distribution of copies of the proposed charter "to each elector whose name appears upon the poll of registration books . . ." because of the differences between registration and nonregistration counties. The proposed amendment makes clear that what is required is an attempt to mail or otherwise distribute a copy to each elector in so far as may be reasonably possible as is the case with proposed county charter amendments, and does not actually require that every elector receive a copy. Newspaper publication of the charter to meet the distribution requirements has never been permitted, and the amendment retains this prohibition. The amendment, however, does permit door-to-door distribution when feasible.

14. Presently a charter commission has only one opportunity to submit a proposed charter to the electors. The proposed amendment would give the charter commission one opportunity to resubmit, or revise and resubmit, the charter at a general or special election within 13 months. In the case of a close vote initially, or where the commission believes it is able to identify the objectionable features of the proposed charter or the reasons for its defeat, a second opportunity to submit the proposed charter, without the election of a new commission and a two-year delay in submission, might be advantageous.

15. Although few insurmountable procedural problems have arisen to date in regard to the functioning of charter commissions, a constitutional provision that gives specific powers to the charter commission over adoption of rules and procedures and the filling of vacancies will eliminate any question of where this power lies.

23. *Ibid.*

ARTICLE XVIII

Section 9

Present Constitution

Section 9. Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments may be mailed to the electors as hereinafore provided for copies of a proposed charter, or, pursuant to laws passed by the General Assembly, notice of proposed amendments may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote.

Commission Recommendation

Section 6. Amendments to any charter framed and adopted as provided in section 5 may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by six per cent of the electors of the municipality, as certified by the election authorities having jurisdiction in the municipality, setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 5 as to the submission of the question of choosing a charter commission; and not less than thirty days prior to the election thereon, copies of proposed amendments shall be mailed or otherwise distributed by the clerk of the legislative authority to each elector of the municipality as far as may be reasonably possible, or, pursuant to laws passed by the General Assembly, notice of proposed amendment may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it

shall become a part of the charter of the municipality immediately upon its approval by the electors unless another time is specified in the petition or ordinance providing for the submission of the amendment. When more than one amendment is submitted at the same time, they shall be so submitted as to enable the electors to vote on each separately. In case of conflict between the provisions of two or more amendments submitted at the same election, the amendment which receives the highest affirmative vote not less than a majority shall prevail. An amendment shall relate to only one subject but may affect or include more than one section or part of a charter. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after the adoption by a referendum vote.

There may be submitted to the electors of any municipality having a charter the question "Shall a commission be chosen to amend or revise the charter of the (city or village) of _____?" and a charter commission may be elected for such purpose, in the manner provided in section 5 as to the question of choosing a charter commission. Such charter commission may frame and submit to the electors of the municipality, in the manner provided in section 5 for the submission of a proposed charter, one or more amendments to the existing charter or a new or revised charter for the municipality. Any such amendment or new or revised charter shall become effective, if approved by the affirmative vote of a majority of the electors voting thereon, at the time specified therein.

A charter may be repealed in the manner provided in this section for the amendment of a charter, by the submission to the electors of the municipality of the question "Shall the charter form of government for the (city or village) of _____ be repealed?" The effective date of such repeal and the election of the officers of the government of the municipality to become effective upon such repeal shall be as provided by general law except as otherwise provided in a charter approved by the electors of the municipality at the same time as or subsequent to approval of the question of repeal.

If the question of the repeal of an existing charter form of government is submitted to the electors of the municipality at the same time as the submission of the question to the electors of a commission to revise the charter or the question of the adoption of a new or revised charter that question which receives the largest number of votes, not less than a majority, shall prevail. The question of the repeal of an existing charter shall not be submitted to the electors at any time after a commission has been chosen to frame a new or revised charter for the municipality and before the submission of such new or revised charter to the electors, or within two years following the adoption of a charter or a new or revised charter.

Commission Recommendation

The Commission recommends the amendment of Section 9 of Article XVIII as follows:

Section 9 6. Amendments to any charter framed and adopted as provided IN SECTION 5 may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ~~ten~~ SIX per ~~centum~~ CENT of the electors of the municipality, AS CERTIFIED BY THE ELECTION AUTHORITIES HAVING JURISDICTION IN THE MUNICIPALITY, SETTING FORTH ANY SUCH PROPOSED AMENDMENT, SHALL BE SUBMITTED BY SUCH LEGISLATIVE AUTHORITY. The submission of proposed amendments to the electors shall be governed by the requirement of section 8 5 as to the submission of the question of choosing a charter commission; and NOT LESS THAN THIRTY DAYS PRIOR TO THE ELECTION THEREON, copies of proposed amendments ~~may~~ SHALL be mailed OR OTHERWISE DISTRIBUTED BY THE CLERK OF THE LEGISLATIVE AUTHORITY TO the electors EACH ELECTOR as hereinbefore provided for copies of a proposed charter, OF THE MUNICIPALITY AS FAR AS

MAY BE REASONABLY POSSIBLE, or, pursuant to laws passed by the General Assembly, notice of proposed amendment may be given by newspaper advertising. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality IMMEDIATELY UPON ITS APPROVAL BY THE ELECTORS UNLESS ANOTHER TIME IS SPECIFIED IN THE PETITION OR ORDINANCE PROVIDING FOR SUBMISSION OF THE AMENDMENT. WHEN MORE THAN ONE AMENDMENT IS SUBMITTED AT THE SAME TIME, THEY SHALL BE SO SUBMITTED AS TO ENABLE THE ELECTORS TO VOTE ON EACH SEPARATELY. IN CASE OF CONFLICT BETWEEN THE PROVISIONS OF TWO OR MORE AMENDMENTS SUBMITTED AT THE SAME ELECTION, THE AMENDMENT WHICH RECEIVES THE HIGHEST AFFIRMATIVE VOTE NOT LESS THAN A MAJORITY SHALL PREVAIL. AN AMENDMENT SHALL RELATE TO ONLY ONE SUBJECT BUT MAY AFFECT OR INCLUDE MORE THAN ONE SECTION OR PART OF A CHARTER. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after the adoption by a referendum vote.

THERE MAY BE SUBMITTED TO THE ELECTORS OF ANY MUNICIPALITY HAVING A CHARTER THE QUESTION "SHALL A COMMISSION BE CHOSEN TO AMEND OR REVISE THE CHARTER OF THE (CITY OR VILLAGE) OF?" AND A CHARTER COMMISSION MAY BE ELECTED FOR SUCH PURPOSE, IN THE MANNER PROVIDED IN SECTION 5 AS TO THE QUESTION OF CHOOSING A CHARTER COMMISSION. SUCH CHARTER COMMISSION MAY FRAME AND SUBMIT TO THE ELECTORS OF THE MUNICIPALITY, IN THE MANNER PROVIDED IN SECTION 5 FOR THE SUBMISSION OF A PROPOSED CHARTER, ONE OR MORE AMENDMENTS TO THE EXISTING CHARTER OR A NEW OR REVISED CHARTER FOR THE MUNICIPALITY. ANY SUCH AMENDMENT OR NEW OR REVISED CHARTER SHALL BECOME EFFECTIVE, IF APPROVED BY THE AFFIRMATIVE VOTE OF A MAJORITY OF THE ELECTORS VOTING THEREON, AT THE TIME SPECIFIED THEREIN.

A CHARTER MAY BE REPEALED IN THE MANNER PROVIDED IN THIS SECTION FOR THE ADMENDMENT OF A CHARTER, BY THE SUBMISSION TO THE ELECTORS OF THE MUNICIPALITY OF THE QUESTION "SHALL THE CHARTER FORM OF GOVERNMENT FOR THE (CITY OR VILLAGE) OF BE REPEALED?" THE EFFECTIVE DATE OF SUCH REPEAL AND THE ELECTION OF THE OFFICERS OF THE GOVERNMENT OF THE MUNICIPALITY TO BECOME EFFECTIVE UPON SUCH REPEAL SHALL BE AS PROVIDED BY GENERAL LAW EXCEPT AS OTHERWISE PROVIDED IN A CHARTER APPROVED BY THE ELECTORS OF THE MUNICIPALITY AT THE SAME TIME AS OR SUBSEQUENT TO APPROVAL OF THE QUESTION OF REPEAL.

IF THE QUESTION OF THE REPEAL OF AN EXISTING CHARTER FORM OF GOVERNMENT IS SUBMITTED TO THE ELECTORS OF THE MUNICIPALITY AT THE SAME TIME AS THE SUBMISSION OF THE QUESTION TO THE ELECTORS OF A COMMISSION TO REVISE THE CHARTER OR THE QUESTION OF THE ADOPTION OF A NEW OR REVISED CHARTER THAT QUESTION WHICH RECEIVES THE LARGEST NUMBER OF AFFIRMATIVE VOTES, NOT LESS THAN A MAJORITY, SHALL PREVAIL. THE QUESTION OF THE REPEAL OF AN EXISTING CHARTER SHALL NOT BE SUBMITTED TO THE ELECTORS AT ANY TIME AFTER A COMMISSION HAS BEEN CHOSEN TO FRAME A NEW OR REVISED CHARTER FOR THE MUNICIPALITY AND BEFORE THE SUBMISSION OF SUCH NEW OR REVISED CHARTER TO THE ELECTORS, OR WITHIN TWO

YEARS FOLLOWING THE ADOPTION OF A CHARTER OR A NEW
OR REVISED CHARTER.

Description of Changes and Comment

Section 9 was originally adopted with the rest of Article XVIII in 1912. It was amended in 1970, however, to permit notice of charter amendments to be made through newspaper advertisements, pursuant to laws passed by the General Assembly. If amended as proposed by the Commission, section 9 would provide the procedures for (1) submitting municipal charter amendments to the electorate; (2) choosing an elected commission to revise the charter; and (3) repealing an existing charter.

As discussed in the commentary on Section 8, several amendments to Section 9 were framed to parallel proposed amendments to Article X, Section 4, which deals with county charter commissions. As with Section 8, some of the amendments proposed for Section 9 are technical changes designed to remedy existing defects or ambiguities. Others, however, represent significant departures from the existing provisions. The changes will be discussed, as far as possible, in the order in which they occur.

1. The section number would be changed from 9 to 6.
2. The number of required petition signatures would be reduced from 10% to 6%, which is the same percentage the Commission has recommended in Section 8 and in the county provisions. The Commission determined that 10%, especially in large municipalities, is too great an obstacle to attaining the required number of signatures, but that 6% is within the power of a serious group of citizens to attain.
3. Under existing Section 9, the municipal legislative authority with which the petition is filed has the responsibility of certifying whether the signatures are valid and of sufficient number. The proposed amendment would transfer the responsibility for verifying petitions to the board of elections which has the necessary facilities and personnel to perform this function. (The proposed amendment is similar to those recommended in Section 8 and in the county provisions.)
4. The proposed amendment to Section 9 requiring that charter amendments be distributed "to each elector of the municipality as far as may be reasonably possible" takes into account the technical difficulties that have arisen in counties that do not require registration of voters. The proposed amendment makes clear that what is required is an attempt to distribute a copy of the amendment to each elector, and does not require that each elector actually receive a copy. Since 1970, pursuant to requirements imposed by general law, newspaper publication of an amendment has been permitted. The proposed amendment to Section 9 retains that provision.
5. Present constitutional provisions do not provide for designation of a specified time an amendment approved by the voters becomes part of the charter. This amendment provides for a uniform time (immediately) for inclusion of an approved amendment, yet retains the voters' power to specify a different time in the charter amendment.
6. Presently the Constitution does not provide procedures for resolving a conflict between provisions of two or more charter amendments which are submitted and approved at the same time, but in a 1931 opinion²⁴ the Ohio Attorney General applied to municipal charter amendments the rule of Article II, Section 1b relating to initiated laws and constitutional amendments. Under that rule, which this amendment would apply specifically to municipal charter amendments, the proposal that receives the highest affirmative vote not less than a majority would prevail in the case

24. 1931 OAG 3626.

of conflict among two or more amendments submitted and approved at the same time.

7. No present provision specifically provides that a charter amendment must relate to only one subject. Inclusion of such a provision would specifically bring municipal charters under the same requirements for single-subject amendments as proposals for amending the state constitution, and for bond issues and tax levies. Single-subject amendments could, however, as provided for in the proposed provision, affect or include more than one section of the charter.

8. Presently, there is no constitutional provision for procedures for a comprehensive revision of a charter. While some municipal charters permit or require appointment of a commission or other group to review and propose amendments to the charter, the municipality's legislative body has the power to change or reject any such proposed amendments. The Constitution does provide for submission of amendments by petition of 10% of the electors of the municipality, but this type of approach is capable of resulting only in piecemeal amendment or revision. The proposal would allow the question of choosing a commission to revise or amend the charter to be placed before the voters. Any amendment framed and approved by a duly elected commission would then be directly submitted to the voters. This would eliminate, as to such proposed amendments, the legislative body's present prerogative to change or reject amendments submitted to it. This amendment is advocated by the Citizens League of Greater Cleveland. Consideration was given to placing an automatic provision in the Constitution similar to that which requires that the question of calling a state constitutional convention be placed on the ballot every 20 years, but this was rejected because the Commission believes its proposed amendment will better serve this purpose and because the voters of the state have rejected each constitutional convention proposal since 1912, thus indicating voter resistance to such automatic referrals.

The Commission also believes that proposals submitted by charter revision advisory groups, appointed by mayors or councils to make recommendations, should remain subject to the approval of two-thirds of the legislative authority before being placed on the ballot. In the absence of such approval, the proposals suggested by such a group could still be submitted pursuant to a petition.

9. In order to allow an elected charter revision commission flexibility in proposing changes and to avoid possible legal conflicts over the definitional differences between amending and revising a charter, the proposed amendment dealing with submission of the question of electing a charter revision commission specifically provides that "a commission be chosen to *amend or revise* the charter . . ." It is believed that it should be such a revision commission's prerogative to decide whether its proposed amendments are substantial enough to constitute a complete revision.

10. There is no present constitutional provision for repeal of a charter. Charter repeals that have occurred have been based on a 1933 Supreme Court decision²⁵ which held that a charter municipality may abolish its charter by initiative procedures. In upholding resort to the initiative to achieve charter repeal, the Court, in effect, held that a charter is a matter which a municipality may control by legislative action. This interpretation is considered faulty by some legal authorities, who believe that the Court's holding might not be followed if challenged today. Therefore, the Commission believes it is best to include specific provisions in the Constitution providing for repeal and specifying its procedures.

11. The Commission has proposed an amendment which would deal with the possibility that a conflict might arise if the question of repeal of

25. *Youngstown v. Craver*, 127 Ohio St. 195, 187 N. E. 715 (1933).

a charter were submitted to the electorate at the same election as a new or revised charter. The proposed amendment provides that in the case of conflicting questions on the same ballot, the question which receives the larger number of affirmative votes above a majority shall prevail.

12. Because the Commission believes stability is an important principle of municipal government, it has included in its proposed provisions for repeal the prohibition against placement of a repeal question on the ballot any time after a revision commission has been chosen or before submission of a new or revised charter by the commission, or two years following adoption of a charter of a new or revised charter. This not only insures an element of stability in governance, but also allows a period of time in which to prove whether or not a charter, once it has been adopted or revised, meets the needs of the community.

ARTICLE XVIII

Section 13

ARTICLE XIII

Section 6

Present Constitution

Article XVIII

Section 13. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Article XIII

Section 6. The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws; and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.

Commission Recommendation

The Commission recommends the repeal of Section 6 of Article XIII and the amendment of Section 13 of Article XVIII as follows:

Section ~~13~~ 7. Laws may be passed to limit the power of municipalities to levy taxes AND ASSESSMENTS and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Description of Changes

Section 13 of Article XVIII would be amended to incorporate the only provision of Section 6 of Article XIII not already included in this, or other sections, of Article XVIII—the provision authorizing the General Assembly to pass laws limiting municipal power to levy assessments. Section 13 would be renumbered to provide better order in the sections in Article XVIII, and section 6 of Article XIII would be repealed because all its provisions would then be covered in Article XVIII.

Commission Recommendation

Section 7. Laws may be passed to limit the power of municipalities to levy taxes and assessments and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Repeal

Background of Sections

Article XIII (Corporations) was adopted in 1851 in part to prohibit the legislature from enacting special acts for the government of municipal corporations, a practice that had been greatly abused by the legislature since the Constitution of 1802 was adopted.²⁶ Section 6 authorizes the legislature to pass general laws for the organization of cities and incorporated villages. As noted earlier, in spite of the "general law" requirement, an extensive classification structure of Ohio municipalities was created by the legislature and eventually declared unconstitutional by the state Supreme Court in 1902. Adoption of Article XVIII in 1912 was an attempt to prevent any future efforts at overclassification.

The framers of Article XVIII in 1912 apparently intended to repeal Article XIII, Section 6 because its substance was contained in Article XVIII, Sections 1, 2 and 13.²⁷ The repeal of Article XIII section 6, however, was inadvertently forgotten or overlooked.

26. Farrell, James W. Jr., "Municipal Public Utility Powers," Ohio State Law Journal, Vol. 21 (1960), pg. 391.

27. Constitutional Convention of 1912, *Proceedings and Debates*, pgs. 1434-1435, 1493-1494.

ARTICLE XVIII

Section 4

Present Constitution

Section 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Commission Recommendation

Section 8. Any municipality may acquire, construct, own, lease, and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

Commission Recommendation

The Commission recommends a change in the section number of Section 4 of Article XVIII in order to place the sections in Article XVIII in better order, as follows:

Section 4 8. Any municipality may acquire, construct, own, lease, and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or products of any such utility.

Background of Section

The sections of Article XVIII dealing with utilities (4, 5, 6, 12) were designed by the Constitution's framers to give municipalities utility powers completely independent of the General Assembly so that municipalities could have flexibility in dealing with their individual utility problems and needs.²⁸

Present Section 4 provides municipalities the right to acquire, construct, own, lease or operate a public utility for its residents. The courts have consistently upheld the high degree of independence and powers relating

28. Constitutional Convention of 1912, *Proceedings and Debates*, pg. 1433.

to ownership and operation of public utilities which were granted municipalities under Section 4.²⁹ However, the courts have ruled against complete municipal autonomy in the area of surplus utility revenues and have refused to permit the use of such revenues to pay general municipal expenses. The Supreme Court decided that a charge for a utility which produced an excess over the amount required to cover the cost of the utility service constituted a tax, and taxes are subject to regulation by the General Assembly pursuant to Article XVIII, Section 13 and Article XIII, Section 6 of the Constitution.³⁰

Section 4 also gives municipalities the power to acquire land for utility purposes by condemnation, even though the land is outside the municipality. That power has been upheld in the courts.³¹ Problems have arisen, however, when one municipality attempts to condemn land which is used for a public purpose by another municipality. This produces a conflict between co-equal governmental units with co-equal powers of eminent domain. In *Blue Ash v. Cincinnati*³² the Supreme Court held that the power to condemn granted in Section 4 did not extend to the public lands of another municipality that are maintained as part of that municipality's governmental function, unless such power is expressly authorized by statute or arises by necessary implication.

Section 4's eminent domain powers were further limited by the Ohio Supreme Court in *Britt v. Columbus*,³³ in which the City of Columbus attempted to acquire unincorporated land through eminent domain in order to extend a sewer line and to sell sewer services to the Village of Dublin. The Court decided that the right of eminent domain is not available if the property acquisition is solely for the purpose of supplying customers outside the municipal border. While there is a statutory eminent domain power covering this circumstance, the municipality must make payment in lieu of taxes on such property.

Comment

Several alternatives to the present Section 4 that would alleviate the negative impact of the *Roettinger*, *Blue Ash* and *Britt* decisions were considered by the Commission and its Local Government Committee.

On the issue of surplus utility revenues to be used for general municipal expenses other than utilities, the Commission determined that, while it does not agree with the theory behind *Roettinger* that such revenues constitute a tax, a change in present Section 4 is not necessary, for several reasons.

1. As a practical matter, municipal officials are reluctant to raise utility rates, even when the need is compelling. The political process effectively acts to keep rates from rising to a point where they would create surplus funds. Municipal officers are unlikely to attempt to fund all or a large part of the operation of their municipality from utility rates because of the anticipated adverse reaction of the voters to such a policy.

2. Municipalities have a common law obligation to provide utility products and services at reasonable rates, so rates cannot be excessive or confiscatory.

3. While municipalities are restricted by common law and the effects of the *Roettinger* decision from charging rates in excess of utility operating costs, the accumulation of funds for the reasonable repair and replacement of the utility is allowed.

29. Farrell, James W. Jr., "Municipal Public Utility Powers," Ohio State Law Journal, Vol. 21 (1969), pgs. 390-394.

30. *Cincinnati v. Roettinger*, 105 Ohio St. 145, 137 N. E. 6 (1922).

31. *Toledo v. Link*, 102 Ohio St. 336, 131 N. E. 796 (1921).

32. *Blue Ash v. Cincinnati*, 173 Ohio St. 345, 182 N. E. 2d 557 (1962).

33. *Britt v. Columbus*, 38 Ohio St. 2d 1 (1974).

4. No municipal or civic group has proposed changing present Section 4. The Ohio Municipal League believes that, while the *Roettinger* decision does impose a theoretical restriction on municipalities, even if Section 4 were amended the results would be the same—a municipality would not set utility rates at a level high enough to raise revenues.

With respect to the negative effects of the *Blue Ash* and *Britt* decisions, the Commission concluded that the General Assembly could set out the conditions under which one municipality's utility needs are of higher priority than another's, permitting condemnation of one municipality's property by another. It believes that this would be very difficult to do in the Constitution and is essentially statutory material.

The second eminent domain problem concerns the statutory provision for payment in lieu of taxes by a municipality that acquires utility property from another municipality. While the Municipal League expressed some interest in amending Section 4 to make it clear that the power of condemnation granted in Section 4 extends to the acquisition of property by a municipality solely for utility expansion outside its territory, the Commission determined that municipalities have statutory powers, if not power directly from the Constitution, to take property outside their territory solely for such purpose. The Commission also concluded that the statutory requirement of payment in lieu of taxes could be amended by the General Assembly in order to handle problems relating to those payments and concluded that the General Assembly is the proper forum for making such a decision, which should be viewed from the perspective of all units of government competing for taxes and weighing their various needs.

ARTICLE XVIII

Section 5

Present Constitution

Section 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

Commission Recommendation

The Commission recommends the amendment of Section 5 of Article XVIII, to place the sections in Article XVIII in better order, as follows:

Section 5 9. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum CENT of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 5 of this article as to the submission of the question of choosing a charter commission.

Commission Recommendation

Section 9. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per cent of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 5 of this article as to the submission of the question of choosing a charter commission.

Comment

Section 5, adopted in 1912, provides for a referendum on any ordinance passed by a municipality to acquire, construct, own, lease or operate a public utility. The courts have consistently held that the only ordinance subject to referendum under Section 5 is that ordinance that first begins the process of exercising Section 4 powers, as opposed to subsequent ordinances which are merely continuations of or additions to the first.³⁴

The Commission determined that present Section 5 does not pose any problems for municipalities that need clarification in the Constitution. It also concluded that it is not possible, nor even desirable, to constitutionally define what specific kinds of ordinances are subject to referendum under Section 5. Therefore, the Commission recommends that no change be made in present Section 5, except to change its number, to make an internal change in the reference to existing section 8 in order to be consistent with the proposed changes in section order, and to change "per centum" to "per cent" in accord with Ohio bill drafting rules.

34. *Fostoria v. King*, 154 Ohio St. 213, 94 N. E. 2d 697 (1950).

ARTICLE XVIII

Section 6

Present Constitution

Section 6. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty percent of the total service or product supplied by such utility within the municipality, provided that such fifty percent limitation shall not apply to the sale of water or sewage services.

Commission Recommendation

Section 11. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality, provided that such fifty per cent limitation shall not apply to the sale of water, sewage, transportation, or solid waste management services.

Commission Recommendation

The Commission recommends the amendment of Section 6 of Article XVIII as follows:

Section 6 11. Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty ~~percent~~ PER CENT of the total service or product supplied by such utility within the municipality, provided that such fifty per cent limitation shall not apply to the sale of water, ~~or~~ sewage, TRANSPORTATION, OR SOLID WASTE MANAGEMENT services.

Description of Changes and Comment

Section 6 limits the amount of utility products or services that a municipality may sell outside its borders to 50% of the total service or product supplied by the utility within the municipality. An exemption to the 50% limit for water and sewage services was added to the constitution in 1959.

The Commission recommends the addition of transportation and solid waste management to the list of exemptions. This recommendation is based on the growing realization that the problems arising in these service areas cannot be solved adequately on the level of a single municipality. The large outlays needed, in terms of planning and operating costs, facilities and equipment, to begin or improve existing mass transit systems and solid waste management systems necessitates large scale operations in

order to benefit from economies of scale. Moreover, these two types of services are matters of areawide concern. Coordinated and efficient service, which will adequately meet the needs of citizens and the requirements of the state and federal governments, can probably be provided only on a relatively large scale. It is the Commission's intention that inclusion in proposed Section 6 of the term "solid waste management" would cover establishment of resource recovery plants for recycling or reuse of solid waste materials. Such plants need large areas, very often entire metropolitan areas, from which to collect in order to be economically viable.

The complete repeal of the 50% limitation on utility products or services sold by a municipality outside its borders was considered. The only major municipal utilities to which the 50% restriction now applies are the municipal electric utilities and the few municipally-owned gas companies.

The 50% restriction was originally placed in the Constitution at the urging of the private electric utilities in order to overcome some of the competition they were facing from rural electric co-ops. The framers of the section realized that economically, a municipality had to build in a surplus electric capacity when it erected its generating facility in order to be able to meet future electrical needs of its residents without expansion. They also knew that this surplus electricity could be sold outside the municipality in competition with private utility companies which did not enjoy the tax exemptions of municipal utilities. Therefore, the framers agreed upon the 50% limitation on municipal utility products or services sold outside a municipality in order to balance the economic needs of both private and municipal utility owners. The Constitutional Revision Commission concluded that the 50% restriction should be retained for municipally owned electric and gas utilities. The basic reasoning of the Commission is that there should be no limitation when the utility product or service is almost always supplied by the public sector; when there is competition between the private and public utilities, however, the Commission believes that the 50% limitation is a fair and equitable solution to the competing interests.

ARTICLE XVIII

Section 10

Present Constitution

Section 10. A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

Commission Recommendation

The Commission has no recommendation with respect to Section 10 of Article XVIII. Several changes were proposed, including repeal of the section, but none secured the necessary $\frac{2}{3}$ Commission vote.

History and Background of Section

Section 10 provides that municipalities, when appropriating or otherwise acquiring property for public use, may, in furtherance of such public use, acquire property in excess of that actually to be occupied by the

Commission Recommendation

No recommendation

improvement and to sell such excess. It also permits them to borrow money and issue revenue bonds to buy the excess property.

Although the present Section is not clearly worded to produce such an effect, one of the purposes of the framers of Section 10 in 1912 was to allow municipalities making improvements to acquire, either by purchase or condemnation, more property than needed for the improvements and then to sell the excess property, which would have increased in value because of the improvements, in order to offset a substantial portion of the cost of improvements.

The courts, however, have ruled that under the 14th Amendment to the United States Constitution, municipalities could not use the excess condemnation provisions of Section 10 unless the municipality, in its ordinance, clearly specified a valid purpose, other than raising revenue or paying part of the cost of the improvement, for the taking, as well as showing its necessity. (*Cincinnati v. Vester*, 33F. 2d 242, 1929 (aff. 281 U. S. 439) ; and *East Cleveland v. Nau*, 124 Ohio St. 433, 1931). The interpretation of Section 10 in the *Cincinnati* and *East Cleveland* decisions, in effect, limits municipalities to eminent domain powers they already possess, and negates the original intention of the section's framers.

Section 10 has been cited by the Ohio Supreme Court as support for the authority to acquire property by eminent domain for urban renewal purposes (*State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 1955).

ARTICLE XVIII

Section 11

Present Constitution

Section 11. Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefited, shall in no case be levied for more than fifty per centum of the cost of such appropriation.

Commission Recommendation

The Commission recommends a change in the section number in Section 11 of Article XVIII, in order to place the sections in Article XVIII in better order, but no substantive changes. The proposed amendment is as follows:

Section 11 13. Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all abutting, adjacent, and other property in the district benefited, shall in no case be levied for more than fifty per ~~centum~~ CENT of the cost of such appropriation.

Comment

Section 11, which was adopted with the rest of Article XVIII in 1912, permits the assessment of benefited property to provide money, in part, for public improvement appropriation. A limitation on the amount of such assessments is fixed at 50% of the cost of the appropriation. The limit is similarly provided for by statute in Section 727.08 of the Revised Code.

The Commission has not discovered nor been advised of any problems with Section 11 that necessitate constitutional change, and therefore recommends no change in Section 11, except in the number.

ARTICLE XVIII

Section 12

Present Constitution

Section 12. Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Commission Recommendation

Section 12. Any municipality which acquires, constructs, improves, or extends any public utility and desires to raise money for such purposes, or to refund or provide for refunding at any subsequent date any bonds or notes, including general obligation bonds or notes, issued at any time for such purposes, may issue bonds and notes in anticipation of bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such bonds and notes issued beyond the general limit of bonded indebtedness be secured only upon the revenues of such public utility, and may be further secured by a mortgage upon all or part of the property of such public utility which mortgage may provide for a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Commission Recommendation

The Commission recommends the amendment of Section 12 of Article XVIII as follows:

Section 12. Any municipality which acquires, constructs, IMPROVES, or extends any public utility and desires to raise money for such purposes, OR TO REFUND OR PROVIDE FOR REFUNDING AT ANY SUBSEQUENT DATE ANY BONDS OR NOTES, INCLUDING GENERAL OBLIGATION BONDS OR NOTES, ISSUED AT ANY TIME FOR SUCH PURPOSES, may issue ~~mortgage~~ bonds AND NOTES IN ANTICIPATION OF BONDS therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such ~~mortgage~~ bonds AND NOTES issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such public utility, AND MAY BE FURTHER SECURED BY A MORTGAGE UPON ALL OR PART OF THE PROPERTY OF SUCH PUBLIC UTILITY WHICH MORTGAGE MAY PROVIDE FOR ~~including~~ a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure.

Description of Changes and Comment

Section 12 permits municipalities to issue revenue bonds, which are not general obligation debt of municipalities, to purchase, construct, or extend a utility. These bonds require a mortgage on the utility property and the grant of a franchise upon foreclosure to the bondholder.

The Supreme Court, in *City of Middletown v. City Commissioners*,³⁵ ruled that Section 12 is self-executing and self sufficient, and that utility mortgage revenue bonds issued strictly within its terms are not affected by other parts of the Constitution or by the Uniform Bond Act.

The proposed amendments to Section 12 include four specific changes:

1. It specifically permits the issuance of bonds to improve the utility. Although municipalities presently possess this power, addition of the word "improve" to "any municipality which acquires, constructs, *improves* or extends any public utility . . ." makes it clear that bonds can be issued for that purpose, and eliminates any possible inference to the contrary.

2. It permits the issuance of notes in anticipation of bonds. This change would allow for temporary financing, especially during the period of construction, until final costs could be determined in order to issue bonds.

³⁵. *City of Middletown v. City Commissioners*, 133 Ohio St. 596, 37 N. E. 2d 609 (1941).

This procedure is the same as in general obligation financing, and in certain other kinds of revenue bond financing.

3. It removes the designation of the bonds as "mortgage" bonds and makes optional the provision of a mortgage on the property or for a mortgage and a franchise to operate as security. Many municipal officials, as well as many bond underwriters and investment bankers, believe that a mortgage on the utility is unneeded in many cases and that no municipality would default and allow a bondholder to take over a utility except as a last resort in an economic depression. Furthermore, officials believe bond purchasers are primarily interested in the revenue anticipated by the operation of the utility, not in the mortgage or franchise. However, if a municipality and its bond underwriters, bankers, and financial advisors believe that the security of a mortgage, with or without a franchise, is needed, the proposed amendment permits this.

4. It allows refunding of notes or bonds, including those of general obligation, by revenue bonds. Section 12 now provides that revenue bonds can be issued only for the purposes of acquiring, constructing or extending a utility, so that if general obligation bonds have already been issued, the utility has already been acquired, constructed or extended. Therefore, under the present section, it is not clear that revenue bonds could be used simply to refund the general obligation debt. The proposed amendment also would permit either immediate refunding, refunding outstanding obligations at their maturity, or advance refunding.

The Commission determined that municipalities need more flexibility and the changes proposed are intended to make local decision making in the area of utility financing more flexible in that financing arrangements could be tailored by the municipality, with advice from underwriters, investment bankers and financial advisors, to fit particular needs and requirements.

ARTICLE XVIII

Section 14

Present Constitution

Section 14. All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total vote cast at the last preceding general municipal election.

Commission Recommendation

No change

Commission Recommendation

The Commission recommends no change in Section 14 of Article XVIII.

Comment

Section 14, which was part of the original Article XVIII adopted in 1912, requires that the election authorities created pursuant to general law must conduct all elections and submissions of questions authorized in Article XVIII. It also requires that the percentage of signatures needed be based upon the total vote in the last general municipal election.

The Commission is not aware of any constitutional problems with present Section 14 and, therefore, recommends that no change be made in it.

MINORITY REPORT

TO: The Constitutional Revision Commission
Columbus, Ohio

I respectfully submit this Minority Report explaining the reason for my negative vote with respect to the Commission's recommendation for revising Section 3 of Article X of the Constitution relating to the adoption of county charters. I submit this report with reluctance since I have the highest regard for those many thoughtful members of the Commission and the Local Government Committee with whom I happen to disagree on this issue—but since I feel this recommendation is one of the most significant ones the Commission has yet presented, I feel an obligation to present my divergent views.

COUNTY CHARTERS

The recommended amendment to this Section would permit a simple majority of the population of any county in the state to adopt an all-powerful charter for the government of the entire county which, by its terms, could wipe out every vestige of local government theretofore existing within that county. Such a charter, if adopted, could obliterate every municipality and every township within the limits of the county and provide for the take-over by the county of all of the property and governmental rights and authority of those units of government without requiring the independent consent of their people. More alarming, if this amendment should be adopted, a county charter could be adopted which would obliterate only *some* of the existing municipalities and townships—permitting a simple majority of the county voters to “pick and choose” which municipalities and which townships should be obliterated. This would indeed represent a drastic change in Ohio's philosophy toward local government.

Since 1912, Ohio municipalities have enjoyed the benefits of “home rule” granted to them by the people under Sections 3 and 7 of Article XVIII. Municipal government flourished in Ohio under “home rule” and when some twenty years later the voters adopted Section 3 of Article X to permit counties to adopt “home rule” charters, the “four majorities” requirement was included to insure that any “take-over” of powers from municipalities and townships would be accompanied by a representative vote of those adversely affected by the change.

As the Commission's Report indicates, as recently as eighteen years ago Section 3 was substantially amended by the people of Ohio and they saw fit at that time to retain the “four majorities” condition. So far as I am aware, neither the report of the Local Government Committee nor any testimony presented before the Commission presented any overwhelming need to facilitate the elimination of “home rule” municipalities or townships. I happen to believe that bigger government does not mean better government and that rather than make it easy to take away the opportunity for “home rule” government within counties, I think this opportunity should be carefully protected and indeed expanded.

Since the voters in 1957 approved substantial revisions in this section and still felt it desirable to retain multiple majorities in the case of a “strong charter”, I think a very strong showing of need should be required before these constitutional protections, so recently reimposed, are stricken. I am not persuaded that such a case has been presented.

Any consideration of Section 3 should include an understanding that a wide range of changes and benefits can be accomplished through the adoption of a so-called "weak county charter". Through such a charter "home rule" and ordinance-making powers can be bestowed and the form and structure of county government can be altered. In addition, such a charter can specify which county officers are to be elected and the manner of their election. It can provide all of the benefits of an "alternate form of government" and much more. In fact, the only prohibited provision in a so-called "weak charter" is one which permits the county to invade or take over the authority of municipal or township governments.

The Commission Report bases this recommendation, in part, on the premise that the multiple majority requirement "permits the citizens of one or a few political subdivisions to veto a charter which is adopted by a majority of all the people voting on it in the county" and that "this situation effectively constitutes minority rule". This statement considerably oversimplifies the issues involved. First of all, the ability of the citizens of political subdivisions to veto a charter is possible *only* when that charter usurps the powers of existing units of local government. Secondly, it gives no recognition to the concept that people living in municipalities which have had the constitutional grant of "home rule" powers since 1912 are entitled to exercise some voice in their own destiny, separate from a majority of the voters in the county. I believe the proposition is more aptly stated as follows: Is it "right" to permit a simple majority of the voters to take away long-standing rights of a minority?

Another reason given in the accompanying report for the elimination of the multiple majorities is the fear that this condition might at some time be stricken down by the courts on a theory extending the "one man, one vote" principle. I do not share that fear since I do not believe the Equal Protection Clause of the United States Constitution will ever be stretched to prohibit the people of "home rule" municipalities from "consenting" in some reasonable manner to the transfer of their power of self-government to some higher level of government. The recent New York case cited in the report (*Citizens for Community Action at the Local Level, Inc. v Ghezzi*, 43 LW 2246, November 22, 1974)¹ is of interest but from the facts cited in that opinion, the case certainly does not seem to stand for the proposition that multiple majorities are not permissible where municipal or township powers are being taken away by a county charter. In fact, Judge Timbers in that case specifically relies upon the test enunciated in a 1971 opinion of the United States Supreme Court in *Gordon et al. vs. Lance et al.*, 403 U. S. 1, wherein Chief Justice Burger said: "The defect this Court found in those (earlier) cases lay in the denial or dilution of voting power because of group characteristics — geographic location and property ownership — that bore no valid relation to the interest of those groups in the subject matter of the election . . ." (Emphasis added). I cannot imagine any more "valid relation" than the interest of the citizens of municipalities and townships in a proposed charter that would eliminate, or usurp the powers of, their units of local government. Be that as it may, I believe that drastic amendments to the Ohio Constitution should be based on a more solid need than speculation that the United States Supreme Court might, at some future time, extend the "one man, one vote" rule into the area of adopting "strong charters" in Ohio.

Although I oppose the Commission's recommendation as presented, I do not oppose some thoughtful change in the multiple majorities provision. I believe a meaningful accommodation can be made which will permit more flexibility in the charter adoption process yet permit the people in smaller units of government to retain some right to determine whether their powers of self-determination should be ceded to the county. I would urge the General Assembly to consider this approach.

TOWNSHIP GOVERNMENT

I am also troubled by the fact that the Commission has not seen fit to recommend any constitutional solution to the plight of urban townships — and in fact as the report indicates, takes the position that township problems should be solved by the legislature, not by the Constitution. I strongly disagree. Urban townships in Ohio are experiencing rapid growth, yet are required to operate under a form of government which does not provide the necessary tools to solve the problems of the people. Townships remain today as they have always been — creatures whose powers are controlled solely by the General Assembly. This is perhaps appropriate in the case of rural townships where the population density is low and where the governmental problem-solving needs are more limited. Hundreds of thousands of Ohioans, however, live in so-called “urban” townships and their need for an effective local governmental structure is just as important as the need of those Ohioans who happen to live in nearby incorporated areas. I do not believe the needs of these people should be ignored by the Commission.

In Hamilton County alone, more than a quarter of a million people live in our 12 unincorporated townships. This represents nearly 30% of the population of the entire county and nearly 3% of the population of the State of Ohio. Eight of these twelve townships have a population in excess of 5,000 people; six of the twelve have a population in excess of 25,000 people; and one of them has a population in excess of 50,000 people — and yet the three trustees of each of these densely populated townships must continue to operate, as they have always operated, with the same tools of government available to the smallest, least complicated and most rural township in the State.

Critics of any effort to enhance township powers or to grant “home rule” to townships often suggest that the solution to the plight of urban township is annexation to an existing municipality or incorporation as a new municipality. Neither of these alternatives offers a solution. Annexation is not a viable proposition for townships since municipalities are justifiably interested in absorbing only those portions of unincorporated townships that have a tax duplicate or wage-earning population which will benefit the municipality or, at the least, be self-supporting — and annexing only the “wealthy” part of a township leaves those citizens who happen to live in the balance of the township with the same “non-government” they have always had.

Furthermore, township residents have the same desire for local government identity as do those citizens who choose to live in cities and villages — and forcing them to annex to an adjoining municipality in order to gain effective tools of government is not, in my view, a worthy objective. In any event, it is clear that annexation has not thus far proved to be a viable solution to township problems in Hamilton County, at least.

The incorporation statutes impose two hurdles which are insurmountable for all practical purposes. First of all, the law requires that for a township to be incorporated, a majority of all of the adult free-holders residing in the township must sign an incorporation petition. This means that the ownership of every parcel of land in the township must be determined and that the signatures of the specific owners of at least a majority of all those parcels must be obtained. In Anderson Township (Hamilton County) there are more than 28,000 residents. Assuming four family members to a household, and that most homes are owned by the husband and wife jointly, it would appear likely that in order to incorporate the township, the signatures of at least 5,000 or 6,000 individual land-owners would have to be obtained. This is an impossible task and the burden increases in proportion to the population of the township. The second in-

surmountable hurdle is the so-called "three mile limit" provision of the Ohio statutes which conditions any new incorporation upon securing the affirmative consent of all existing municipalities lying within three miles of any portion of the township. In order to incorporate Anderson Township, the consent of *nine* separate municipalities would have to be obtained. If Sycamore Township in Hamilton County should seek to incorporate, it would have to secure the consent of *nineteen* separate municipalities lying within three miles of its borders. The incorporation of six of the other townships in Hamilton County would require the following number of municipality consents: Springfield, seventeen; Columbia, fifteen; Symmes and Colerain, eight each; Whitewater and Miami, four each. Although I have not had the opportunity to extend this survey beyond the limits of Hamilton County, I trust that a similar problem exists in other counties of the state and that the future will only intensify the problems of townships as their populations grow.

I have advocated to the Local Government Committee of the Commission that either of two constitutional alternatives should be proposed. The first would be a provision permitting urban townships to have the "local option" through a vote of their electorate to assume "home rule" powers which, however, would yield in the event of a conflict with state law or with any powers exercised by the county or any municipality lying within the township boundaries. The alternative proposal would be a provision permitting an entire urban township to incorporate as a "home rule" municipality upon the favorable vote of the electorate of the township — thus, eliminating the adult free-holder petition and the "three mile limit" conditions when an entire township seeks to incorporate.

Up to this time, at least, the Commission has not seen fit to recommend either of these alternatives — nor in fact to recommend any remedy for township problems. If the full Commission should in the future decide to propose some constitutional assistance for urban township government, I trust a separate recommendation and report will be forwarded to the General Assembly. In the meantime, I urge that the General Assembly favorably consider implementing these or other proposals in order to provide effective tools of self-government to Ohio's urban townships.

Respectfully submitted,
NOLAN W. CARSON
Commission Member

1. 36 F. Supp. 1, February 26, 1975.

COMMENTS ON MINORITY REPORT

County Charters

It would indeed be a sad commentary on the work of the Commission if some of its proposals were not so substantive as to produce disagreement. The fundamental nature of the proposal to amend Section 3 of Article X did indeed result in four negative votes out of a total of 31, and a respected member of the Commission, Mr. Nolan Carson, has submitted his views to you in the form of a minority report.

The proposed change in Section 3 of Article X is an extension of the basic philosophy adopted by the Local Government Committee at the beginning of its work, and is fully endorsed by the Commission. The Commission reached the conclusion that the people of Ohio are not yet ready for a regional form of government which would add a new layer of local government. They believe that an existing unit, the county, should be the vehicle for providing those services which cannot effectively or economically be provided on a smaller scale. To that end, the Commission, throughout its proposals for Article X, has endorsed the strengthening of the county. It seeks to provide the counties of Ohio with those tools which the people living within them wish them to have.

It is Mr. Carson's contention that:

The recommended amendment to this Section would permit a simple majority of the population of any county in the state to adopt an all-powerful charter for the government of the entire county which, by its terms, could wipe out every vestige of local government theretofore existing within that county. Such a charter, if adopted, could obliterate every municipality and every township within the limits of the county and provide for the take-over by the county of all of the property and governmental rights and authority of those units of government without requiring the independent consent of their people. More alarming, if this amendment should be adopted, a county charter could be adopted which would obliterate only *some* of the existing municipalities and townships — permitting a simple majority of the county voters to "pick and choose" which municipalities and which townships should be obliterated.

While this is true, it may be said that it is true only in so far as it goes. In the present Constitution, and in the Commission's proposal, this section provides that the people within a county may adopt any kind of charter they desire for their county. They may choose to adopt NONE, or a very limited one, or a very far-reaching one, or one anywhere along the continuum.

Mr. Carson goes on to say that this proposal "would indeed represent a drastic change in Ohio's philosophy toward local government." The proposal, as is seen from the comparative drafts presented in the report, adds no new words — it only deletes. Thus it not only does not represent a drastic change from the powers presently possible under a county charter, it represents no change in them at all. What is changed, of course, is the vote necessary to adopt a type of charter already permitted and foreseen by the people when they adopted this section in 1933. Presently, adoption of a charter which would permit a county to exercise municipal powers exclusively in the county or take over municipal or township property

or obligations without consent of the legislative authority of such municipality or township, calls for either a three-way or four-way majority.

They are as follows:

1. A majority in the county as a whole.
2. A majority in the largest municipality within the county.
3. A majority in the area outside of the largest municipality.
4. In counties with a population of 500,000 or less, a majority in each of a majority of the combined total of municipalities and townships in the county.

It is the Commission's proposal that the same vote, that is, a majority throughout the county, be used for adoption of any kind of charter that the people within that county desire. It is not an abrogation of local government but an exercise of the prerogatives of local government. It is a choice by the vote of the people as to how much home rule they wish to have retained in the local units and how much they feel a need to delegate to their county — presumably in the belief that the county can provide better management of those municipal functions delegated to it.

Mr. Carson objects that a charter could "provide for the take-over by the county of all governmental rights and authority of those units of government without requiring the independent consent of their people." However, the Constitution presently does not require the independent vote or consent of the people of a particular unit of government affected, except in the one largest city in the county.

It is frequently painful for the minority when the majority prevails. By definition, the minority has not gotten what it wants or believes in, and feels that its rights have not been protected. This is not, obviously, a problem restricted to the administration of local government in Ohio. It has been hammered out for 200 years in our country, beginning with the federal Constitution.

It seemed clear to the full Commission when it voted on this subject, that the wishes of a minority should not be permitted to prevail when the majority of the people in a county felt that the charter they had voted to adopt was necessary for the benefit of the county as a whole. If the people of a county wish to make that decision there really are no "governmental rights" of any unit of government in the county that should be superior to the right of the people to decide how they wish to exercise their home rule powers for local affairs.

In the view of the Commission the voice of each person in a unit has the same weight; his rights are not affected by his address. His vote should not be counted as two votes or even three votes because of that address. He is a single unit within a "unity" which is made up of all the other single units *equally*.

Township Government

Although the Commission has no recommendation with respect to townships other than urging thorough legislative study of the problems of the residents of at least the more heavily populated townships, I believe that it is not correct to say that the Commission has ignored the needs of these people.

The Local Government Committee spent many hours discussing township government, the relationship of township government to the Constitution, the governing statutes, and various proposals for constitutional (and, incidentally, statutory) change. The committee met with township representatives, who presented their points of view—as individual township officers, as well as of the official organization of township trustees and clerks. After reviewing all the proposals, and considering the problems of township government as part of the whole picture of local government in Ohio, the committee made a recommendation to the Commission for granting urban townships limited “home rule” powers on a local option basis, providing annexation and incorporation were tried first and could not be accomplished because of rejection by those outside the township. The Commission then discussed this proposal, and held a public hearing at which both municipal and township spokesmen rejected it; it was then withdrawn from further Commission consideration since it seemed to have no support from any quarters—even from Commission members themselves.

The Local Government Committee then, at Mr. Carson’s request reopened the township question and once again discussed it, with specific consideration given to the two proposals he has outlined in his minority report. There was, however, no support in the committee for either of these proposals.

Mr. Carson has expressed very well the problems with the present statutes, those relating to annexation as well as those relating to incorporation. The committee and the Commission have both expressed the opinion that the legislature has established policy with respect to townships by its enactment of these statutes—policy about the status of townships as well as specific procedures for annexation and incorporation. The difficulties outlined by Mr. Carson are entirely within the scope of legislative review and correction; should the legislature determine, after study of the issues, that public policy about annexation and incorporation should be altered, there are no constitutional barriers to such alteration. There was no evidence that those who represent township interests before the General Assembly have made serious efforts to have the legislature alter these policies, and it seemed most appropriate to the committee to recommend that that approach be taken before serious consideration is given to altering them by constitutional mandate.

Linda U. Orfirer
Chairman, Local
Government Committee

APPENDIX A

One question raised in the aftermath of the adoption of Article XVIII, which culminated in the *Leavers v. Canton*¹ case cited in the text, was whether Section 3 confers the powers of local self-government on *all* municipalities. The existence of the separate section permitting charters, (Section 7) raised the question whether the powers of Section 3 are self-executing or come into play only when a charter is adopted. An early case, *State ex rel. Toledo v. Lynch*,² held that a charter is a prerequisite to the exercise of the home rule powers under Section 3. In *Perrysburg v. Ridgeway*,³ however, the Supreme Court overruled *Lynch* and held that all municipalities derive their powers of local self-government from the Constitution and that the grant of powers in Section 3 is self-executing, not dependent on adoption of a charter.

From 1923 to 1953, the court reiterated the *Perrysburg* doctrine time and again, but also developed two devices to evade some of the impact of the doctrine: the concept of "statewide concern," and an extremely broad interpretation of the meaning of police regulations. In *Morris v. Roseman*,⁴ however, the Court, while specifically reaffirming *Perrysburg*, held that the procedures used in governing a noncharter municipality (specifically those relating to the passage of zoning legislation) were controlled by statute through Article XVIII, Section 2, although the noncharter municipality's substantive powers exercised through those procedures were derived directly from Section 3 and were, therefore, not subject to statutory control.

The *Morris* decision brought up the question of the difference between procedural and substantive powers, but did not give an adequate answer.

The impact of *Morris* on noncharter municipalities has been analyzed as follows:

"Even though *Morris* made no attempt to explain how its conclusion was reached, the implication of the decision seemed clear. Since *Perrysburg* was specifically reaffirmed; since both the opinion and the syllabus of *Morris* are specifically confined to the "procedure" or "method" of enacting legislation; and since it held that the "statutes in no way inhibit" home-rule powers granted by section 3; than a non-charter municipality must still derive its *substantive* powers directly from section 3. A statute, which is based on the general powers of the state, and which interfered with home-rule powers would still be void.

The problem of *Lynch*, *Perrysburg* and *Morris* is an essentially political one—should safeguards against abuse of power by local officials be a responsibility of the municipalities' electorate or the General Assembly? The decision in *Morris* appears to leave the court without a clear answer to that problem and creates a new one where its only yardstick is "procedural v. substantive." That distinction is an even more elusive one than the distinction between "proprietary" and "governmental" activities in the fields of municipal tort and tax liability.⁵

In 1960, the decision in *Petit v. Wagner*,⁶ eroded the *Perrysburg* doctrine. In *Petit*, the court held that noncharter municipalities may exercise their powers of local self-government only in a manner not at variance

1. *Leavers v. City of Canton*, 1 Ohio St. 2d 33, 203 N.E. 2d 354 (1964).

2. *State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 102 N.E. 670 (1913).

3. *Perrysburg v. Ridgeway*, 108 Ohio St. 245, 140 N.E. 595 (1923).

4. *Morris v. Roseman*, 162 Ohio St. 447, 123 N.E. 2d 419 (1954).

5. Duffy, John J., "Non Charter Municipalities: Local Self-Government," Ohio State Law Journal, Vol. 21 (1960) pg. 319.

6. *Petit v. Wagner*, 170 Ohio St. 297, 164 N.E. 2d 574 (1960).

with the statutory law.⁷ In *Leavers v. Canton*,⁸ which reinforced *Petit*, the Court's view of Section 3 as it applies to charter and non-charter municipalities was as stated in the text.

Recent cases relate the powers of local self-government to issues primarily of municipal concern. In the most recent of these cases, *Village of Willoughby Hills v. Corrigan*,⁹ the Court upheld the validity of airport zoning regulations applicable to territory within a charter municipality enacted by an airport zoning board pursuant to statutory authority. This decision reaffirms the principle adopted earlier by the court in *Cleveland Electric Illuminating Company v. City of Painesville*,¹⁰ striking down an ordinance requiring electrical transmission lines traversing, but not serving, the city to be placed underground, while the applicable statutes permitted overhead installation, and *City of Beachwood v. Board of Elections*,¹¹ holding invalid an ordinance providing for a method of detachment of territory from the municipality which differed from the statutory procedure.

7. Gotherman John E., "Municipal Home Rule in Ohio Since 1960," Ohio State Law Journal, Vol. 33 (1972) pg. 596.

8. *Op. cit.*

9. 29 Ohio St. 2d 89 (1972).

10. 15 Ohio St. 2d 125 (1968).

11. 167 Ohio St. 379 (1958).

APPENDIX B

Section 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it ~~shall have~~ HAS been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

A NONCHARTER MUNICIPALITY MAY VARY FROM THE GENERAL LAWS FOR THE GOVERNMENT OF THE MUNICIPALITY, BUT NO SUCH VARIANCE SHALL BECOME OPERATIVE IN THE MUNICIPALITY UNTIL IT HAS BEEN SUBMITTED TO THE ELECTORS THEREOF, AND AFFIRMED BY A MAJORITY OF THOSE VOTING THEREON.

Section 3. NONCHARTER 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. THE EXERCISE OF ANY POWER OF LOCAL SELF-GOVERNMENT, OTHER THAN LOCAL POLICE, SANITARY AND OTHER SIMILAR REGULATIONS, WHICH VARIES FROM GENERAL LAWS SHALL NOT BECOME OPERATIVE IN A NONCHARTER MUNICIPALITY UNTIL IT HAS BEEN SUBMITTED TO THE ELECTORS THEREOF, AND AFFIRMED BY A MAJORITY OF THOSE VOTING THEREON.

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. SUCH A MUNICIPALITY MAY ADOPT AND ENFORCE WITHIN ITS LIMITS SUCH LOCAL POLICE, SANITARY AND OTHER SIMILAR REGULATIONS AS ARE NOT IN CONFLICT WITH GENERAL LAWS.