STATE OF OHIO

OHIO CONSTITUTIONAL REVISION COMMISSION

Recommendations for Amendments to the Ohio Constitution

PART 8

LOCAL GOVERNMENT

March 15, 1975
Ohio Constitutional Revision Commission
41 South High Street
Columbus, Ohio 43215

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Ann M. Eriksson, *Director*

April 1, 1975

To: The General Assembly of the State of Ohio

The Constitutional Revision Commission is pleased to present to you this final report, Part 8 of the Commission's report to the General Assembly, on two very important Articles in the Ohio Constitution - Article X, County Government, and Article XVIII, Municipal Corporations.

Our Local Government Committee and the Commission labored long and hard over these two Articles, and the recommendations in this Report represent some of the most important that the Commission will be making to you. We hope that you will give them most careful consideration, and offer as many as you believe worthy to the voters of Ohio as soon as possible.

Very truly yours,

Richard H. Carter

Richard H. Carter
Chairman

RHC/ba

TABLE OF CONTENTS

The 108th General Assembly (1969-70) created the Ohio Constitutional Revision Commission and charged it with these specific duties, as set forth in Section 103.52 of the Revised Code:

A. Studying the Constitution of Ohio;
B. Promoting an exchange of experiences and suggestions respecting desired changes in the Constitution;
C. Considering the problems pertaining to the amendment of the Constitution;
D. Making recommendations from time to time to the General Assembly for the amendment of the Constitution.

The Commission is composed of 32 members, 12 of whom are members of the General Assembly selected (three each) by the Speaker of the House of Representatives, the Minority Leader of the House of Representatives, the President Pro Tem of the Senate, and the Minority Leader of the Senate. The General Assembly members select 20 members from the general public.

Part 1 of the Commission's recommendations was presented to the General Assembly December 31, 1971. That report dealt with the organization, administration, and procedures of the General Assembly, and included recommendations for improving the legislative process, having the Governor and Lieutenant Governor elected as a team, and repealing obsolete sections of the Constitution. The recommendations in that report were the result of study by a committee appointed to study the Legislative and Executive branches of government, chaired by Mr. John A. Skipton of Findlay.

Part 2 of the Commission's recommendations was presented to the General Assembly as of December 31, 1972 and dealt with State Debt. Included were recommendations respecting all sections in Article VIII and one section in Article XII. These recommendations resulted from the work of the Finance and Taxation Committee, chaired by Mr. Nolan W. Carson of Cincinnati.

Part 3 of the Commission's recommendations dealt with aspects of the constitutional amendment process and affected only one section of the Constitution—Section 1 of Article XVI. It resulted from the work of the committee appointed to study Elections and Suffrage, chaired by Mrs. Katie Sowie, of Athens, and was presented to the General Assembly December 31, 1973.

Part 4 was presented to the General Assembly in November of 1974 and covers Article XII, Taxation. Mr. Nolan Carson, of Cincinnati, was chairman of the Commission's Finance and Taxation Committee whose study resulted in the recommendations contained in that report.

Part 5 dealt with the indirect debt limit, Section 11 of Article XII. It resulted from studies of the Finance and Taxation Committee, Mr. Nolan Carson, Chairman, and the Local Government Committee, Mrs. Linda Orfirer, Chairman.

Part 6 of the Commission's report covers the Executive Branch—Article III and several sections of Article XV. It resulted from the study of the Legislative-Executive Committee, chaired by Mr. John Skipton of Findlay.

Part 7 covers Elections and Suffrage, and contains recommendations relating to Article V, Article XVII, and several sections in Articles II and III. Mrs. Katie Sowle, of Athens and Columbus, chaired the committee that studied these portions of the constitutional provisions and made recommendations to the Commission.

Part 8 covers Local Government. Article X of the Ohio Constitution contains the provisions relating to counties and Article XVIII, those relating to municipal corporations. Although this summary contains only those sections in which changes are recommended, the complete report reviews all sections in both Articles and discusses not only the recommended changes but the background of all the provisions and the reasons for recommending no change in some sections. Mrs. Linda Orfirer of Cleveland chaired the committee. The committee was one of the first created by the Commission and some persons who are currently serving on the committee were not members originally. The complete list of committee members, in addition to Mrs. Orfirer, is as follows: Senator Calabrese, Mr. Carson, Representative Celeste, Mr. Duffey, Representative Fry, Senator Gillmor, Mr. Heminger, Mrs. Hessler, Senator Leedy, Mr. Ostrum, Mr. Pokorny, Mr. Ross, Representative Russo, Mr. Schroeder, Representative Speck, and Mr. Wilson.

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March 15, 1975

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Overview of Local Government

One of the major issues that confronted the Constitutional Revision Commission from its inception was the relationship of local governments in Ohio to each other and to the state. The problems now facing many Ohio counties, municipalities and townships have been growing in magnitude during the last several decades and have raised serious questions in some cases as to the appropriateness of the governmental structures and powers granted to these units by provisions of the Ohio Constitution, some of which were originally adopted more than 170 years ago. The fact that the Constitutional Revision Commission was created indicates that the General Assembly recognizes the need for review and revision of the present Constitution during the 1970s.

The Advisory Commission on Intergovernmental Relations, in a report covering the general question of state constitutional revision throughout the country, stated its position on the need for revision to meet the problems confronting local government:

> "Early in its study, the Commission was confronted with the fact that many State constitutions restrict the scope, effectiveness, and adaptability of State and local action. These self-imposed constitutional limitations make it difficult for many States to perform all of the services their citizens require, and consequently have frequently been the underlying cause of State and municipal pleas for federal assistance. It is significant that the Constitution prepared by the Founding Fathers, with its broad grants of authority and avoidance of legislative detail, has withstood the test of time far better than the constitutions later adopted by the States. . . . The Commission finds a very real and pressing need for the States to improve their constitutions. A number of States recently have taken energetic action to rewrite outmoded charters. In these states this action has been regarded as a first step in the program to achieve the flexibility required to meet the modern needs of their citizens."[1]

The three basic units of local government in Ohio—counties, municipalities and townships—were established with differing structures, powers and functions. The county serves as the basic administrative unit of the state for local government. Municipal corporations—cities and villages—form the administrative and legislative structure of urban areas and provide the bulk of the complex services these areas require. Townships are the local governmental structures for the unincorporated areas, although services, particularly utilities, are infrequently supplied directly by them. The overlap in authority among these three units is considerable and the level of government delivering a particular service varies widely within the state.[2]

In Ohio the number of general purpose units of local government has grown from a total of 2,291 in 1930 to 2,345 in 1970. The slight overall increase in local units is attributable to an increase in the number of cities, from 113 in 1930 to 229 in 1970. The number of villages and townships decreased slightly, from 752 villages to 708, and from 1,338 townships to 1,320, while the number of counties remained constant.[3]

Although the number of general purpose local governments remained fairly stable, there was a proliferation of special purpose units on the local level (school districts excluded). In the 15-year period from 1957 to 1972, the number of units that the U.S. Census Bureau designates as special districts in Ohio increased from 160 to 275.[4] Special districts are usually single-function, autonomous units whose jurisdictions are usually drawn to encompass particular service areas and frequently overlap existing local government boundaries.[5]

Not included by the Census Bureau in its compilation of special districts are various governmental designations that have certain characteristics of governmental units—often including considerable fiscal and administrative independence—but are treated by the Census as subordinate agencies of counties or municipalities. Special purpose units of local government are often created to solve problems or provide services that the counties, municipalities or townships are unable to handle because they lack the necessary powers, jurisdiction or fiscal resources. The Census designation of subordinate agencies includes, on the county level, some transit system districts, garbage and waste disposal districts, general health districts, joint sewer districts, and sewer and water districts. On the municipal level are health districts, joint sewer districts and joint municipal improvement districts.[6] The subordinate agencies further add to the proliferation of special units of local government. Overall, Ohio ranks ninth

1 U.S. Advisory Commission on Intergovernmental Relations, *A Report to the President for Transmittal to the Congress*, Washington, D.C.: U.S. Government Printing Office (1955) pgs. 37-38.

2. Ohio Department of Urban Affairs, *Delivery and Organization of Local Government Services in Ohio*, (Draft, 1971) pgs. 4-5.

3. These figures were taken from *Ohio Population Reports* by the Ohio Secretary of State, 19th Federal Census (1970) and 16th Federal Census (1940).

4. These figures were taken from the *U.S. Census of Goverments 1957* and *1972* by the U.S. Bureau of the Census, Vol. 1 pg. 426 (1972) and Vol. 1 No. 3 pgs. 62-63 (1957).

5. U.S. Advisory Commission on Intergovernmental Relations, *Regional Decision Making: New Strategies for Substate Districts*, Washington D.C.: U.S. Government Printing Office (October 1973) pgs. 20-21.

6. *U.S. Census of Governments 1972, op. cit.*, pg. 427.

among the states in the number of all local government units, with 3,259.[7]

Although the proliferation of special governmental units was, in large measure, a response to demands of metropolitan area residents for particular services or governmental functions, the trend toward an increasing number of special local units has only exacerbated the problems relating to increased urbanization of the state of Ohio. The problem has been described in these terms:

> "As the responsibilities of a local government expand beyond its fixed political boundaries, more and more political entities seem called for, to solve here-a-problem, there-a-problem, whenever the need becomes too obvious or too urgent to ignore. Unfortunately, the bits-and-pieces philosophy of government is totally inadequate at a time in our history when more than 70%—soon to be 80%—of the population of the United States is urban, when more than half of the people in more than half of the states live in metropolitan areas." [8]

Between 1900 and 1970, the percentage of Ohioans living in areas considered by the United States Census Bureau to be urban increased from 48.1% of the residents of the state to 75.3%.[9] Each of the state's 10 largest counties is classified as more than 75% urban, and the six largest are each more than 90% urban.[10] Continued urban growth, not only in Ohio but throughout the nation, is forecast.[11]

With the increasing urbanization of Ohio, an increasing number of areas of concern to local government officials, as well as citizens of these units, have developed, among them: a) the relative rigidity of boundaries of local units which often impedes proper service delivery; b) service areas that do not coincide with political boundaries and are seldom administered by persons directly responsible to the voters; c) the proliferation of special units of government and with this the fragmentation of responsibilities; d) maintenance of adequate services in rural areas; e) decline in property values and loss of tax revenues, especially in older central cities; and f) the impetus from the federal and state governments for increased cooperation among units and for regionalism.

In order to better understand these and other pressing problems facing local government in Ohio, the Constitutional Revision Commission established its Local Government Committee and gave it the responsibility of examining the problems and recommending any constitutional changes that could offer promise for solution.

The Local Government Committee, in studying present Ohio constitutional provisions relating to local government, conducted a seminar in the Fall of 1971 on the constitutional aspects of local government. The seminar, held at The Ohio State University, helped focus on current problems and resulted in the publication of a series of articles on local government in the Ohio State Law Journal.[12]

The committee studied metropolitan problems of a regional nature, such as transportation, law enforcement, pollution and waste disposal, which are not confined to arbitrary geographic or political boundaries, even county boundaries. The committee studied forms of metropolitan or regional governments that have been created elsewhere—particularly the Minneapolis-St. Paul seven-county region in Minnesota, and the often-cited Toronto, Canada experience—and worked extensively on a draft for a constitutional provision that would enable the creation of regional government by the voters. It then held a series of public hearings in Columbus, Cleveland and Cincinnati, at which both public officials and private citizens expressed their views on the problems of local government and on regional government as a means of solving those problems. What emerged from those meetings was a belief that regional government is the government of the future, but that in Ohio it is, indeed, still in the future. It is a concept not yet acceptable to many officials and citizens in Ohio, who variously fear loss of identity or deplore an additional level of government and taxation.

The alternative concept that emerged from the study of regional government was the belief that some local government problems in Ohio could be solved if county government were strengthened—indeed, in all but a few of the metropolitan areas in the state, the county *is* the region within which effective action could be taken to solve problems. The committee then recommended some amendments relating to county government which were considered by the full Commission and constitute the first part of this report.

The general thrust of the Commission's recommendations on county government is to strengthen county government. The Commission agrees with Robert Merriam, Chairman of the Advisory Commission on Intergovernmental Relations, who summarized the current emphasis on strong county government as follows:

"The Critical Need for Strong Counties

"Even if county government had not

7. *U.S. Census of Governments 1972, op. cit.*, pg. 426. This figure includes 88 counties, 936 municipalities, 1320 townships, 640 school districts, and 275 special districts.
8. Hessler, Iola O., *Metropolitan Answers*, Cincinnati: Stephen H. Wilder Foundation (1968) pg. 7.
9. *Ohio Population Report*, 19th Federal Census, *op. cit.*, pg. 201.
10. *Ibid.*, pgs. 8-10.
11. Commission on Population Growth and the American Future, *Population and the American Future*, pgs. 36-37.
12. *Ohio State Law Journal*, Vol. 33 No. 3 (1972).

existed in the Anglo-American structure, it would have to be invented now." Such was the conclusion of the authoritative second report of New Jersey's County and Municipal Government Study Commission. And this must be the conclusion of more and more policy-makers—at all levels of government—who are grappling with the ever increasing need for an effective governmental mechanism below the State level and above the localities.

For those who ponder this areawide need as it relates to counties, let me underscore a few of the more obvious linkages:

—When we seek effective regional answers to urban service problems, we, in effect, are seeking an effective county government in a majority of cases, since more than half of the Nation's standard metropolitan areas still are single-county in scope.

—When we struggle with the imbalances that characterize recent urban growth and especially the agonizing plight of rural areas suffering from outmigration, economic decline, and costly services, we squarely confront the burdensome agenda now troubling hundreds of our rural counties.

—When we see the helter-skelter consumption of valuable land on the urban periphery and the ineffectiveness of most land use controls and zoning, we see, in many instances, a glaring weakness of many county governments.

—When we criticize the proliferation and the frequent lack of accountability of special districts in both urban and rural areas, we, in effect, are criticizing a shackle that limits all too many counties.

—When we come to grips with the areawide implications of the various environmental programs and proposals requiring our urgent attention, we will see a new role for many counties.

—When we weigh the pros and cons of new towns and rural growth centers, we end up assessing the capabilities of the counties affected, since these jurisdictions have a prime role in coping with many of the governmental needs of such communities and centers.

—Finally, when we strive to reconcile bitter differences between the States and many of their larger municipalities, we strive for an effective intermediary force that can help arbitrate these destructive conflicts—hopefully, the counties." [13]

The Constitutional Revision Commission concluded that the existing form of government and powers of counties in Ohio do not adequately equip them to be effective leaders in solving the problems facing local governments. Amendments to the Constitution are needed to assist in the process of strengthening county government's ability to deal with urban problems.

The Commission's proposals for counties would strengthen county government by a) permitting the General Assembly to classify counties, within certain limits, for the purposes of establishing their organization and government; b) grant counties powers of local self-government, subject to certain limitations; c) make county charters easier to adopt; d) clarify ambiguities in the provisions for the operation of county charter commissions and for placing proposed charters on the ballot; and e) clarify the General Assembly's authority to reduce the number of counties, with the consent of the people in the counties.

As for Article XVIII, which deals with municipal corporations, the Commission is recommending that no changes be made in the basic municipal home rule provisions. It is, however, recommending amendments that would a) clarify the General Assembly's authority to enact legislation to change municipal boundaries; b) revise and clarify the procedures for and powers of municipal charter commissions; c) revise the procedures and powers of municipalities concerning the issuance of notes and bonds for utility purposes; and d) exempt transportation and solid waste management services from the 50% limitation on sale of municipal utility products or services outside a municipality. Non-substantive changes the Commission is recommending for the municipal sections include rearrangement of sections, language changes, clarifications and elimination of duplicative provisions.

In its considerations of Article XVIII on municipalities, particularly the home rule sections, the Commission recognized that since its adoption in 1912 there have been many legal battles over interpretations of some provisions of this article. The Commission viewed its basic task not as writing the ideal constitution with ideal solutions to state and local problems, but rather as ascertaining whether solutions to current problems are hindered by the present constitutional language or lack of it. The Commission was also concerned with whether the present language relating to municipalities, as currently interpreted, creates problems because those who must use and understand it are confused or unable to determine a course of action because they do not know what it means. In the final analysis, the Commission determined that although the constitutional language has been interpreted in varying ways, those interpretations are now understood and a body of law has grown up around them. They are not,

13. U.S. Advisory Commission on Intergovernment Relations, "For a More Perfect Union—County Reform," Washington, D.C.: U.S. Government Printing Office (1971) pg. 3.

therefore, presently a barrier to solving pressing problems. The meaning is reasonably fixed today and appears to be satisfactory to officials of both charter and noncharter municipalities.

Other sections of Article XVIII, in addition to the home rule sections, either give municipalities specific powers, such as the utility sections, or contain limitations by reserving certain powers to the General Assembly. Although it might be questioned whether some provisions are necessary, such as the authority for a municipal corporation to acquire utilities, which would probably be considered part of the home rule power of local self-government, most of the sections contain specific limitations or conditions which both the state and the municipalities have come to rely upon over the years, and extensive rewriting or repeal did not seem advisable. Changes have been recommended in the municipal sections to correct particular problems that have arisen since the sections were adopted. The Commission also recommends changing the order of the sections in Article XVIII because the present arrangement does not place all sections dealing with the same subject together or in proper sequence. For some sections dealing with municipalities, the only recommended change is in the number of the section.

On the matter of townships the Commission determined that the only significant problems that exist involve "urban townships" and only about 8% of the total number of townships in the state have populations, in 1970, of 5,000 or over. The problems now facing urban townships are similar in many respects to the problems facing other local units that are trying to deal with the myriad responsibilities and difficulties related to providing public services in metropolitan areas.

Some township officials urged the Commission to recommend constitutional amendments that would allow changes in the present structure of townships, and to recommend provisions that would allow townships to increase their powers and functions to those of home rule municipalities.

The Commission, however, is not recommending any changes in the township provisions. It believes that the General Assembly has ample authority to solve the problems facing urban townships and that there is no evidence of a compelling need to provide constitutionally for solutions or for a new governmental structure.

CHAPTER I

County Government

The county structure of government in the United States is an outgrowth of colonial experiences with British administrative districts of the national government. Following the British pattern, state constitutions were written to provide for the establishment of county government as an administrative arm of the state.[1]

Establishment of counties in Ohio predated statehood. Washington County was formed in 1788 and at the time included almost all of present-day Ohio. Soon after, Hamilton (1790), Knox (1790), and Wayne (1796) counties were created. In 1851 the last of the present 88 counties, Noble County, was formed. The last boundary change occurred in 1888 between Auglaize and Logan counties.[2]

In relation to other states, Ohio's counties are small in land area, averaging 455 square miles, compared to the national average of 600 square miles.[3]

According to the 1970 census, the populations of Ohio's counties range from a high of 1,721,300 in Cuyahoga County to a low of 9,420 in Vinton County. The populations of 19 of the state's counties exceed 100,000, and 31 counties are included in the U.S. Census Bureau classification as standard metropolitan statistical areas. By contrast, in 1960 only 19 Ohio counties were classified as SMSAs.[4]

While the population density average for all Ohio counties is 260 persons per square mile, 10 counties have densities ranging from 518.8 to 3,774.8 persons per square mile.[5]

Taxable resources and economic activities of Ohio counties also vary greatly. The estimated yield per capita on a one mill levy on county real and public utility taxable property varies from a low of $1.72 to a high of $7.01, with the average yield $2.81.[6]

Counties in Ohio, as in nearly all the states, are considered administrative units of state government, authorized by the Constitution to exercise only those powers expressly conferred upon them by the General Assembly, or powers incident to those powers. More than 100 years ago the Ohio Supreme Court in *Hamilton County v. Mighels*,[7] clearly defined the role of counties in Ohio in the following portions of its opinion:

> "Neither a county, nor the board of commissioners of a county, is a corporation proper; it is at most but a legal organization which, for purposes of a civil administration, is invested with a few functions characteristic of a corporate existence. . . .
>
> Counties are legal subdivisions of a State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. . . .
>
> A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." [8]

The structure of county government, created in the earliest days of Ohio's history, has remained essentially the same up to the present time, although the needs of county residents and the demands made both upon the county and by the county government upon its residents no longer bear much resemblance to the forces that originally helped mold the structure of county government. It has long been recognized that the structure of county government as developed during the 19th century is inadequate to meet the needs of modern counties. Forty years ago the problems with county government structure were fully recognized and the Governor's Commission on County Government in its 1934 report, *The Reorganization of County Government in Ohio*, described the county dilemma in these terms:

> "In the judgment of most students of government the present system of county government is basically unsound and ill-adapted

1. Duncombe, Herbert Sidney, *County Government in America*, Washington, D. C.: Arrow Press (1966) pg. 18.
2. Downes, Randolph Chandler, "Evolution of Ohio County Boundaries," Ohio Archaeological and Historical Society Publications Vol. 36 (1927), pgs. 340-477.
3. Ohio Leglislative Service Commission, "Staff Report on County Government," (1970) pg. 3.
4. *Ibid*, pgs. 3-5.
5. *Ohio Population Report*, 19th Federal Census, pg. 205.
6. Legislative Service Commission, *op cit.*, pg. 4.
7. *Hamilton County v. Mighels*, 7 Ohio St. 109 (1857).
8. *Ibid*, pgs. 115-119.

to the performance of the functions entrusted to it. . . . The county has undergone the least change of organization of any major part of the system of local government. It is cut to a pattern designed in pioneer days, the principal features of which have been but little modified in the last century. In fact, the county officers of today are the same as those in 1834, and with one exception they are filled in the same manner. While this pattern was never written into the constitution in detail, as in some states, its chief characteristics were prescribed by provisions of the constitution of 1851." [9]

The inadequacies of county governmental structure, however, are not constitutional in nature and, therefore, could be dealt with legislatively by the General Assembly. In addition, the Commission is recommending amendments that would make it easier for a county to adopt a charter and thus make changes in its own structure to meet particular needs.

The governmental structure of Ohio counties, established by general law, consists of a three-person elected board of county commissioners, eight other elected officers and a complex network of commissions and boards. County governments provide a large number of varied functions—such as welfare, highways and hospitals—and often perform functions in cooperation with other governments and governing boards.[10]

Counties may exercise some additional powers by adopting a charter pursuant to Sections 3 and 4 of Article X of the Ohio Constitution, or by adopting an alternative form of county government under Section 1 of Article X and Chapter 302. of the Ohio Revised Code. To date no county has adopted either a charter or an alternative form.

Pressure for county home rule began to be felt soon after adoption of the municipal home rule sections of Article XVIII in 1912, and several county home rule constitutional amendments permitting county charters were introduced into the General Assembly. The issue finally reached the ballot in the form of a new Article X in November, 1933.

County home rule was strongly opposed by many county, township and suburban municipal officials, although public debate over the issue in 1933 was somewhat muffled because of the fact that the repeal of Prohibition was on the same ballot.[11]

Charles P. Taft II of Cincinnati, chairman of the County Home Rule Association, and one of the prime sponsors of the amendment, was quoted at the time as saying that "only tax spenders are opposing" [12] the county home rule amendment, and the evidence seems to indicate that the economic situation that characterized the Depression aided, to a great degree, in convincing Ohioans that the amendment should be approved as a means of reducing taxes in counties that adopt charters.

The constitutional amendment repealing old Article X and replacing it with new Article X, which contained authorization for county charters, was approved by a majority of more than 100,000 of the almost 1,600,000 people voting.[13]

Since new Article X was adopted, there have been 17 elections in eight of the state's 12 largest counties on the question of election of a charter commission; ten resulted in the election of commissions. Nine of the proposed charters were defeated at the polls.[14] The 10th, recently elected in Summit County, has not yet submitted its charter. A more detailed discussion of the problems faced by counties in adopting charters can be found in the portion of this report dealing with Sections 3 and 4 of Article X.

Although the power to provide for alternative forms of county government was granted the General Assembly by new Article X in 1933, it was not until 1961 that the Legislature enacted Chapter 302. of the Revised Code authorizing counties to adopt either an elected or appointed executive alternative form of county government, on approval of a majority of electors voting. According to Chapter 302., upon adoption of an alternative form, general laws pertaining to counties are operative only insofar as they are not inconsistent with the alternative form of government laws. In addition to the specific powers granted to the board of county commissioners of a county which adopts an alternative form of government, division (M) of Section 302.13 of the Revised Code, which was added by an amendment enacted in 1963, provides that the board of county commissioners may:

"By ordinance or resolution make any rule, or act in any matter not specifically prohibited by general law; provided that, in the case of conflict between the exercise of powers pursuant to division (M) of this section and the exercise of powers by a municipality or township, the exercise of power by the municipality or township shall prevail, and

9. Governor's Commission on County Government, *The Reorganization of County Government in Ohio*, (1934) pgs. 37-38.
10. Legislative Service Commission, *op. cit.*, pgs. 6-12.
11. The Cleveland Plain Dealer, October 7, 1933 pg. 7.
12. *Ibid.*
13. The Ohio State Journal, November 9, 1933, pg. 2.
14. Institute of Governmental Research, *Obstacles to County Reorganization: Constitutional Aspects*, University of Cincinnati (1971).

further provided that the board may levy only taxes authorized by general law."

This provision was attacked in the case of *Blacker v. Wiethe*, 16 Ohio St. 2d 65 (1965) as an unconstitutional delegation of legislative power without standards for the exercise thereof. The court found Article X, Section 1 to be sufficient authority for the provision in question. While the case is important in upholding the power, it should be noted that the case arose not in response to an attempt to exercise that power but as a challenge to the validity of an election on the adoption of an alternative form of government. The court's holding was then limited to a determination that division (M) is not "unconstitutional on its face." This holding leaves much room for further consideration of the extent to which powers could actually be exercised under that provision.

The Commission, however, recommends no change in Section 1 of Article X as it relates to the alternative form of county government. This section confers upon the General Assembly ample authority to provide for alternative forms and to make determinations as to the extent of the powers to be granted, within constitutional limitations.

Since 1961, Cuyahoga County has tried twice and Hamilton and Montgomery counties once each to pass alternative forms, but all were defeated at the polls.[15]

15. *Ibid.* pg. 5.

Recommendations

ARTICLE X

Section 1

Present Constitution

Section 1. The General Assembly shall provide a general law for the organization and government of counties, and may provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and approved by a majority of those voting thereon under regulations provided by law. Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities or townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

Commission Recommendation

Section 1. The General Assembly shall provide by general law for the organization and government of counties, and for such purposes may classify the counties of the state. Each classification, which may be according to population or any other reasonable basis, shall be for a purpose as specified in the law establishing the same, and any such basis shall be related to the purpose of the classification. No classification shall contain more than four classes, and each class shall contain more than one county.

The General Assembly may also provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and aproved by a majority of those voting thereon under regulations provided by law.

Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities and townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

Commission Recommendation

The Commission recommends the amendment of Section 1 of Article X as follows:

Section 1. The General Assembly shall provide by general law for the organization and government of counties, and FOR SUCH PURPOSES MAY CLASSIFY THE COUNTIES OF THE STATE. EACH CLASSIFICATION, WHICH MAY BE ACCORDING TO POPULATION OR ANY OTHER REASONABLE BASIS, SHALL BE FOR A PURPOSE AS SPECIFIED IN THE LAW ESTABLISHING THE SAME, AND ANY SUCH BASIS SHALL BE RELATED TO THE PURPOSE OF THE CLASSIFICATION. NO CLASSIFICATION SHALL CONTAIN MORE THAN FOUR CLASSES, AND EACH CLASS SHALL CONTAIN MORE THAN ONE COUNTY.

THE GENERAL ASSEMBLY may ALSO provide by general law alternative forms of county government. No alternative form shall become operative in any county until submitted to the electors thereof and approved by a majority of those voting thereon under regulations provided by law.

Municipalities and townships shall have authority, with the consent of the county, to transfer to the county any of their powers or to revoke the transfer of any such power, under regulations provided by general law, but the rights of initiative and referendum shall be secured to the people of such municipalities and townships in respect of every measure making or revoking such transfer, and to the people of such county in respect of every measure giving or withdrawing such consent.

Description of Changes

The amendment to Section 1 recommended by the Constitutional Revision Commission would specifically add to the General Assembly's constitutional power to provide by general law for the organization and government of counties, the power also to classify counties for such purposes.

The General Assembly could, within specified limits, recognize differences among counties in legislation relating to their organization and powers, by arranging counties into groups having common, defined characteristics.

The amendment permits an unlimited number of classifications, but requires that the purpose for each be specified in the law establishing the classification. The basis upon which counties would be assigned to the classes created by any classification would have to be reasonably related to the purpose of the classification.

The language permitting the General Assembly to classify on the basis of population "or any other reasonable basis," is similar to Section 8.01 of the Model State Constitution of the National Municipal League [16] and is intended to give the General Assembly a high degree of flexibility in reaching solutions to county problems.

The amendment limits the General Assembly's authority to classify counties by prohibiting classifications containing more than four classes, and by requiring that each class contain more than one county. The term "classification" used in the amendment means the entire group of 88 counties as divided into classes for a specific purpose. Within any one classification, all the counties of the state could be divided into not more than four classes. These two limitations are intended to prevent excessive classification and special legislation, which characterized municipal legislation prior to the adoption of the municipal home rule powers in Article XVIII in 1912. The Commission believes that an unlimited authority to classify, which could result in adoption of laws containing particular governmental or organizational provisions for each of the 88 counties, should not be permitted.

Although the Commission is not recommending that the General Assembly adopt any particular classification scheme, it suggests several examples of possible purposes for dividing the state's 88 counties into classes. Among the purposes suggested:

a) In order to deal rationally with water resources and facilities, counties could be divided into different classes according to the type of waterway located within or on the border of each county (i.e., counties along Lake Erie, counties along major rivers, counties with small streams, etc.)

b) In order to assist counties in providing necessary services or governance, counties could be divided according to size to permit different forms of government.

The only other change in Section 1—adding "also" in the sentence permitting the General Assembly to provide alternative forms of county government—is intended to emphasize that the power to classify is in addition to the other powers in the section which the General Assembly possesses regarding county government.

History and Background of Section

In 1933, the proponents of county home rule proposed a constitutional amendment that included a complete revision of Article X, which dealt with counties. Present Section 1 was adopted by the voters, along with the rest of new Article X, and, except for changes in Section 3 made in 1957, remains in the same form today as originally adopted. Section 1 authorizes the General Assembly to provide by general law for the organization and government of counties, for alternative forms of county government, and for the transfer by municipalities or townships of any of their powers to the county, and for the revocation of such transfers.

Classification of counties in Ohio has never been specifically authorized by the Constitution, although the Constitutional Convention of 1874 did propose a sectioon that could be interpreted as permitting clasification.

16. National Municipal League, *Model State Constitution*, Section 8.01.

Article II, Section 29, as proposed by the Convention read in part: "nor shall any act be passed conferring special powers or privileges upon any county . . . not conferred upon all counties . . . of the same general class." [17] The constitution submitted by the Convention of 1874, however, was defeated by the voters.

Section 1 of Article X, which requires the General Assembly to provide "by general law" for the organization and government of counties, and Section 26 Article II, which provides that "All laws, of a general nature, shall have a uniform operation throughout the state . . .", have been the basis for several Court opinions holding unconstitutional various legislative acts classifying counties for one purpose or another.[18] At the same time, classification of counties does exist in the statutes.[19]

Rationale and Intent of the Commission

At least 13 states classify counties for one or more purposes; some have specific constitutional provisions permitting classification and others apparently do it without specific constitutional authorization. In addition, at least 7 states permit special local legislation—something that the Commission feels is undesirable. The Commission believes that its proposal to permit classification of counties within certain limitations will avoid special legislation and the vast amount of legislative time it consumes.

One of the primary reasons leading the Commission to recommend this amendment to Section 1 is the division of opinion among legal authorities as to the present constitutional power of the General Assembly to classify counties. The Commission is convinced that the General Assembly should have the flexibility available through classification to deal with county government and organization problems, and believes that a constitutional amendment to that effect is desirable to remove doubt as to the constitutionality of existing classifications and to provide expressly for the conditions under which future classifications could be made.

Because the counties in Ohio are extremely diverse entities, varying greatly in such characteristics as population, density, taxing ability and effort, geography, urban-rural mix, and amount of industrialization, the Commission believes that classification of counties, as provided for in this amendment, will allow the General Assembly to tailor county government and organization to groups of counties bound by similar characteristics as the varying needs of Ohio counties are made known to the General Assembly. At the same time, counties which feel no need for changes in governmental structure need not be altered.

An indication that the differences among Ohio counties have long been recognized as factors having significant effect on the governance and organization of counties is found in the 1934 report of the Governor's Commission on County Government, which noted population differences, taxing ability differences, and further noted that, while the population of Ohio was nearly evenly distributed between urban and rural in 1900, by 1930 68% of the state's population lived in urban areas and 32% in rural.[20] The trend toward urbanization has continued. In 1970, 75.3% of Ohioans lived in urban areas.[21]

During its deliberations on the merits of allowing classification, the Commission's Local Government Committee, with the cooperation of the County Commissioners Association, sent a questionnaire to the boards of county commissioners in all 88 counties soliciting their opinions about classification. The committee received 34 replies, most indicating they were

17. *The Constitution of Ohio*, compiled by Isaac Franklin Patterson, Cleveland: The Arthur H. Clark Co., (1912) pgs. 192-193.
18. *State ex rel. Newell, Jr. v. Brown*, 162 Ohio St. 147 (1954); *State ex rel. Cooley v. Thrasher* 130 Ohio St. 434, (1936); *Davis v. Wiemeyer*, 124 Ohio St. 103 (1930).
19. For example, Sections 307.23 and 307.65 of the Ohio Revised Code.
20. Governor's Commission on County Government, *op. cit.*, pg. 3, pg. 20.
21. *Ohio Population Report*, 19th Federal Census, *op. cit.* pg. 8.

filled out on behalf of all commissioners. More than 60% (21) of the respondents favor classification, and all commissioners responding from counties over 150,000 population favored classification. The breakdown of responses, according to population, is:

County Population	% Favoring Classification	% Opposing Classification	Total Number of Responses	Number of Counties Category
over 150,000	100% (5)	0% (0)	5	13
50,000-150,000	73% (8)	27% (3)	11	30
under 50,000	44% (8)	56% (10)	18	45
Total All counties	62% (21)	38% (13)	34	88

One comment on the questionnaire indicated a reason smaller counties are often opposed to classification—a belief that it could be used as a device to confer monetary benefits on some counties but not on others. The Commission believes, however, that any arbitrary action of this type by the General Assembly would not fall within "organization and government" of counties and would be held unconstitutional. Moreover, the amendment recommended by the Commission requires that the criteria used for classification be related to the problem at hand and, therefore, no county that met the criteria could be disqualified from any programs devised by the General Assembly to solve county problems, and any benefits that accompany such programs.

Of the county commissioners who favored classification, 16 indicated that criteria other than population might also be used in classifications, including several which were suggested in the questionnaire—number of local units in the county, property valuation, area, and location. Additional criteria were also suggested by the respondents—source of revenue, drainage areas, complexities of services provided, summer population, budget, urban and rural population, size and poverty level of the core city, per capita income, tax effort, and the federal revenue sharing formula.

The recommended amendment is flexible enough, in the Commission's opinion, to permit the General Assembly, if it so desires, to allow counties to move from one class to another, depending on the county problems and the intended aim of the classification.

The Commission recognizes that some of the advantages of classification that it has cited could be secured by counties needing them through adoption of either a county charter or an alternative form of government. However, since no county has yet been successful in any attempts to do either of these, the Commission believes that the additional authority that this amendment would provide should be made available to permit the General Assembly by legislative action to provide for the needs of a group or groups of counties having common problems.

ARTICLE X

Section 2

Present Constitution

Section 2. The General Assembly shall provide by general law for the election of such township officers as may be necessary. The trustees of townships shall have such power of local taxation as may be prescribed by law. No money shall be drawn from any township treasury except by authority of law.

Commission Recommendation

No recommendation.

Comment

The Local Government Committee and the Commission heard from township officials, county officials, and municipal officials concerning township problems, and considered several proposals for constitutional changes. Township problems appear to stem from both the structure of township government—like that of counties, the structure has remained virtually unchanged throughout Ohio's history—and powers, or lack of them. Township problems are concentrated in the so-called "urban" townships, for which there is no agreed, uniform definition. Townships with populations of over 5,000 constitute approximately 8% of the 1320 townships in Ohio.

The Commission is not recommending constitutional changes relating to townships. Township government is viewed as in a state of flux, and the Commission believes that, under such circumstances, the legislature is better equipped to recognize problems and solve them legislatively than constitutionally; governmental structure and powers tend to remain locked in the Constitution once they are placed there. Some urban townships appear to feel a need for powers similar to those of municipalities, but point to the difficulties inherent in the process of incorporating—difficulties imposed by law, not by the Constitution. The Commission takes no position on whether urban townships should incorporate, but notes that the Constitution poses no barriers.

The Commission believes that the General Assembly has ample authority to deal with the problems of townships, and recommends no constitutional changes, but believes that legislative study will point the way to solutions.

ARTICLE X

Section 3

Present Constitution

Section 3. The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment which alters the form and offices of county government or which provides for the exercise by the county of powers vested in municipalities by the constitution or laws of Ohio, or both, shall become effective if approved by a majority of the electors voting thereon. In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. A charter or amendment providing for the exclusive exercise of municipal powers by the county or providing for the succession by the county to any property or obligation of any municipality or township without the consent of the legislative authority of

Commission Recommendation

Section 3. The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in either case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment shall become effective if approved by a majority of the electors voting thereon.

such municipality or township shall become effective only when it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in counties having a population, based upon the latest preceding federal decennial census, of 500,000 or less, in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a muncipality.)

Commission Recommendation

The Commission recommends the amendment of section 3 of Article X as follows:

Section 3. The people of any county may frame and adopt or amend a charter as provided in this article but the right of the initiative and referendum is reserved to the people of each county on all matters which such county may now or hereafter be authorized to control by legislative action. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in ~~any such~~ EITHER case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal power so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. Any charter or amendment ~~which alters the form and offices of county government or which provides for the exercise by the county of powers vested in municipalities by the constitution or laws of Ohio, or both,~~ shall become effective if approved by a majority of the electors voting thereon. ~~In case of conflict between the exercise of powers granted by such charter and the exercise or powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. A charter or amendment providing for the exclusive exercise of municipal powers by the county or providing for the succession by the county to any property or obligation of any municipality or township without the consent of the legislative authority of such municipality or township shall become effective only when it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in counties having a population, based upon the latest preceding federal decennial census, of 500,000 or less, in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality.)~~

Description of Changes

Section 3 presently provides for county charters, and for the powers which counties may have if they adopt charters. Two kinds of county charters are provided for: one under which the county could exercise municipal powers to the exclusion of municipalities within the county, or succeed to property or obligations of municipalities or townships without their consent or be organized as a municipal corporation; and one which could provide for alteration of county government form or offices and for the exercise of municipal powers concurrently with, but not to the exclusion of, the municipalities. The first requires approval by majorities in the county, in the largest municipality, in the county outside the largest municipality, and, in counties with a population of 500,000 or less, in a

majority of the combined total of municipalities and townships in the county. (Counties over 500,000 were exempted from the fourth majority requirement by a constitutional amendment in 1957.)

The Commission proposal, in essence, eliminates the distinctions between the two types of charters. It does this by eliminating the requirement for the "multiple majority" approval of the first type of charter; thus permitting the adoption of a county charter by a majority of the electors voting thereon. In addition, the proposal would remove a provision relating to the county charter requiring only a simple majority for approval which resolves any conflict in the exercise of powers by the county and a municipality or a township in favor of the municipality or township. The issue of whose authority prevails (the county's, or the municipality's or township's) in case of a conflicting exercise of power would be resolved in the county charter in any manner the charter prescribes, rather than constitutionally as is now the case. Removal of the conflict provision from the constitution would also serve to remove a distinction between the two types of charters.

The proposal retains the provision that any county charter must "provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law." The intention of this provision seems to be to make it clear that even counties having charters continue to be administrative arms of the state for purposes of carrying out certain functions throughout the state. While, therefore, a county could by charter change its form of government and expand the powers which it may exercise and be less inhibited by statutory provisions in the manner of the exercise of those powers, those duties required by general law of counties and county officers would still have to be carried out.

The proposal retains the provision allowing a county to provide by charter for the concurrent or exclusive exercise by the county in all or part of its area, of any or all designated powers vested by the Constitution or laws of Ohio in municipalities, for the organization of the county as a municipal corporation and for the succession by the county to the rights, properties and obligations of municipalities and townships in the county incident to the municipal powers vested in the county. Since these provisions are optional, a county charter could provide for some, all or none of those powers, or the effect of a charter could be limited to changes in the form and existing powers of county government. The vote required for the adoption of any county charter would be the same regardless of the powers acquired.

History and Background of Section

Since 1933, when the sections permitting county charters were added to the Constitution, counties have had a 100% failure rate in their attempts to secure home rule. Voters have in some instances, however, agreed to the idea of drafting a charter and have elected a charter commission, only to reject the commission's work when it is completed.[22]

Of the state's 12 largest counties, eight have made a total of 17 attempts at getting the charter commission question on the ballot. Of these 17 attempts, ten resulted in the election of a charter commission, and nine of the ten resulting charters have been defeated at the polls. The tenth, recently elected in Summit County, has not yet completed its work. Eight

22. Analyses of county charter failures can be found in a number of publications, among them: Institute of Governmental Research, "Obstacles to County Reorganization: Constitutional Aspects", *op. cit.* (1971); a detailed analysis of the recent Summit County failure by John H. Bowden and Howard D. Hamilton, "Some Notes on Metropolitics in Ohio," in the Kent State University Book *Political Behavior and Public Issues in Ohio;* "Constitutional Problems of County Home Rule," by Earl L. Shoup, Western Reserve Law Review (1949); "Metropolitan Government in Metro Cleveland," by Watson and Romani, in 5 Midwest Journal of Political Science, No. 4, November 1961; and "Factors Affecting Voter Reactions to Governmental Reorganization in Metropolitan Areas," by U.S. Advisory Commission on Intergovernmental Relations Washington, D. C.: U.S. Government Printing Office (1962).

of the 17 charter commission elections were held in the years 1934-1936, immediately following the adoption of the constitutional provision in 1933, and four charter commissions were elected in that period.

The language of section 3 as it was adopted in 1933 differed significantly from its present language, resulting from 1957 amendments. As originally adopted, section 3 read as follows:

> "Any county may frame and adopt or amend a charter as provided in this Article. Every such charter shall provide the form of government of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the Constitution or laws of Ohio in municipalities; it may provide for the organization of the county as a municipal corporation; and in any such case it may provide for the succession by the county to the rights, properties, and obligations of municipalities and townships therein incident to the municipal powers so vested in the county, and for the division of the county into districts for purposes of administration or of taxation or of both. No charter or amendment vesting any municipal powers in the county shall become effective unless it shall have been approved by a majority of those voting thereon (1) in the county, (2) in the largest municipality, (3) in the county outside of such municipality, and (4) in each of a majority of the combined total of municipalities and townships in the county (not including within any township any part of its area lying within a municipality)."

A significant blow to the advocates of county charters came shortly after Section 3 was adopted. The question of electing a charter commission had been submitted and approved by the voters of Cuyahoga County in 1934. In order to avoid the requirement of four separate majorities (in the county, in the largest municipality, in the county outside the largest municipality, and in each of a majority of the combined total of municipalities and townships in the county) the charter commission limited its recommendations to those functions that the country was currently performing. The commission's proposed charter provided for a council-manager form of government, reorganized departments, established a merit system, provided for initiative and referendum, and specifically stated that "nothing herein shall be interpreted as transferring municipal powers to the county." In the 1935 election, the charter received a majority affirmative vote in the county as a whole and in Cleveland, but failed to receive the third or fourth majorities required by the Constitution for a charter vesting municipal powers in the County.

The Board of Elections refused to certify the charter as adopted, and the case brought to require the Board to certify resulted in a decision by the Ohio Supreme Court which dealt a blow to the county charter advocates and eventually resulted in the 1957 amendments to section 3 making a distinction between charters which give a county municipal powers concurrent with municipalities as distinguished from exclusive municipal powers. The Court, in the case of *State ex rel. Howland v. Krause*, 130 Ohio St. 456 (1936) cited four specific instances where the charter sought to vest in the county powers which the court believed were vested in municipalities by the constitution and laws of the state:

1) The power of the county council to enact "ordinances" rather than "resolutions", the term used for acts of boards of county commissioners;
2) Provision for the use of the initiative and referendum on county questions;

3) Establishment of a civil service commission;

4) Establishment of a department of safety instead of an elected sheriff.

"These powers," the Court said, "are not only generally recognized as municipal powers, but are specifically so treated by the laws of the state."[23]

Although the 1957 amendments were designed to overcome the obstacles presented in the Court's decision by permitting the adoption of a charter by a majority in the county without the other majorities so long as it did not give the county municipal powers to be exercised to the exclusion of the exercise of the same powers by municipalities, the fact that the decision appeared to be incorrect in a number of particulars [24] still can operate to cast some doubt on what are municipal powers. In any event, there have been no simple county majorities for any charter since the Cuyahoga County one in 1935, and the 1957 language remains uninterpreted by Court decision.

Rationale and Intent of the Commission

As noted above, there is substantial legal doubt about the correctness of the Court's interpretation of "municipal powers" in the *Howland* decision. Because of the failure of Cuyahoga County to achieve a charter that was not in any way intended to interfere with municipalities, the *Howland* decision, in spite of the 1957 comments, continues to cast a dark cloud on charter commission efforts. One noted commentator, Jefferson Fordham, has put the matter as follows:

> "The existing Ohio contitutional provisions for county home rule recognize that problems overreach municipalities and townships and that countywide jurisdiction may be desirable. It does not, however, permit county assumption of jurisdiction over township and municipal affairs without clearing the incredibly high hurdle of the well-known four-way vote in the governmental units in the county. As a consequence, the achievement of county home rule in Ohio is almost out of the question."[25]

The Commission, therefore, recommends the removal of the "multiple-majority" requirement for the adoption of a county charter, regardless of the range of powers or form of government it assumes for the country.

Besides the implications of the *Howland* decision, there is a further question involved in the multiple-majorities requirement. The effect of requiring three or four majorities in order to adopt a charter is that it 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. In the Commission's opinion, this situation effectively constitutes minority rule.

The United States Supreme Court has held that equal protection of the laws requires that one person's vote be given the same weight as another's regardless of residence in elections of state legislators, United States Representatives, county governing bodies and other units of local government.[26] A recent New York case[27] addressed the question presented here — whether several majorities can be required for the adoption of a county charter which will apply to all. In November, 1974, a United States District Court in New York agreed that the New York State Constitution's multiple

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23. *Howland v. Krause*, 130 Ohio St. 455, p. 459.
24. See, for example, Lowrie, S. Gale, "Interpretation of County Home Rule Amendment by the Ohio Supreme Court." University of Cincinnati Law Review No. 10, (1936) pg.454.
25. Fordham, Jefferson G. "Ohio Constitutional Revision—What of Local Government?" Ohio State Law Journal, Vol. 33 (1972) pg. 581.
26. *Baker v. Carr*, 369 U. S. 186 (1962) 7 L. Ed. 2d 663, 82 S. Ct. 691; *Reynolds v. Sims*, 377 U. S. 533 (1964) 12 L.Ed. 2d 506 S. Ct. 1362, and others.
27. *Citizens for Community Action v. Ghezzi et al.*, U. S. District Court, W. D. N. Y. Civil Action 1973-222, Nov. 22, 1974, 36 F. Supp. 1.

majority requirement for passage of a county charter violated the one man, one vote principle. State officials have recently determined not to appeal the decision.[28]

In another case, the New Mexico Supreme Court has found unconstitutional, under the one-man one-vote rule, a provision of that state's constitution which required a two-thirds vote in each county of the state in order to adopt an amendment to the state constitution. Thus, slightly more than one-third of the voters in a single county could thwart the will of a majority of voters in the state, and all of the other counties. The New Mexico court stated that, in one election, this made the vote of an elector in one county equal to 100 voters in another county.[29]

The Commission, having taken the view that strengthening county government offers a constitutional solution toward solving metropolitan problems, believes that the analogy between a state constitution, which, in Ohio, is adopted or amended by a majority of all the people in the state voting on it, and a county charter, which provides the government for the people of the county, is an apt one.

ARTICLE X

Section 4

Present Constitution

Section 4. The Legislative authority of any charter county or the Board of County Commissioners of any other county may by a two-thirds vote of its members, or upon petition of ten per cent of the electors of the county shall forthwith, by resolution submit to the electors of the county the question, "Shall a county charter commission be chosen?" The question shall be voted upon at the next general or primary election, occurring not sooner than sixty days thereafter. The ballot containing the question shall bear no party designation, and provision shall be made thereon for the election from the county at large of fifteen electors as such commission if a majority of the electors voting on the 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 county, which shall be filed with the election authorities not less than forty 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; but not more than seven candidates residing in the same city or village may be elected. Within ten months after its election such commission shall frame a charter for the county or amendments to the existing charter, and shall submit the same to the electors of the county, to be voted upon at the next general election occuring not sooner than sixty days after such submission. Amendments to a county charter may also be submitted to the electors of the county in the manner provided in this section for the submission of the question whether a charter commission shall be chosen, to be voted upon at the first general election occurring not sooner than sixty days after their submission. The authority submitting any charter or amendment shall mail or otherwise distribute a copy thereof to each of the electors of the county as far as may be reasonably possible. Except as provided in Section 3 of this Article, every charter or amendment shall become effective if it shall have been approved by the majority of the electors voting thereon. It shall take effect on the thirtieth day after such approval unless another date be fixed therein. 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 amend-

Commission Recommendation

The legislative authority (which includes the Board of County Commissioners) of any county may by a two-thirds vote of its members, or upon petition of six per cent of the electors of the county as certified by the election authorities of the county shall forthwith, by resolution submit to the electors of the county the question, "Shall a county charter commission be chosen?" The question shall be voted upon at the next general or primary election, occurring not sooner than ninety-five days after certification of the resolution to the election authorities. The ballot containing the question shall bear no party designation. Provision shall be made thereon for the election to such commission from the county at large of fifteen electors, if a majority of the electors voting on the 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 county. The petition shall be filed with the election authorities not less than seventy-five 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; but not more than seven candidates residing in the same city or village may be elected. The holding of a public office does not preclude any person from seeking or holding membership on a county charter commission nor does membership on a county charter commission preclude any such member from seeking or holding other public office. The legislative authority shall appropriate sufficient sums to enable the charter commission to perform its duties and to pay all reasonable expenses thereof.

The commission shall frame a charter for the county or amendments to the existing charter, and shall, by vote of a majority of the authorized number of members of the commission, submit the same to the electors of the county, to be voted upon at the general election next following the election of the commission. The commission shall certify the proposed charter or amendments to the election authorities not later than seventy-five days prior to such election. Amendments to a county charter or the question of the repeal thereof may also be submitted to the electors of the county in the manner provided in this section for the submission of the question whether a charter commission shall be chosen, to be

28. The New York Times, February 23, 1975, pg. 25.
29. *State ex rel. Wilt v. State Canvassing Board*, 78 N. M. 682, 437 P. 2d 143 (1968).

ments adopted at the same time, that provision shall prevail which received the highest affirmative vote. The basis upon which the required numbers of petitioners in any case provided for in this Article shall be determined, shall be the total number of votes cast in the county for the office of Governor at the last preceding election therefor.

The foregoing provisions of this Article shall be self-executing except as herein otherwise provided.

voted upon at the first general election occuring not sooner than sixty days after their submission. The legislative authority or charter commission submitting any charter or amendment shall, not later than thirty days prior to the election on such charter or amendment, mail or otherwise distribute a copy thereof to each of the electors of the county as far as may be reasonably possible, except that, as provided by law, notice of proposed amendments may be given by newspaper advertising. A charter or amendment shall become effective if it shall have been approved by the majority of the electors voting thereon. It shall take effect on the thirtieth day after such approval unless another date be fixed therein. When more than one amendment, which shall relate to only one subject but may affect or include more than one section or part of a charter, is submitted at the same time, they shall be so submitted as to enable the electors to vote on each separately. In case more than one charter is submitted at the same time or in case of conflict between the provisions of two or more amendments submitted at the same time, that charter or provision shall prevail which received the highest affirmative vote not less than a majority. If a charter or amendment submitted by a charter commission is not approved by the electors of the county, the charter commission may resubmit the same one time, in its original form or as revised by the charter commission, to the electors of the county at the next succeeding general election or at any other election held throughout the county prior thereto, in the manner provided for the original submission thereof.

The legislative authority of any county, upon petition of ten per cent of the electors of the county, shall forthwith, by resolution submit to the electors of the county, in the manner provided in this section for the submission of the question whether a charter commission shall be chosen, the question of the adoption of a charter in the form attached to such petition.

Laws may be passed to provide for the organization and procedures of county charter commissions, including the filling of any vacancy which may occur, and otherwise to facilitate the operation of this section. The basis upon which the required number of petitioners in any case provided for in this Article shall be determined, shall be the total number of votes cast in the county for the office of Governor at the preceding election therefor.

The foregoing provisions of this section shall be self-executing except as herein otherwise provided.

Commission Recommendation

The Commission recommends the amendment of section 4 of Article X as follows:

Section 4. The legislative authority ~~of any charter county or~~ [WHICH INCLUDES the Board of County Commissioners] of any ~~other~~ county may by a two-thirds vote of its members, or upon petition of ~~ten~~ SIX per cent of the electors of the county AS CERTIFIED BY THE ELECTION AUTHORITIES OF THE COUNTY shall forthwith, by resolution submit to the electors of the county the question, "Shall a county charter commission be chosen?" The question shall be voted upon at the next general or primary election, occurring not sooner than ~~sixty~~ NINETY-FIVE days ~~thereafter~~ AFTER CERTIFICATION OF THE RESOLUTION TO THE ELECTION AUTHORITIES. The ballot containing the question shall bear no party designation~~,~~. Provision shall be made thereon for the election TO SUCH COMMISSION from the county at large of fifteen electors ~~as such commission~~, if a majority of the electors voting on the 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 county~~,~~. ~~which~~ THE PETITION shall be filed with the election authorities not less than ~~forty~~ SEVENTY-FIVE 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; but not more than seven candidates residing in the same city or village may be elected. THE HOLDING OF A

PUBLIC OFFICE DOES NOT PRECLUDE ANY PERSON FROM SEEKING OR HOLDING MEMBERSHIP ON A COUNTY CHARTER COMMISSION NOR DOES MEMBERSHIP ON A COUNTY CHARTER COMMISSION PRECLUDE ANY SUCH MEMBER FROM SEEKING OR HOLDING OTHER PUBLIC OFFICE. THE LEGISLATIVE AUTHORITY SHALL APPROPRIATE SUFFICIENT SUMS TO ENABLE THE CHARTER COMMISSION TO PERFORM ITS DUTIES AND TO PAY ALL REASONABLE EXPENSES THEREOF.

~~Within ten months after its election such~~ THE commission shall frame a charter for the county or amendments to the existing charter, and shall, BY VOTE OF A MAJORITY OF THE AUTHORIZED NUMBER OF MEMBERS OF THE COMMISSION, submit the same to the electors of the county, to be voted upon at the general election ~~occurring not sooner than sixty days after such submission~~ NEXT FOLLOWING THE ELECTION OF THE COMMISSION. THE COMMISSION SHALL CERTIFY THE PROPOSED CHARTER OR AMENDMENTS TO THE ELECTION AUTHORITIES NOT LATER THAN SEVENTY-FIVE DAYS PRIOR TO SUCH ELECTION. Amendments to a county charter OR THE QUESTION OF THE REPEAL THEREOF may also be submitted to the electors of the county in the manner provided in this section for the submission of the question whether a charter commission shall be chosen, to be voted upon at the first general election occurring not sooner than sixty days after their submission. The LEGISLATIVE authority OR CHARTER COMMISSION submitting any charter or amendment shall, NOT LATER THAN THIRTY DAYS PRIOR TO THE ELECTION ON SUCH CHARTER OR AMENDMENT, mail or otherwise distribute a copy thereof to each of the electors of the county as far as may be reasonably possible, EXCEPT THAT, AS PROVIDED BY LAW, NOTICE OF PROPOSED AMENDMENTS MAY BE GIVEN BY NEWSPAPER ADVERTISING.

~~Except as provided in Section 3 of this Article, every~~ A charter or amendment shall become effective if it shall have been approved by the majority of the electors voting thereon. It shall take effect on the thirtieth day after such approval unless another date be fixed therein. When more than one amendment, WHICH SHALL RELATE TO ONLY ONE SUBJECT BUT MAY AFFECT OR INCLUDE MORE THAN ONE SECTION OR PART OF A CHARTER, is submitted at the same time, they shall be so submitted as to enable the electors to vote on each separately. In case MORE THAN ONE CHARTER IS SUBMITTED AT THE SAME TIME OR IN CASE OF conflict between the provisions of two or more amendments SUBMITTED at the same time, that CHARTER OR provision shall prevail which received the highest affirmative vote NOT LESS THAN A MAJORITY. IF A CHARTER OR AMENDMENT SUBMITTED BY A CHARTER COMMISSION IS NOT APPROVED BY THE ELECTORS OF THE COUNTY, THE CHARTER COMMISSION MAY RESUBMIT THE SAME, ONE TIME IN ITS ORIGINAL FORM OR AS REVISED BY THE CHARTER COMMISSION, TO THE ELECTORS OF THE COUNTY AT THE NEXT SUCCEEDING GENERAL ELECTION OR AT ANY OTHER ELECTION HELD THROUGHOUT THE COUNTY PRIOR THERETO, IN THE MANNER PROVIDED FOR THE ORIGINAL SUBMISSION THEREOF.

THE LEGISLATIVE AUTHORITY OF ANY COUNTY, UPON PETITION OF TEN PER CENT OF THE ELECTORS OF THE COUNTY, SHALL FORTHWITH, BY RESOLUTION SUBMIT TO THE ELECTORS OF THE COUNTY, IN THE MANNER PROVIDED IN THIS SECTION FOR THE SUBMISSION OF THE QUESTION WHETHER A CHARTER COMMISSION SHALL BE CHOSEN, THE QUESTION OF THE ADOPTION OF A CHARTER IN THE FORM ATTACHED TO SUCH PETITION.

LAWS MAY BE PASSED TO PROVIDE FOR THE ORGANIZATION AND PROCEDURES OF COUNTY CHARTER COMMISSIONS, INCLUD-

ING THE FILLING OF ANY VACANCY WHICH MAY OCCUR, AND OTHERWISE, TO FACILITATE THE OPERATION OF THIS SECTION. The basis upon which the required number of petitioners in any case provided for in this Article shall be determined, shall be the total number of votes cast in the county for the office of Governor at the last preceding election therefor.

The forgoing provisions of this ~~Article~~ SECTION shall be self-executing except as herein otherwise provided.

Description of Changes; Rationale and Interest of the Commission

Section 4, added in 1933, provides the procedures for the election of county charter commissions and for the framing and submission to the electors of the proposed county charter and amendments. Some of the amendments proposed for this section are technical in nature and intended to remedy existing defects or ambiguities, while others represent significant departures from, or additions to, the existing provisions.

The major substantive changes recommended by the Commission are:

a) Reducing the number of petition signatures from 10% to 6%.

b) Establishing procedures for submitting a proposed charter or amendment to the board of elections.

c) Specifically permitting public officeholders to be members of charter commissions.

d) Specifying the vote necessary by the commission for submission of a proposed charter or amendment.

e) Establishing procedures for repeal of a charter.

f) Permitting a charter commission to resubmit or revise and resubmit, one time only, a charter that had been defeated at the polls.

g) Permitting direct submission of a charter by the county legislative authority upon petition of 10% of the electors.

It is the Commission's opinion that the amendments it has recommended will clarify Section 4 and possibly avoid future debates over application of the section.

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

1) The term "legislative authority" is defined to include a board of county commissioners, so that a single term may be used throughout the section.

2) The number of signatures required on a petition to have the question of calling a charter commission placed on the ballot is reduced from 10% to 6% of the electors. The Commission believes that 10%, particularly in a very large county, is too great an obstacle and that 6% is a sufficient number to prevent vain and frivilous attempts, yet would be attainable by a serious group of citizens.

3) Responsibility for determining whether a petition has a sufficient number of valid signatures is transferred from the legislative authority (now board of county commissioners), which has limited ability to perform this function, to the board of elections, which has the facilities and personnel needed for this purpose.

4) The section presently does not specify the action required to be taken with respect to the board of elections to cause an election to be held on a proposed charter or amendment or the time by which it must be accomplished. The proposed amendment to this section would require certification of the resolution of the legislative authority to the board of elections not later than 75 days before the election. The Secretary of State's office is presently urging the adoption, as far as possible, of a uniform 75-day deadline for submission of questions for elections. Other

changes are also proposed which will conform to the Secretary of State's request that additional time is needed for ballot preparation and mailing to absent voters.

5) The section presently is silent on the question of whether membership on a county charter commission constitutes the holding of public office, but the Ohio Supreme Court in *State ex rel. Bricker v. Gessner*,[30] has held that such membership is a public office. As a result, those officers prohibited by the Constitution, laws or municipal charters from holding other public office may not be members of a county charter commission. The operation of the prohibition is thus not uniform, since not all public officers are forbidden to hold other public office. The proposed amendment removes the prohibition and permits all persons holding other public office to be members of county charter commissions. It is the Commission's opinion that most public officeholders have experience in the areas that would be under discussion in the drafting of a charter and, therefore, would be valuable, contributing members of the commission.

6) While the Ohio Revised Code[31] and case law[32] seem to establish the obligation of the board of county commissioners to provide funds necessary for a charter commission to carry out its duties, this has proved in some cases to be a matter of controversy. A specific requirement to this effect in the Constitution would resolve any question concerning the existence of the county commissioners' duty to provide the charter commission with funding to enable it to perform its assigned function.

7) Because the Office of the Secretary of State is urging adoption of a uniform 75-day deadline for submission of question for elections, the Revision Commission recommends that the provision requiring submission at the general election following the commission's election be added to Section 4 and that the 10-month deadline be removed since its need no longer would exist. The deadline for completion of the commission's work would be related to the time when the proposed charter or amendments must be certified to the board of elections.

8) No provision is presently made for the vote required by a charter commission to submit a proposed charter or amendment. The proposed amendment to the section would require for this purpose a majority of the total number of members authorized to be elected to the commission, and that number would remain constant even if the number of members on the commission were diminished by death, resignation or disqualification.

9) The procedure by which the proposed charter or amendment is placed before the voters is presently unclear. The amendment to the section provides for certification to the board of elections not less than 75 days before the election.

10) The Constitution presently makes no provision for the repeeal of an existing charter. Addition of such a provision would permit a return to the statutory form of government, if desired by the electors of the county, or for the repeal of an existing charter and adoption of a new one or an alternative form of county government at the same election. In the case of a repeal only, legislation by the General Assembly might be required to provide the procedure for reestablishment of the statutory form.

11) Responsibility for giving notice of the election on the proposed charter or amendments is presently not entirely clear, nor is the time by which the mailing or distribution is to be completed specified. The amendment provides that the authority (either legislative body or charter commission) submitting the charter or amendment is to give notice thereof, and that such mailing or distribution must be accomplished not less than thirty days before the election, which is the deadline for the similar municipal charter provision of Article XVIII Section 8.

30. *State ex rel. Bricker v. Gessner*, 129 Ohio St. 290 (1935).
31. Section 307.70.
32. 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.

12) In the same manner as provided in the recent amendment to Article XVIII, Section 9[33] relating to amendments to municipal charters, the General Assembly could by law provide for notice of proposed county charter amendments to be given by newspaper advertising. In the absence of such a law, the requirements as to mailing or other distribution would apply.

13) The additional language as to what may constitute a single amendment is intended to reflect current case law on that subject as it relates to proposed constitutional amendments and to negate any inference that an amendment must relate to only a single section of a charter.

14) Presently a charter commission has one, and only one, opportunity to submit a proposed charter to the electors. This amendment would give the commission the opportunity to resubmit or to revise and resubmit the proposed charter at the following general election or any other countywide election prior thereto. In the case of a close vote initially or where the commission believes that it is able to identify the objectionable features of the proposed charter or other reasons for its defeat, a second opportunity to submit the proposed charter, without the election of a new charter commission and a two-year delay in resubmission, might be advantageous. The revised or resubmitted charter could be submitted to the voters one time only.

15) The election of a charter commission at a general election and submission of the proposed charter framed by it at the following general election entails considerable delay, and the electors have little or no control over the type of charter which the commission will propose. A new provision would permit direct submission, upon petition of 10% of the electors to the county legislative authority, of a charter drafted by a group other than an elected charter commission.

16) Because of the provision for direct submission of proposed charters by petition, the possibility would exist that more than one charter could be submitted at the same election. Should more than one of such proposed charters receive a majority vote, the one receiving the highest majority would be adopted.

17) The authority of the General Assembly to provide by law for matters involving the procedure for adoption of county charters is of limited and uncertain extent. This amendment would, in general terms, and similar to the provision relating to the initiative and referendum in Article II, Section 1g, authorize the General Assembly as necessary to facilitate the operation of the section. Procedures as to the printing, mailing, distribution or advertising of proposed charters and amendments is an example of the kind of provisions which might be made by statute. Such power might avoid the need for constitutional amendments with respect to some unforeseen problems as they arise in the future.

18) County charter commissions, presently have no authoritative or established procedures concerning such matters as the method of their organization, election of officers, rules of procedure, notice of meetings, filling of vacancies and other such matters. This amendment would allow the General Assembly to provide by statute for these procedural matters and for the filling of vacancies. Failure of the General Assembly to act, however, would not preclude charter commissions from organizing and carrying out their functions under rules adopted by themselves, as they presently do. The General Assembly would also provide by statute for procedures and rules which a charter commission could adopt at its option.

33. An amendment to Article XVIII Section 9, adopted in 1970, permits newspaper advertising of municipal charter amendments, pursuant to general law, as a means of fulfilling the distribution requirement.

ARTICLE X

Section 5

Present Constitution
Commission Recommendation
New Section

Section 5. Counties may, except as limited by general law, adopt and enforce within their limits all measures for the local self-government of the county, including local police, sanitary, and other similar regulations, as are not at variance with the general laws or in conflict with the exercise by any municipal power authorized by this Constitution; provided, that no tax shall be levied by any county except as authorized by law.

Commission Recommendation

The Commission recommends the adoption of a new Section 5 in Article X as follows:

Section 5. COUNTIES MAY, EXCEPT AS LIMITED BY GENERAL LAW, ADOPT AND ENFORCE WITHIN THEIR LIMITS ALL MEASURES FOR THE LOCAL SELF-GOVERNMENT OF THE COUNTY, INCLUDING LOCAL POLICE, SANITARY, AND OTHER SIMILAR REGULATIONS, AS ARE NOT AT VARIANCE WITH THE GENERAL LAWS OR IN CONFLICT WITH THE EXERCISE BY ANY MUNICIPAL CORPORATION OF ANY MUNICIPAL POWER AUTHORIZED BY THIS CONSTITUTION; PROVIDED, THAT NO TAX SHALL BE LEVIED BY ANY COUNTY EXCEPT AS AUTHORIZED BY GENERAL LAW.

Description of Changes

The Commission proposes to add a new section to Article X which would provide for powers of all counties. It would put counties in substantially the same relationship to the state and to the General Assembly as that which now pertains to non-charter municipalities. It would resolve conflicts with municipalities in favor of the municipality. The language of the section is adapted from Section 3 of Article XVIII, familiar to all students of local government in Ohio, which reads:

> "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."

A series of Ohio Supreme Court decisions culminating in 1964 in *Leavers v. City of Canton,* [34] resulting in what may be regarded as an authoritative pronouncement by the Supreme Court concerning the powers of charter and noncharter municipalities and the differences between them.

The court said that:

> Any ordinance dealing with police regulations passed by either a charter or noncharter city, which is at a variance with state law, is invalid. Section 3, Article XVIII of the Ohio Constitution.
>
> An ordinance passed by a charter city, which is not a police regulation but which deals with local self-government, is valid and effective even though it is at a variance with a state statute. *State ex rel. Canada v. Phillips, supra.*
>
> An ordinance passed by a noncharter city, which is not a police regulation but is concerned with local self-government regulation, is valid where there is no state statute at a variance with the ordinance. *Perrysburg v. Ridgway, supra.*

34. *Leavers v. City of Canton,* 1 Ohio St. 2d 33 (1964).

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 variance with a state statute. *State ex rel. Petit v. Wagner, supra.*[35]

The language of the proposed section would not make a distinction between measures providing for local self-government and police, sanitary and other similar regulations;rather, the later provisions would be treated as being among the powers of local self-government of the county This seems to be the result of the *Leavers* case as to noncharter municipalities. In addition to the limitations on this grant of powers to counties that measures adopted by the county must not be at variance with the general laws, this section would also provide that any such exercise of powers by the county may not conflict with the exercise by any municipal corporation of its powers under the Constitution.

Under this proposed section the General Assembly could also establish limits upon the exercise of the power conferred. As an example, the General Assembly could put all matters involving the incurrence of debt or the levying of taxes outside the ability of counties to act without expressly granted powers. The proposed section 5 language regarding taxes probably would not be necessary, but it is deemed desirable to include it to assure any who might question whether unlimited taxing powers were being conferred upon counties, that it is not.

The section would be self-executing, as is Section 3 of Article XVIII.

A county having the powers granted by the section would have the freedom to act with respect to any matter of local self-government in those areas where the General Assembly has not already provided for the matter. The General Assembly has, of course, legislated with respect to a great many matters involving counties, but this section would eliminate the necessity for counties to request legislation from the General Assembly as to those cases where the statutes are silent. The section would not substantially affect the relationship between counties and municipalities now existing, except that it might permit counties to enter into agreements with municipalities in those areas where specific statutory authority cannot be found. Repeal or substantial revision of many existing statutes relating to counties by the General Assembly would give counties greater freedom of action and, since county officials complain that many of the existing statutes are greatly outmoded[36], the Commission believes this section would hasten the process of legislative review of county law.

Rational and Intent of the Commission

The often-quoted but little-implemented report on "The Reorganization of County Government in Ohio" by the Governor's Commission on County Government, submitted in 1934, states under its recommendation dealing with the Board of County Commissioners that:

> "Considerable ordinance-making power is needed as to unincorporated territory to permit the regulation of amusement places, nuisance industries, etc., and to meet other problems involving local legislation."[37]

That Commission noted Ohio's increasing urbanization, and the difficulties counties had dealing with the problems caused by urbanization under the restrictive and outmoded county laws. These problems have increased substantially since 1934.

Counties are today, and have been since the beginning of statehood, creatures of the state—state agencies—designed originally to carry out

35. *Ibid.*, pgs. 356-357.
36. Examples of outmoded county statutes are: Section 307.63 which requires the board of county commissioners to pay for antitoxin furnished to an indigent child suffering from diphtheria; Section 339.31, which permits the board of county commissioners in counties over 50,000 population to erect and operate a county hospital for the treatment of tuberculosis.
37. Governor's Commission on County Government, *The Reorganization of County Government in Ohio,* (1934) pg. 7.

essentially state functions in designated geographical areas. As a result of this legal theory of what a county is, the legal theory of what a county may do follows: a county may do only those things specifically provided by the General Assembly, and those necessarily required to carry out the mandated duties.

Such limitations means that counties have no ability to meet new situations. Each county needs to provide services, to regulate activities for the benefit of the citizens, and to provide for the better administration of government, but these can be met only by legislation enacted by the General Assembly. One county official, urging support during the 109th General Assembly of H.B. 435, which would have conferred upon all counties some powers of local self-government, listed a number of county needs that cannot be dealt with by county officials because of statutory silence. They included: placing delinquent water bills as a lien against property, street lighting of county roads, removing obstructions to good sight distance at intersections, hiring a financial consultant, establishing moving and razing regulations, requiring sanitary sewer connections, sign control, etc. Other commentators on this subject have noted that counties cannot adopt a fire prevention or housing code, and, if there is not adequate state legislation in these areas, residents may be denied essential protections

The Commission believes that the proposed section will help counties meet present-day problems without diminishing municipal powers. It became convinced, during its deliberations on local government and particularly the limitations placed upon counties, that conferral of limited "home rule" powers on counties is not only desirable, but is necessary in order to meet the increasingly complex problems of urbanization. It will give counties that need to act, the power to act; it will not force programs and burdens on counties that do not need them.

As is the case with classification, there is the possibility that the General Assembly could presently confer upon counties the powers provided for in this section. Indeed, there is even more reason to believe this would be possible for powers than for classification since a conferral of similar powers upon counties which might adopt an alternative form of government has been upheld by the Ohio Supreme Court against a challenge that it was an unlawful delegation of legislative powers.[38] The language of that statute (County commissioners may "by ordinance or resolution make any rule, or act in any manner not specifically prohibited by general law . . .," Division (M) of Section 302.13 of the Revised Code) was not selected by the Commission because its meaning is not as clear as that of Section 3 of Article XVIII, and it appears, on the surface, to be considerably more limited. No county has been able to take advantage of that provision, however, since no county has adopted an alternative form of government. During the 109th General Assembly, H.B. 435, which would have conferred upon all counties powers of local self-government similar to those being proposed in this section, was introduced but did not pass. A similar bill, upon all counties powers of local self-governmtnt similar to those being S.B. 220, failed to be passed in 110th General Assembly.

In spite of the apparent ability of the General Assembly to do by law what this section proposes, the Commission believes it is important enough to propose a constitutional amendment on the subject.

38. *Blacker v. Wiethe*, 16 Ohio St. 2d 65 (1968).

ARTICLE X

Section 6

Present Constitution
Article II, Section 30

Section 30. No new county shall contain less than four hundred square miles of territory, nor, shall any county be reduced below that amount; and all laws creating new counties, changing county lines, or removing county seats, shall, before taking effect, be submitted to the electors of the several counties to be affected thereby, at the next general election after the passage therof, and be adopted by a majority of all the electors voting at such election, in each of said counties; but any county now or hereafter containing one hundred thousand inhabitants, may be divided, whenever a majority of the voters, residing in each of the proposed divisions, shall approve of the law passed for that purpose! but, no town or city within the same, shall be divided, nor, shall either of the divisions contain less than twenty thousand inhabitants.

Commission Recommendation
Article X, Section 6

Section 6. No new county shall contain less than four hundred square miles of territory, nor, shall any county be reduced below that amount; and all laws creating new counties, changing county lines, reducing the number of counties, or removing county seats, shall, before taking effect, be submitted to the electors of the several counties to be affected thereby, at the next general election after the passage thereof, and be adoptd by a majority of all the electors voting at such election, in each of said counties; but any county now or hereafter containing one hundred thousand inhabitants, may be divided, whenever a majority of the voters, residing in each of the proposed divisions, shall approve of the law passed for that purpose; but, no town or city within the same, shall be divided, nor, shall either of the divisions contain less than twenty thousand inhabitants.

Commission Recommendation

The Commission recommends the repeeal of section 30 of Article II and the adoption of a new section 6 of Article X as follows:

Section 6. NO NEW COUNTY SHALL CONTAIN LESS THAN FOUR HUNDRED SQUARE MILES OF TERRITORY, NOR, SHALL ANY COUNTY BE REDUCED BELOW THAT AMOUNT; AND ALL LAWS CREATING NEW COUNTIES, CHANGING COUNTY LINES, REDUCING THE NUMBER OF COUNTIES, OR REMOVING COUNTY SEATS, SHALL, BEFORE TAKING EFFECT, BE SUBMITTED TO THE ELECTORS OF THE SEVERAL COUNTIES TO BE AFFECTED THEREBY, AT THE NEXT GENERAL ELECTION AFTER THE PASSAGE THEREOF, AND BE ADOPTED BY A MAJORITY OF ALL THE ELECTORS VOTING AT SUCH ELECTION, IN EACH OF SAID COUNTIES BUT ANY COUNTY NOW OR HEREAFTER CONTAINING ONE HUNDRED THOUSAND INHABITANTS, MAY BE DIVIDED, WHENEVER A MAJORITY OF THE VOTERS, RESIDING IN EACH OF THE PROPOSED DIVISIONS, SHALL APPROVE OF THE LAW PASSED FOR THAT PURPOSE; BUT, NO TOWN OR CITY WITHIN THE SAME, SHALL BE DIVIDED, NOR, SHALL EITHER OF THE DIVISIONS CONTAIN LESS THAN TWENTY THOUSAND INHABITANTS.

Description of Changes

Present Article II Section 30 gives the General Assembly the authority to create new counties and change county boundaries, provided that no county contain less than 400 square miles or fewer than 20,000 inhabitants, and to remove county seats. Under the existing section, no law providing for any of these matters becomes effective until it is submitted to and approved by a majority of electors of each county affected voting separately.

The proposed new Section 6 of Article X would add a provision specifically permitting the General Assembly to reduce the number of counties, if the General Assembly desires to do so, while retaining all other provisions of Section 30. Any such law would also be subject to the approval of the voters in the affected counties.

The Commission also recommends moving this section from Article II (Legislative) to Article X because it relates solely to counties, which is the subject matter of Article X.

History and Background of Section

Present Article II Section 30 had its beginning in the state's first constitution in 1802. In that version (Article VII Section 3), the Legislature was

given the power to establish new counties provided that both the new and old counties contain at least 400 square miles. In the 1851 Constitution the section was rewritten to include all of the language in present Section 30 except the restriction that "no town or city within the same, shall be divided, nor, shall either of the divisions contain less than 20,000 inhabitants."

The addition of that clause was first proposed by the Constitutional Convention in 1874; however, the document drafted by that convention was defeated by the voters. The additional clause was again proposed by the drafters of the Constitution of 1912 and that time was approved at the polls.

Although the 400 square mile minimum area provision has been a part of the Constitution since statehood, several counties were created between 1832 and 1851 which contained less than the minimum area. In three of the counties — Carroll (390 square miles), Lucas (343 square miles) and Noble (398 square miles) — it appears that the establishment of the counties with smaller areas may not have been intentional and probably was due to surveying difficulties or errors. In three other counties — Erie (264 square miles), Lake (231 square miles) and Ottawa (261 square miles) — it appears that the Legislature deliberately ignored the Constitution and established undersized counties.[39] No one, however, appears to have challenged the legislature's actions in these matters.

The 88 counties of Ohio currently range in size from 700 square miles (Ashtabula) to 231 square miles (Lake), with an average size of 466 square miles.[40] There have been no changes in county boundaries, under provisions of Section 30, since 1888.

Conclusion

After studying this section, the Constitutional Revision Commission determined that present Section 30 was not clear as to whether the language providing for creation of new counties and changing of county lines authorized the consolidation of counties. Because the section was unclear on that point, the Commission recommended amending the section to include the phrase "reducing the number of counties."

The Commission also considered whether the provision requiring approval of any change by separate majorities in each county affected was an insurmountable obstacle to establishing new counties, reducing the number, or changing the county lines or county seats. The Commission could not uncover any instances in recent history of counties that tried to do any of these but were held back by the separate majorities provision, and therefore, made no recommendation to change the existing provision. (The last revision in the boundaries of any Ohio county was made in 1888 when the Auglaize-Logan line was changed.)

39. *Ohio Constitutional Convention Debates* (1851) Vol. 2, pg. 210.
40. *Ohio Population Report*, 19th Federal Census, *op. cit.*

CHAPTER 2

Municipal Corportions

Introduction

The Ohio Constitution provides for two classes of municipal corporations, cities and villages, requires the General Assembly to provide for their incorporation and government by general law, and grants the people of municipal corporations of both classes certain home rule powers and the right to adopt charters. In addition, Article XVIII deals with specific powers of municipal corporations, such as the power to acquire utilities and provide utility services.

Municipal corporations with populations over 5,000 are cities and the remainder are villages. According to the Secretary of State, there were 229 cities and 708 villages as of 1970, an increase of 37 cities over 1960 and a decrease of 25 villages since 1960.[1]

As of November 1, 1974, 148 cities (65% of all cities) and 24 villages (3%) had adopted charters. Of the charter cities, 73% (108) adopted their charters wihin the last 20 years, with 32% (47) adopting them between 1965 and 1974. Of the villages with charters, 80% (17) were adopted within the last 20 years, with 50% (12) adopting charters between 1965 and 1974.[2]

The populations for individual cities in Ohio range from 4.070 in Shadyside to 750,903 in Cleveland, with nine cities having populations over 100,000. The populations of villages range from 15 people in Valley Hi to to 4,997 in Canfield.[3].

Article XVIII was added to the Ohio Constitution in 1912, and was the result of dissatisfaction with the history of legislative special acts, passed to deal with the incorporation and problems of individual cities, with the classification system, which resulted in special acts through the guise of classification after special acts were prohibited by the 1851 Constitution, and, finally, with the Municipal Code itself, enacted when the classification system was invalidated by the Ohio Supreme Court.

The Local Government Committee and the Commission studied the provisions of Article XVIII with great care, and with particular attention to the grant of home rule as it is contained in the Constitution. Specific discussion of its interpretation and effect on municipalities and their powers since its adoption in 1912 will be discussed in the commentary to Sections 3 and 7. The home rule and charter provisions were compared to those of the Model State Constitution and to those of other states. In the final analysis, the committee concluded that no valid reason exists to propose changes in the classification, home rule, or power to adopt charter provisions of the Ohio Constitution, and the Commission agreed with this conclusion.

This report does recommend changes in some sections in Article XVIII. The power of the General Assembly to provide, by general law, for the resolution of municipal boundary problems and for the dissolution of municipal corporations would be clarified; municipal utility bonding powers would be made more flexible and modernized, and municipal utilities could sell unlimited amounts of transportation services and solid waste management services outside municipal boundaries, as is now possible with water and sewage services. Changes are proposed in the municipal charter sections to fill gaps presently existing in procedures, to provide a procedure for repeal of a charter and for election of a charter revision commission, and for other similar purposes. Other changes would rearrange sections and make corrective amendments.

1. *Ohio Population Report*, 19th Federal Census, pgs. 132-135.
2. "Ohio Charter Municipalities as of January 1, 1974," Ohio Secretary of State, updated.
3. *Ohio Population Report*, 19th Federal Census, pgs. 179-191.

RECOMMENDATIONS

ARTICLE XVIII

Section 1

Present Constitution

Section 1. Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

Commission Recommendation

No change.

Background of Section

Section 1 of Article XVIII was enacted in 1912 in an attempt to end widespread overclassification of municipal corporations. Although a constitutional provision was adopted in 1851 prohibiting the legislature from enacting special laws relating to municipalities, the legislature, under the guise of general law, managed to evade this restriction by use of the device of classification. The legislature created many classes of municipalities with varying powers, some classes consisting of only one municipality.[4]

Finally, in 1902, the state Supreme Court invalidated the entire classification structure.[5] The *Knisely v. Jones* opinion stated that:

> "The increasingly numerous classes of municipalities show that even where a difference in population is made to appear as the basis of classification, the differences in population are so trivial that they cannot be regarded as the real basis. The real basis is found in the differing views or interests of those who promote legislation for the different municipalities of the state. The apparent legislative intent is to substitute isolation for classification." pg. 454

The Municipal Code of 1902 emerged from the resulting crisis at a special session of the legislature. The Code, as amended, still forms the basis of municipal government in Ohio except to the extent that it has been modified by charters adopted pursuant to and by court interpretations of the 1912 home rule provisions.[6]

The 1912 provision creates two classes of municipal corporation: those with populations of 5,000 or more are classified as cities; all others as villages. The framers of this section believed that the two divisions adequately met the requirements of municipal corporations. They reasoned that villages, because they are smaller units, would need less complex governmental structures than the larger units, cities. The framers intended the detailed regulations of the state code to lighten the work load of village officers. The section also provides that a village becomes a city and vice versa by a method established by general law.

Comment

The Constitutional Revision Commission recommends that no changes be made in Section 1.

Classification is unimportant when it is realized that both cities and villages have equal power to adopt charters, and the ability to structure the municipal government by charter adoption is not in any way limited or restricted by law or by the Constitution, regardless of the size of a

4. Gotherman, John E., "Municipal Home Rule in Ohio Since 1960," Ohio State Law Journal, Vol. 33 (1972) pg. 589.
5. *State ex rel. Knisely v. Jones*, 66 Ohio St. 453, 64 N.E. 424 (1902); *State ex rel. Attorney General v. Beacom*, 66 Ohio St. 491, 64 N.E. 427 (1902).
6. Gotherman, *op. cit.*, pg. 590.

municipal corporation once it has been created. In addition to charter adoption, many devices other than classification exist for solving municipal problems, including contracts with other political subdivisions for the transfer or joint exercise of powers, and cooperation through councils of government.

Consideration was given to the suggestion advanced by the constitutional authority, Dean Jefferson B. Fordham, that only municipal corporations over 5,000 population (cities) should be permitted to adopt charters and acquire home rule powers.[7] He argues that because of their small size and uncomplicated governmental activities, very few of the villages in Ohio have been compelled to draft and adopt charters, preferring instead to function under statutory law. (As of November 1, 1974, 24 of the state's 708 villages have adopted charters.)[8]

The Commission rejected the notion of limiting the charter option and home rule powers to cities. It believes that the 5,000 population demarcation between villages and cities established by Section 1 is an artificial distinction and that factors other than population level usually determine whether a municipality needs the governing latitude provided by a charter, or whether the statutory forms provided are sufficient. Some Ohio villages are more active governmentally than some cities in such matters as operating utilities and making or operating public improvements. The villages that have felt the need to adopt charters or that may feel that need in the future should not be restricted from exercising the charter option in governing their affairs.

Further, the Commission concluded that not only is 5,000 residents an artificial point of distinction, but that any population figure chosen for classification would be artificial. Many other factors, such as population density, poverty, or ability to raise taxes, may determine a corporation's needs and abilities to provide for those needs. It is neither practical nor necessary to attempt to write such standards in the Constitution.

7. Fordham, Jefferson B., "Ohio Constitutional Revision—What of Local Government?" Ohio State Law Journal, Vol. 33 (1972) pgs. 580-581.
8. "Ohio Charter Municipalities as of January 1, 1974," Ohio Secretary of State, updated.

ARTICLE XVIII

Section 2

Present Constitution

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

Commission Recommendation

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

Commission Recommendation

The Commission recommends amendment of Section 2 of Article XVIII as follows:

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

Description of Changes

The proposed amendment to Section 2 would clarify and add to the constitutional requirement that the General Assembly provide by general law for the incorporation and government of municipal corporations. The amendment would provide clearly in the Constitution that the General Assembly does possess the general law power to set criteria and provide procedures for changing the boundaries of municipal corporations, specifically including the powers to consolidate, divide, dissolve or alter boundaries, in order to meet changing needs and demands placed upon both the state and local units of government in Ohio. The statutes currently provide three methods for municipalities to adjust their boundaries voluntarily: annexation, merger and detachment of territory. There is no statutory provision for dissolution of a municipality.

The General Assembly, in carrying out the constitutional mandate of Section 2, has provided statutorily for the incorporation of municipal corporations as villages. There is no provision for direct incorporation as a city, even though the population of the territory proposing to incorporate is over 5,000. To become a city, a territory must first become a village and then proceed to city status by one of the methods provided by general law. The Commission believes that the General Assembly should change this procedure and provide a statutory method for direct incorporation as a city.

Once incorporated, cities and villages alike share in the home rule powers of local self-government, whether or not they adopt charters, and in the ability to adopt charters.

Present Section 2 also authorizes passage of additional laws for the government of municipalities to become operative in a municipality only if approved by a majority vote of the electors of a municipality voting thereon. Optional forms of government are provided in the statutes for adoption by municipalities in this way.

Comment

Political subdivisions are usually incorporated in order to provide needed services to the residents and to provide a governmental structure acceptable to them. Over a period of time, however, political subdivision boundaries tend to become obsolete. In urban areas particularly service areas and political subdivision boundaries do not always correspond.

The Committee for Economic Development expressed the problem in these terms:

> The bewildering multiplicity of small, piecemeal, duplicative, overlapping local jurisdictions cannot cope with the staggering difficulties encountered in managing modern urban affairs. The fiscal effects of duplicative suburban separatism create great difficulty in provision of costly central city services benefiting the whole urbanized area. If local governments are to function effectively in metropolitan areas, they must have sufficient size and authority to plan, administer, and provide significant financial support for solutions to areawide problems.[9]

Until 1967, when the statutory restriction against incorporation within three miles of a municipal corporation was enacted, incorporation as a municipality in Ohio was relatively easy, whereas annexation of territory by a municipality and merger of two municipalities were more difficult.

9. Committee for Economic Development, *Reshaping Government in Metropolitan Areas*, 1970, pg. 16.

This former statutory policy contributed to the number of smaller municipalities surrounding the larger cities. The central cities may now lack the financial resources necessary to provide for needed services and regulation, and some of the surrounding communities may suffer the same problems, whereas others, perhaps because of a wealthy tax base or population, may be able to provide a level of services far above those available to their neighbors.

There exist in Ohio today some municipalities that cannot meet the population density and assessed valuation criteria presently required for incorporation, and thus, could not be incorporated under present statutes. A few have difficulty finding enough people to fill municipal offices. It is the Commission's belief that the General Assembly should have the powers to set minimum standards for municipalities, and, if a municipality falls below the standard, provide for its dissolution.

The Commission, through its deliberations and consultations with officials, citizens, and groups involved in the problems of local government, concluded that, if the General Assembly determines that boundary changes in municipal corporations are necessary for better government of metropolitan areas, or for better provision of services to the people, the Constitution should clearly give the legislature the needed authority to act.

The Commission believes that the amendment to Section 2 that it proposes will make it clear that the General Assembly does possess the powers to provide for modification of municipal boundaries, if necessary.

The method by which the General Assembly implements the proposed amendments to Section 2 is left entirely in the hands of the General Assembly, except that it must be by general law. This is in keeping with the general philosophy which has governed the recommendations of the Commission: that the General Assembly has, through the Constitution, the duty and responsibility to set overall policy for the state and that the Constitution should provide the General Assembly with the flexibility necessary for it to fulfill its functions effectively and equitably now and in the future. The Commission studied methods currently employed in other states to help alleviate boundary problems, including the use of boundary commissions on a local, regional or state level, with either recommending or enforcement powers. The Commission's conclusion, however, was that the legislature should have the freedom to provide for the best methods for implementing this proposal to make changes in the methods of adjusting boundaries or to adopt new ones as experience and knowledge about boundary problems increase.

The Commission is aware that inclusion of these specified powers in the Constitution will not, in itself, alter the present procedures relating to merger, annexation and incorporation. The General Assembly would have to change the statutes governing these procedures. It is the Commission's conclusion that, upon adoption of Section 2, the General Assembly should provide statutorily for the criteria and means by which a municipal corporation may be dissolved.

It is hoped that the General Assembly will be encouraged to seek new solutions to boundary problems. The Commission believes that adoption of the proposed amendments to Section 2 will support the General Assembly in its obligation to provide an effective framework for local government.

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 wth 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, 203 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 Painesville,* 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* docrine 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.

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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, not 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 legistive 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 Commssion 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 opporunity 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 hereinbefore 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 opinion[24] 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 decision [25] 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

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

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.

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 independenec 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 (1960), 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 Municial 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

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.

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 sumitted 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.

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 beween 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

No recommendation

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 ⅔ 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

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

Section 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 the abutting, adjacent, and other property in the district benefited, shall in no case be levied for more than fifty per cent 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*, 138 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 heren 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 eighteeen 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.

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 Commisison 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 "proprietory" 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.

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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 39 (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.


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