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Municipal Home Rule*

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In Ohio, municipal corporations (cities and villages) have certain powers granted to them in Article XVIII of the Ohio Constitution that exist outside authority found in the Revised Code. Because these powers originate in the Constitution, laws passed by the General Assembly that interfere with them may be invalid as applied to municipal corporations unless those laws are sanctioned by other provisions of the Constitution. These powers, granted by the Constitution and known as "home rule" powers,[1] include the power of local self-government, the exercise of certain police powers, and the ownership and operation of public utilities. This paper briefly discusses each of these powers.

The General Assembly cannot interfere with powers granted to municipal corporations by the Ohio Constitution unless the Constitution sanctions the interference.

A word of caution: some of the numerous court cases interpreting home rule powers may appear to conflict with the general principles stated in this paper. Although the courts have established some basic principles regarding home rule powers, they are not always consistently applied. Thus, it is best to view the following principles as guidelines, understanding that, in the area of municipal home rule, situations are open to court interpretation on a case-by-case basis.

Powers of local self-government

Section 3 of Article XVIII of the Ohio Constitution reads as follows:

> 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.

Municipal "home rule" powers include the power of local self-government, the exercise of certain police powers, and the ownership and operation of public utilities.

This section grants municipal corporations two types of authority: the power of local self-government and the power to adopt and enforce local police, sanitary, and other similar regulations that are not in conflict with general laws.[2] The section's limiting language "that are not in conflict with general laws" applies only to the passage of police, sanitary, and other similar

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regulations and does not apply to the powers of local self-government.[3] Nonchartered municipal corporations are required, however, to follow procedural requirements in state law when they exercise their local self-government powers. See "***Adoption of charter to exercise local self-government powers***," below.

The exact scope of "all powers of local self-government" has not been defined by the courts, but numerous cases have established standards for determining what the term includes. A basic standard applied by the Ohio Supreme Court is to determine if an issue has impact outside the territory of the municipal corporation. In 1958, the Court described the limits of the power of local self-government as follows:

> The power of local self-government granted to municipalities by Article XVIII relates solely to the government and administration of the internal affairs of the municipality, and, in the absence of [a] statute conferring a broader power, municipal legislation must be confined to that area. . . . [citation omitted.] Where a proceeding is such that it affects not only the municipality itself but the surrounding territory beyond its boundaries, such proceeding is no longer one which falls within the sphere of local self-government but is one which must be governed by the general law of the state.[4]

And in 1982, the Court further stated:

> . . . [P]ursuant to the "statewide concern" doctrine, a municipality may not, in the regulation of local matters, infringe on matters of general and statewide concern. . . . A city may not regulate activities outside its borders, and the state may not restrict the exercise of the powers of self-government within a city. . . .[5]

While the courts have not specifically defined the limits of "local self-government," they have found the following to be matters of local self-government:

- Internal organization;
- The control, use, and ownership of certain public property;
- Salaries of municipal officers and employees;
- Recall of municipal elected officials;
- Regulation of municipal streets;
- Procedures for the sale of municipal property.

On the other hand, courts have found the following to be matters of statewide concern and, thus, outside the scope of municipal home rule powers of local self-government:

- Detachment of territory;
- Annexation;
- Prevailing wage law;
- Public employee collective bargaining law.

Adoption of charter to exercise local self-government powers

Section 7 of Article XVIII of the Ohio Constitution reads as follows:

> 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.

Sections 8 and 9 of Article XVIII provide the procedures for adoption and amendment of a municipal charter.

It is a common misconception that only chartered municipalities have home rule authority. All cities and villages have home rule authority derived directly from the Ohio Constitution and not from a charter. A charter is not necessary for the exercise of police powers. A charter is, however, needed to exercise some, but not all, aspects of local self-government. In 1980, in *Northern Ohio Patrolmen's Benevolent Ass'n v. Parma*, the Ohio Supreme Court held that a nonchartered municipal corporation must follow the procedure prescribed by state statutes in matters of local self-government, but may enact an ordinance that is substantively at variance with state law in such matters.[6] So a charter is not necessary in order to exercise a substantive power of local self-government, but the procedures used to exercise such a power require a charter if they vary from state law. Municipal corporations that do not adopt a charter must follow the procedures provided in state law for the exercise of local self-government matters.

A municipal charter is necessary to specify procedures of local self-government that vary from state law.

Exercise of municipal police powers

The second power granted in Section 3 of Article XVIII is the power to adopt and enforce local police, sanitary, and other similar regulations that are not in conflict with general laws. "Police power" has been defined as the authority to make regulations for the public health, safety, and morals and the general welfare of society.[7] Examples of regulations found to be police regulations include those pertaining to zoning, animal control, fluoridation of water, traffic, and "bait and switch" advertising.

Municipal laws for the exercise of municipal police powers may not be in conflict with general laws. What are "general laws"? Until recently, the Ohio Supreme Court defined those laws as follows:

> The words "general laws" as set forth in Section 3 of Article XVIII of the Ohio Constitution means [sic] statutes setting forth police, sanitary or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to

Municipal laws for the exercise of municipal police powers may not be in conflict with "general laws."

> adopt or enforce police, sanitary or other similar regulations.[8]

But in *Canton v. State* in 2002, the Court delineated a four-part test defining what constitutes a "general law" for purposes of home rule analysis:

> A statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.[9]

Therefore, a state statute that purports only to grant or limit the legislative authority of municipal corporations and does not prescribe a mode of conduct as part of a comprehensive enactment is not a "general law" within the meaning of Section 3 of Article XVIII. For example, a state law that would only prohibit political subdivisions from restricting the ownership, possession, transportation, or transfer of firearms or ammunition probably would not be a general law since it would merely limit the legislative authority of a municipal corporation without also providing state standards in those areas. But as the Court ruled in 2008, a comprehensive legislative enactment regulating the authority to carry concealed weapons is a general law.[10]

Conflicts with general laws

The generally accepted test for determining whether a conflict exists between a municipal ordinance and a general law was set forth by the Ohio Supreme Court in 1923:

> In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.
>
> A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance.[11]

In cases where the municipal ordinance includes a criminal penalty, the Ohio Supreme Court has made it clear that:

> [w]here the only distinction between a state statute and a

> municipal ordinance, proscribing certain conduct and providing punishment therefor, is as to the penalty only but not to the degree (misdemeanor or felony) of the offense, the ordinance is not in conflict with the general law of the state.[12]

Stated another way:

> [w]hen a municipal ordinance varies in punishment with the state statute such ordinance is not in conflict with the statute when it only imposes a greater penalty. . . . [But if the] ordinance had altered the degree of punishment to a felony rather than a misdemeanor it would have been unconstitutional. However, . . . [if] the ordinance only increased the penalty from a lesser misdemeanor to a first degree misdemeanor, it is not in conflict with the general laws of Ohio.[13]

So when an ordinance changes a state law penalty from a misdemeanor to a felony, or vice versa, there is a conflict with state law, and the municipal ordinance is unconstitutional. This is because, as the Court has stated:

> [a]lthough the ordinance . . . does not permit what the statute prohibits, and vice versa, it does contravene the expressed policy of the state with respect to crimes by deliberately changing an act which constitutes a felony under state law into a misdemeanor [or vice versa], and this creates the kind of conflict contemplated by the Constitution. Conviction of a misdemeanor entails relatively minor consequences, whereas the commission of a felony carries with it penalties of a severe and lasting character. . . .[14]

An example of a conflict between a municipal corporation's police powers and a general law that does not involve penalties is found in a 1975 Ohio Supreme Court ruling, in which the Court upheld a state statute requiring municipal corporations to fluoridate their water supplies. The city (Canton) argued that fluoridation was a local matter and chose not to fluoridate. The Court held that, while fluoridation of municipal water supplies is a proper exercise of municipal police power, it is equally a proper subject for the exercise of the state's police power. So the state fluoridation statute was a general law and controlled over any conflicting municipal ordinance.[15]

Three-step analytical framework

The Ohio Supreme Court has set forth a three-step home rule analysis concerning many of the concepts addressed thus far. The first step is to determine whether the local ordinance is an exercise of local self-government or an exercise of local police power. If the ordinance relates solely to

matters of local self-government, the analysis ends because the Ohio Constitution authorizes a municipal corporation to exercise all powers of local self-government within its jurisdiction.[16]

The second step applies only if the ordinance involves an exercise of police power. This step requires a determination of whether the statute at issue is a general law under the four-part test announced in 2002 in *Canton v. State*. If the statute is a general law, the local ordinance must give way if it conflicts with the general law.

The final step is to determine whether the ordinance conflicts with the statute, i.e., whether the ordinance permits or licenses that which the statute forbids, and vice versa.[17] If the ordinance conflicts with the general law, it will be held unconstitutional. If there is no conflict,[18] the municipal action is permissible even though the statute is a general law. Thus, concurrent exercise of state and local police power is permissible.

The first step of this analytical framework may be an overstatement or at least problematic when addressing an exercise of local self-government by a nonchartered municipal corporation. For example, the case does not consider the substance/procedure issues raised in 1980 by *Northern Ohio Patrolmen's Benevolent Ass'n v. Parma*. It may be that this three-step process is really useful only for examining whether the exercise of a police power conflicts with a general law.

Municipal authority to own and operate utilities

The Ohio Constitution specifically grants municipal corporations the right to operate utilities. Section 4 of Article XVIII reads as follows:

> 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.

Section 6 of Article XVIII reads as follows:

> 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 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 services.

These utility home rule powers are subject to fewer restrictions than the more general home rule powers, but the restrictions discussed below under "***Other limitations on municipal home rule power***" apply to them. Not every issue that could be found to be a matter of the operation of a utility, however, falls under these utility home rule provisions. For example, in the 1975 fluoridation case discussed above, fluoridation of the municipal water supply was found to be a matter of public health—a police power—rather than a matter of the operation of the municipal water utility. The Ohio Supreme Court found that the state's exercise of its police power had only an incidental effect on the municipal corporation's operation of a public utility.

Unlike the other home rule power constitutional provisions, these constitutional utility provisions grant a municipal corporation powers beyond its borders. Municipal corporations are authorized not only to sell and deliver surplus utility products or services outside their borders, but also to establish and operate utilities in these "outside" areas. And to implement these powers, a municipal corporation is granted, among other powers, eminent domain authority outside its borders.

Other limitations on municipal home rule power

In addition to the limitations in Article XVIII of the Ohio Constitution mentioned above, there are other limitations on a municipal corporation's exercise of home rule powers. A municipal corporation may be limited by the United States Constitution or relevant federal laws. Also, provisions of other articles of the Ohio Constitution limit the exercise of municipal home rule powers.

Other limitations found in the Ohio Constitution apply to municipal corporations.

Several sections in the Ohio Constitution limit municipal power to tax and incur debt. Section 2 of Article XII prohibits the taxation of property in excess of 1% of its true value (ten mills per dollar) unless laws are enacted authorizing the levy of taxes beyond that limitation, either when approved by a vote of the electorate or when provided for by the charter of a municipal corporation.

The General Assembly has enacted legislation authorizing both of these exceptions to this constitutional ten-mill limitation: R.C. 5705.07 authorizes a levy of taxes beyond the ten-mill limitation, and R.C. 5705.18 authorizes a municipal corporation to provide in its charter for a limitation other than the ten-mill limitation.

The municipal home rule power to own and operate a public utility extends a municipality's power beyond its borders.

On the other hand, Section 6 of Article XIII requires the General Assembly to restrict a municipal

corporation's powers to tax, assess, borrow money, contract debt, and loan its credit in order to prevent the abuse of these powers. Section 13 of Article XVIII also authorizes the General Assembly to pass laws to limit the power of municipal corporations to levy taxes and incur debt and, further, allows the General Assembly to require reports from municipal corporations as to their financial condition and transactions, to provide for the examination of municipal vouchers, books, and accounts, and to provide for the examination of public undertakings conducted by a municipal authority.

Section 6 of Article VIII prohibits any "city" or "town" from passing laws to become a stockholder in any joint stock company, corporation, or association whatever or to raise money for, or loan credit to or in aid of, any of those entities. (This does not prohibit the insuring of public buildings or property in mutual insurance associations or companies.) However, the Ohio Supreme Court held in 1989 that the lending of credit for a public welfare purpose (in that case, subsidized housing), not a business purpose, did not violate this constitutional provision.[19]

Additional constitutional provisions address a variety of other restrictions on municipal home rule powers. Article IV creates the judicial branch of government, preventing municipal corporations from establishing courts or judgeships.

Section 1f of Article II reserves for the citizens of each municipal corporation the right to initiative and referendum on all legislative matters. This right cannot be eliminated by a municipal corporation, but the procedures to effectuate this right may be provided for in a municipal charter.

Section 10 of Article XV requires appointments and promotion in the civil service of cities according to merit and fitness. There is, however, no such requirement for villages. While the Revised Code provides for a municipal civil service in cities, a city may provide for a civil service in its charter instead of following those Revised Code provisions as an exercise of its constitutional local self-government powers.[20] But in some form, a city must provide for a civil service that meets Article XV's constitutional standards.

Finally, Section 34 of Article II provides that no provision of the Ohio Constitution impairs or limits the power of the General Assembly to pass laws that fix and regulate the hours of labor, establish a minimum wage, or provide for the comfort, health, safety, and general welfare of all employees. The Ohio Supreme Court has held that laws passed by the General Assembly establishing the Prevailing Wage Law, the Collective Bargaining Law, the Police and Fire Pension Fund, and a law generally prohibiting residency requirements for political subdivision employees are

applicable to municipal corporations under this provision, overriding any municipal home rule powers.

It is worth noting, however, that the Court decision upholding the Collective Bargaining Law had an arduous history in which the tensions between Section 34 of Article II and the constitutional home rule provisions were extensively discussed. This case was heard twice by the Court with different results each time. Both times the decision had four justices supporting the majority opinion, three dissenting. The first decision, in 1988, supported the exercise of home rule powers, saying Section 34 of Article II applied only in very limited circumstances.[21] Upon reconsideration, the Court held in 1989 that Section 34 of Article II applied, overriding the constitutional home rule provisions.[22] And more recently, in 2009, the Ohio Supreme Court gave Section 34 of Article II a very expansive application to uphold state law restricting local residency requirements.[23] These cases illustrate the occasional unpredictability of the holdings of Ohio courts in cases involving municipal home rule issues.

Conclusion

The home rule provisions of the Ohio Constitution generally authorize municipal corporations to govern themselves in local municipal matters independent of state law. This authority, however, is not without limitations. Nonchartered municipal corporations must follow procedures set forth in statutes, although chartered municipal corporations may deviate both substantively and procedurally in matters of local self-government. Municipal corporations exercising police powers cannot act in conflict with general laws. And other provisions of the Ohio Constitution may allow interference from the General Assembly.

It is far easier to set forth general principles gleaned from the abundant case law of home rule jurisprudence than it is to predict an outcome in any given set of circumstances. Although the courts have established some basic principles, some tests, and some analytical frameworks, they do not consistently apply them. There is sufficient leeway in the tests to reach varying outcomes. Some outcomes are fact specific. So, one must exercise caution when finding a case that seems to answer a specific home rule question; there may be other cases with different outcomes under similar facts, or the court may not follow precedent, or the case may be limited to its facts, or a later refinement of a given test may apply. It is difficult to simplify this area of law. This is why members are often advised that we cannot be sure how a court will rule on the constitutionality of legislative action affecting municipal corporations.

Endnotes

[1] Municipal home rule powers should not be confused with those exercised under Chapter 504. of the Revised Code by townships that adopt a limited home rule government. Township "home rule" powers are not only different from municipal home rule powers, but their source is the Revised Code, so that the General Assembly can pass laws to amend or rescind township "home rule" powers without any amendment of the Ohio Constitution.

[2] The term "general laws" for purposes of home rule analysis under Section 3 of Article XVIII, has a precise meaning and a unique analysis (see "***Exercise of Municipal Police Powers***"). It does not mean any law that is enacted by the General Assembly. Thus, if the law is not a "general law," a municipal corporation need not follow the law and, indeed, may even act in conflict with that law. Only those laws that rise to the level of a "general law" apply to a municipal corporation exercising a police power, and a municipality must not act in conflict with that law (see "***Conflicts with General Laws***").

[3] *Ohio Assn. of Pub. School Emp., Chapter No. 471 v. Twinsburg* (1988), 36 Ohio St.3d 180.

[4] *Beachwood v. Bd. of Elections of Cuyahoga Cty.* (1958), 167 Ohio St. 369, 371. Although home rule authority generally does not extend outside a municipal corporation's boundaries (except for the public utility home rule authority), the General Assembly may grant, and has granted, municipal corporations authority outside their borders. For example, under the Platting Law, municipal corporations may enact subdivision regulations that apply, in some cases, as far as three miles outside the municipal borders (R.C. 711.09).

[5] *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 89-90.

[6] *Northern Ohio Patrolmen's Benevolent Ass'n v. Parma* (1980), 61 Ohio St.2d 375.

[7] *Miami County v. Dayton* (1915), 92 Ohio St. 215.

[8] *Village of West Jefferson v. Robinson* (1965), 1 Ohio St.2d 113 (paragraph three of the syllabus).

[9] *Canton v. State* (2002), 95 Ohio St.3d.

[10] *Ohioans for Concealed Carry, Inc. v. Clyde* (2008), 120 Ohio St.3d 96.

[11] *Village of Struthers v. Sokol* (1923), 108 Ohio St. 263, paragraphs two and three of the syllabus.

[12] *Toledo v. Best* (1961), 172 Ohio St. 371 (syllabus).

[13] *Niles v. Howard* (1984), 12 Ohio St.3d 162, 165.

[14] *Cleveland v. Betts* (1958), 168 Ohio St. 386, 389.

[15] *Canton v. Whitman* (1975), 44 Ohio St.2d 62.

[16] See *American Financial Services Ass'n v. Cleveland* (2006), 112 Ohio St.3d 170.

[17] See *Struthers v. Sokol* (1923), 108 Ohio St. 263; *Marich v. Bob Bennett Constr. Co.*, (2008), 116 Ohio St.3d 553.

[18] The concept of conflict is complicated by the Ohio Supreme Court's decision in *American Financial Services Ass'n v. Cleveland* (2006), 112 Ohio St.3d 170, in which the court bases its decision on a theory of "conflict-by-implication." Although the court states that this has been a part of home rule jurisprudence after finding five cases as support, it is debatable

whether this is a long-standing or well-known home rule concept. See dissenting opinions. This theory may open the door for more inconsistent or result-oriented decisions and may further complicate the analysis of home rule cases.

[19] *State ex rel. Tomino v. Brown* (1989), 47 Ohio St.3d 119.

[20] *State ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St.3d 106.

[21] *Rocky River v. State Empl. Relations Bd.* (1988), 39 Ohio St.3d 196.

[22] *Rocky River v. State Empl. Relations Bd.* (1989), 43 Ohio St.3d 1.

[23] *Lima v. State* (2009), 122 Ohio St.3d 155.

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