SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 7 | Issue 1

1955

The Problem of Metropolitan Government in Ohio

Robert D. Cochran

Follow this and additional works at: http://scholarlycommons.law.case.edu/caselrev

 Part of the Law Commons

Recommended Citation

Robert D. Cochran, *The Problem of Metropolitan Government in Ohio*, 7 Cas. W. Res. L. Rev. 87 (1955)
Available at: http://scholarlycommons.law.case.edu/caselrev/vol7/iss1/8

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

The Problem of Metropolitan Government In Ohio

In a mid-twentieth century economy, municipalities are being forced to extend their services to meet the demands of contemporary society. Many municipal corporations for example are faced with the problem of developing more modern, more efficient police departments in order to cope with modern crime. Yet there always exists the problem of monetary limitations on such adventures. One solution would be a single large police department serving several communities. This would avoid the usual duplication of facilities and instead of having several mediocre police stations, there would be one, well equipped with all of the accoutrements of scientific law enforcement. This solution, however, is not possible under the present laws in this state. The purpose of this note is to show in what areas municipalities may, and in what areas they may not band together to perform their functions jointly.

The Ohio Revised Code provides methods for joint action by municipalities. One method is for several municipalities to unite and form one large city.[1] This solution is handicapped by the reluctance of municipalities to give up their identity. Another method would be to adopt a county charter which would transform the county into a municipal corporation.[2] This plan has an advantage over annexation in that it takes in a county-wide area, permitting the county to exercise all of its municipal powers either exclusively of or concurrently with the existing municipal corporations. The real obstacle to the plan lies in the "four majority" rule, imposed by the constitution. Under this rule a majority vote of each of four areas of the county is necessary for adoption of such a charter.[3] Past experience has demonstrated that this hurdle is almost insurmountable.[4] This leads us back to the purpose of this article which is to examine the Ohio Constitution and the Ohio Revised Code in order to determine to what extent municipalities, as they are presently constituted, may join forces.

---

[1] OHIO REV. CODE § 709.22. See also 6 WEST. RES. L. REV. 146.

[2] OHIO CONST. Art. X, § 3.

[3] OHIO CONST. Art. X, § 3. "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) "

[4] In 1950, the Cuyahoga County charter received none of the four majorities. The total vote cast was 223,858 against the charter and 205,344 for the charter.

THE HOME RULE AMENDMENT

In order better to understand what powers municipal corporations may exercise jointly, it is necessary to see what powers they have. Before 1912, the municipalities depended on the legislature for their grant of authority. Their powers were at the whim and caprice of the legislature; none of them emanated directly from the constitution. The municipalities were in fact a political football.[5] To remove this uncertainty, the state adopted the home rule amendment to the Ohio Constitution.[6] It 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 the *general* laws." (emphasis supplied)

At first blush, it would seem that this amendment made a broad grant of power to the municipalities. The Ohio Supreme Court held that the amendment was self-executing and needed no subsequent legislation,[7] and that it applied to non-charter as well as charter cities.[8]

Difficulties of construction have arisen, however, as to the meaning of the phrase "powers of local self government" and "general laws." "Powers of local self government" mean roughly those matters which are not of state-wide concern.[9] "General laws" has been held to mean statutes passed by the legislature.[10] The legislature, therefore, is still supreme in certain areas, and its domain includes "police, sanitary, and other similar regulations."[11] Where a matter is considered to be of state-wide concern, it is still beyond the control of the municipalities and is said to be "pre-empted" by the legislature. But what matters are pre-empted is still largely to be judicially determined on a case by case basis.[12]

---

[5] Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923)

[6] OHIO CONST. Art. XVIII, § 3.

[7] State v. De France, 89 Ohio App. 1, 100 N.E.2d 689 (1950); Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923)

[8] Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923)

[9] "The phrase all powers of *local* self-government' as used therein, means the power of self-government in all matters of a purely local nature." (Note the circularity of this statement which does not really aid in the interpretation of the word local) State v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944)

[10] State v. Sherrill, *supra,* note 9.

[11] Neil House v. Columbus, 144 Ohio St. 248, 58 N.E.2d 665 (1944) (regulation of liquor belongs to the state); Frecker v. City of Dayton, 88 Ohio App. 52, 85 N.E.2d 419 (1949) (city may regulate but not prohibit) See also MCQUILL, MUNICIPAL CORPORATIONS § 4.85 (3d ed. 1949)

[12] Turner, J., dissenting in State v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944) referring to his dissenting opinion in Cincinnati v. Gamble, 138 Ohio St. 220, 232, 34 N.E.2d 226 (1941) See also MCQUILLIN, MUNICIPAL CORPORATION § 4.29 (3d ed. 1949)

A problem develops when a municipality attempts to pass regulations in a field which the legislature has pre-empted. The amendment states that the local government may pass regulations as long as they do not conflict with the general laws, and it has been held that the interstices may validly be filled until the state acts.[13] In short, then, when examining municipal regulations, it must be determined whether the ordinance covers a matter pre-empted by the state or a purely local matter. If it is the former, it must be ascertained whether or not the ordinance conflicts with any state statute. On the other hand, if the matter is a local one, and a state law conflicts with the ordinance, the state law is superfluous (if identical with the ordinance) or unconstitutional (if it is contrary), since the home rule amendment is self-executing.[14]

THE PUBLIC UTILITY AMENDMENT

An appreciation of the joinder powers granted by the code also requires knowledge of the public utility amendment to the Ohio Constitution because this amendment has been incorporated into the code provision on joinder. The amendment reads as follows:[15]

> "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 such product or service. "

This amendment is also self-executing,[16] but has no such restrictions as those imposed by the courts on the home rule amendment, except for certain fiscal limitations.[17] By this amendment, municipal corporations may own every type of public utility.[18]

THE CODE PROVISION FOR JOINDER

The authority for the joint exercise of municipal powers is set forth in the code.[19]

---

[13] Williams, J., concurring in State v. Sherrill, 142 Ohio St. 574, 590, 53 N.E.2d at 507 (1944).

[14] Hugger v. City of Ironton, 83 Ohio App. 21, 82 N.E.2d 118 (1947); Goebel v. Cleveland Railway, 17 Ohio N.P. (N.S.) 337 (1915).

[15] OHIO CONST. Art. XVIII, § 4.

[16] Village of Euclid v. Camp Wise, 102 Ohio St. 207, 131 N.E. 349 (1921).

[17] OHIO CONST. Art. XVIII, § 5.

[18] Toledo v. Jenkins, 143 Ohio St. 141, 54 N.E.2d 656 (1944) (airport); Colley v. Village of Englewood, 80 Ohio App. 540, 71 N.E.2d 524 (1947) (sewers); Pierce v. City of Hamilton, 40 Ohio App. 338, 178 N.E. 432 (1931) (gas); Village of Euclid v. Camp Wise, 102 Ohio St. 207, 131 N.E. 349 (1921) (water); Priest v. City of Wapakoneta, 24 Ohio L. Abs. 214 (1937), appeal dismissed, 132 Ohio St. 527, 9 N.E.2d 292 (1937) (electricity).

> *Two or more* municipal corporations may enter into an agreement for the joint construction and management, of *any* public work, utility, or improvement, benefiting each such municipal corporation *or for the joint exercise of any power* conferred on municipal corporations by the Constitution or laws of this state, in which each of such municipal corporations is interested. Any such agreement shall be approved by ordinance, passed by the legislative body of each municipal corporation thereto, which ordinance shall set forth the agreement in full, and when approved shall be a binding contract between such municipal corporations. (emphasis supplied)

This provision incorporates both of the aforementioned constitutional amendments, giving the municipalities a very broad power of joinder as indicated by the italicized portions. If joinder were a power of local government, this provision would not be necessary, since the power would be derived from the home rule amendment, obviating the necessity for a statutory enabling provision. In view of the fact, however, that the legislature has in positive terms granted the power of joinder, it is academic to speculate whether the code provision is necessary, unless at some future date the legislature should attempt to take the power away.

Another code section gives more insight into precisely what are considered to be powers of local government.[20] The powers listed in this provision were thought by the legislature to be local, and because of the statute which enables joinder, all of them (except as noted) may be used for joint projects. This provision is probably superfluous, as all of these powers would be assumed to be included in the home rule amendment.[21] The value of the provision lies in the fact that it does, at least to some extent, enumerate certain local powers.

The Pre-empted Area

Some functions, however, have been declared to be solely of state concern[22] and have been covered by code provisions. If one were asked to

---

[19] Ohio Rev. Code § 715.02.

[20] Ohio Rev. Code § 717.01. Among other things, this section states that a municipal corporation may do the following: acquire real estate, erect garbage incinerators, purchase turnpike roads and make them free, construct wharves and landings on navigable waters, construct infirmaries, workhouses, police stations, water works, gas works and generating plants, sewers, libaries, parks, hopsitals, roads, watercourses and subways. The code also includes items pertaining to police and fire departments. The possibility of joint activity in these latter spheres may be doubted because of the stringent regulations with respect to these functions found in other parts of the code.

[21] Examples of superfluous sections of the code are Ohio Rev. Code §§ 715.42 (public conveniences), 715.43 (refusal disposal), 715.40 (watercourses and sewers), 715.28 (market places), 715.21 (power to acquire, hold, lease, sell, or donate lands.) But see, Shook v. Mahoning Valley Sanitary District, 120 Ohio St. 449, 166 N.E. 415 (1929)

[22] State v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944)

list certain powers he thought to be in their nature local, he would undoubtedly include police and fire protection. Yet the legislature has preempted both of these functions. It would seem that in this area, because of the extensive provisions relating to it no metropolitan type of activity could be promoted. For example, the director of public safety of each city must be the head of the police and fire departments.[23] This makes it impossible to place the departments within some metropolitan framework. Moreover these powers can not be delegated to a joint control board. It has been held, for instance, that the director must hold the hearings dealing with cases of suspension of the police and fire department personnel. This power may not be delegated even to the city manager in a charter city.[24] Restrictions of this sort leave a municipality little room for experimentation or change.[25] The only statutory provision relating to cooperation in this field is a contractual device whereby municipalities may agree to pool their forces in time of emergency.[26] This device has been used considerably and points up the fact that municipal corporations need legislation which facilitates further cooperation as they desire it. Except for this limited contractual device, which is restricted to a three-year period, little hope for joint enterprise exists in this area as things now stand.

PLANNING

Code provisions have been specifically adopted which permit cooperation among municipalities in the functions of platting and planning. These provisions are not part of the main joinder statute previously discussed. If these functions were construed as local under the home rule amendment, then these specific code provisions would be unnecessary because the main joinder provision would cover them. In any case, the code sets up provisions for a joint platting commission.[27] Its purpose is to plat and map an area for future development. The respective municipalities may then adopt the map. Another code provision provides for regional planning commissions with a greater power, namely, the power to plan for the beautification—*e.g.*, the setting aside of parks—of an

---

[23] OHIO REV. CODE § 732.02.

[24] State v. Sherrill, 142 Ohio St. 574, 53 N.E.2d 501 (1944).

[25] Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941) (pensions); State v. Eichelberger, 76 Ohio App. 108, 61 N.E.2d 818 (1945) (suspensions); OHIO REV. CODE § 737.06 (chief of police shall have exclusive control of stationing and transfer of men); § 737.09 (fire chief has same control over his men). See also '51 OPS. ATT'Y GEN. (Ohio) No. 900 (cannot combine fire and police force).

[26] OHIO REV. CODE § 717.02 (fire); § 737.04 (police).

[27] OHIO REV. CODE § 735.25.

area as well as the platting of it.[28] The drawback to both types of commissions is that they may only make recommendations, the actual adoption of a plan being left to the respective governmental units.[29] To be effective, a development commission should have the powers of zoning as well as platting and planning so that it can draw master plans to cover the whole area. And, more important, it should have the power to put them into effect and to enforce them. This would eliminate the temptation of the cooperating municipalities to alter the master plan in response to local pressures.

Such a development commission is envisaged which could have all of these powers and use them on its own volition, except that the county, not being a municipal corporation, could not be included. A little thought will illustrate this possibility. Zoning has been held to be a local power.[30] Although statutory provisions respecting zoning are set forth in the code,[31] the state is precluded from pre-empting this field since zoning is local in nature. One section even states that these zoning regulations do not modify any power granted by law, the constitution or a municipal charter.[32] This appears to constitute an admission by the legislature that zoning is a local power. It has been held that a municipality, through its charter, may grant this power to an administrative board.[33] It would seem that planning, being similar by nature to zoning, could also be delegated to an administrative board. Under the joinder statute,[34] since these powers are delegable, they can be transferred to a joint planning commission. This commission has the power to implement the plans which it develops and is not restricted to a recommendatory function.

County Cooperation

Joint activities by the counties and the municipalities are quite limited because the former are not municipal corporations and the joinder statute only applies to such corporations. If any joint enterprise is allowed, it

---

[28] Ohio Rev. Code § 713.21.

[29] Ohio Rev. Code § 713.23. See also State v. Franklin County Regional Planning Commission, 158 Ohio St. 496, 110 N.E.2d 415 (1953)

[30] "If any character of municipal legislation is more distinctly local than any other, then a zoning ordinance must be held to occupy the first position." Dillon v. Cleveland, 117 Ohio St. 258, 273, 158 N.E. at 611 (1927) For a recent case see Valley View v. Proffett, 221 F.2d 412 (6th Cir. 1955)

[31] Ohio Rev. Code §§ 713.01 — .14.

[32] Ohio Rev. Code § 713.14.

[33] State v. Zachritz, 135 Ohio St. 580, 586, 22 N.E.2d at 87 (1939) "In adopting a charter, a municipality may make any one or more of its boards the repository of legislative power."

[34] Ohio Rev. Code § 715.02.

must be undertaken according to the code provisions.[35] One code section permits the county to contract to perform for another governmental unit any power which that unit is allowed to exercise.[36] This contractual agreement provision — although it may be highly useful in many ventures — is not the same thing as joint ownership and control. The inherent weakness of the contractual device lies in the fact that under it the municipal corporations must give up all voice in the arrangement. This they are naturally reluctant to do.

The reader will have noticed that there exists today a considerable area in which the municipalities may act jointly. The state, however, has pre-empted important areas such as police and fire protection. To some degree, the cities may have certain services performed for them by the county, but this is a make-shift device. Successful cooperation requires the participation of the county as well as of its municipalities, in a relationship of joint ownership and control. Theoretically this may now be done, but as practical matter, the "four majority" rule is an almost insurmountable obstacle. A solution to the problem might be reached in two ways. In the first place, in defining "local" matters, the courts should be liberal and tend to favor the local units. This would enable the municipalities to take greater advantage of the home rule amendment and the joinder provision in the code. Secondly, a constitutional amendment automatically transforming all counties into municipal corporations is desirable. This step — the more far-reaching of the two — would permit the government at its local levels to perform their services on a truly regional basis.

In this second half of the Twentieth Century, our highly industrialized society is demanding more and greater government services. Highways, police and fire protection are illustrations. To meet this challenge, the local units of government are finding it increasingly difficult to go it alone. Seeking some kind of cooperation, they have turned to the imperfect contractual devices. The laws should be altered to meet the needs perceived and expressed by the municipal corporations. Only thus can we achieve effective metropolitan government.

ROBERT D. COCHRAN

---

[35] OHIO REV. CODE § 717.01 (joint workhouse permitted). But see '35 OPS. ATT'Y GEN. (Ohio) No. 4163 (a city may not contract with the county commissioners for lease of office space to the county in a city office building); '38 OPS. ATT'Y GEN. (Ohio) No. 1909 (city and county may not jointly construct a proposed building for housing indigent transients); '39 OPS. ATT'Y GEN. (Ohio) No. 700 (Vol. 2) (a county has no authority to join with a municipality for the purpose of constructing a joint county court house and city building either upon a site acquired jointly or upon land owned by the city or county).

[36] OHIO REV. CODE § 307.15.