



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

FOR THE MEETING HELD
THURSDAY, MAY 11, 2017

Call to Order:

Chair Ed Gilbert called the meeting of the Education, Public Institutions, and Local Government Committee to order at 9:19 a.m.

Members Present:

A quorum was present with Chair Gilbert and committee members Craig, Cupp, Sykes, Taft, and Talley in attendance.

Approval of Minutes:

The minutes of the April 13, 2017 meeting were approved.

Presentations and Discussion:

Garry Hunter

E. Rod Davisson

Ohio Municipal League and Ohio Municipal Attorneys Association

"Updating Municipal Home Rule in Article XVIII of the Ohio Constitution"

Chair Gilbert recognized Gary Hunter, general counsel for both the Ohio Municipal League and the Ohio Municipal Attorneys Association, and E. Rod Davisson, administrator for the Village of Obetz, to present a proposal for an amendment to Article XVIII, Section 3, regarding municipal powers of self-government. That section currently 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.

Mr. Hunter indicated he and Mr. Davisson were present to address the principle of home rule as it pertains to municipalities. He said, in response to a request from committee member Bob Taft,

he formed a committee consisting of members of law firms and law directors around the state. He said they had several meetings in which they reviewed in detail the history of the home rule amendment, which was adopted at the Constitutional Convention in 1912. He said they also reviewed case law in this area. He said the result of these meetings is a report that recommends that Article XVIII, Section 3 be amended to read as follows:

Municipalities shall have authority to exercise all powers of local self-government. Municipalities shall also have the authority to adopt and enforce within their territorial limits such local police, sanitary and other similar regulations as are not in direct conflict with general laws. The General Assembly cannot interfere with powers granted to municipal corporations by the Ohio Constitution unless the Constitution sanctions the interference. These exercises of municipal authority are self-executing, and no municipality shall be required to adopt a charter in accordance with Sections 7 and 8 of this Article XVIII to exercise this authority.

Presenting an overview of the committee's recommendation, he said the proposal does not enlarge the power of home rule, but rather clarifies areas the committee feels are important. He said home rule is the foundation of municipal government, and the basis for democracy in the governmental system.

Turning to Ohio history, Mr. Hunter said Ohio initially did not afford home rule but rather used the "Dillon Rule" – a system originating in Iowa in which local municipalities had only those powers granted by the legislature. He continued that the rule was a disaster in Ohio because the state legislature was enacting special legislation for municipalities and one size did not fit all. He said the 1912 Constitutional Convention decided to establish home rule for municipalities in the constitution, taking power away from the legislature as to home rule topics. He said home rule allows municipalities to decide their own fate, including what quality of life citizens want and can afford, and so allows citizens to decide what municipalities they want to live in. He said the basic difference between different cities is the quality of life, and that home rule is "the engine that drives economic development." Continuing, Mr. Hunter said Ohio has about 11 million residents, with 7.5 million living in municipalities. Because the majority of Ohioans live in municipalities, he said home rule is an important issue as to their quality of life.

Addressing the current language in Article XVIII, Section 3, Mr. Hunter said the current language grants powers of home rule to municipalities, but does not distinguish between chartered cities and statutory cities. In addition, he said the section does not distinguish between statutory home rule and procedural home rule. He said the courts generally refer to statutory home rule as opposed to procedural. In addition, he said the first sentence in Section 3 gives municipalities "all powers of local self-government." He noted that additional powers, such as pertaining to police activities, are couched as being subject to the general laws of Ohio. He said this clause is always interpreted by the courts to apply only to the police powers, with powers of local self-government not being subject to general law restrictions.

Mr. Hunter continued that the Supreme Court of Ohio has embraced the "statewide concern doctrine," which, in his opinion, was an attempt by the court to try to define what general laws have been, but now subjects local governments to statewide concern issues. He said this directive from the court has caused the General Assembly to attach to bills language indicating a

matter is of statewide concern. This approach has caused two problems, according to Mr. Hunter. First, “statewide concern” is not in the constitution. Second, he said, the General Assembly is not the entity to decide what a statewide concern is; rather, the courts are. He acknowledged it is difficult and expensive for municipalities to challenge legislation in court, so many of these laws stay on the books because no one has brought litigation.

Mr. Hunter said both the legislature and municipalities derive their power from the Ohio Constitution. He said the only way the state legislature can preempt municipal power is if there is something else in the constitution that authorizes it. He said there are some constitutional provisions allowing this, such as a section allowing one percent taxes without a vote.

Noting part of the proposal explicitly stating that home rule powers are self-executing, he said that may seem evident but needs to be said. He said adding the word “direct” emphasizes that only local regulations that are in direct conflict with state law fall outside of the home rule principle. He said they wished to emphasize that the General Assembly cannot usurp home rule without a provision in the constitution allowing it. He said, finally, they wished to clarify that home rule does apply both to statutory and chartered municipalities.

Senator Vernon Sykes asked what happens when a city ordinance conflicts with a legislative bill. Mr. Hunter said there has to be a conflict between an ordinance and a general law, and in an area of police power, which is preserved to local self-government. He said it is necessary to see if there is a conflict in accord with what the section says.

Explaining further, Mr. Davisson added there are two very distinct powers. First, he said, the power of local self-government has not been defined and is unfettered constitutional power. He said the other power is the ability to enact police and sanitary regulations; powers that are not unchecked and can conflict with the state rules. He said the 1912 framers were not trying to create islands of power, but they did so in some respects by giving the power of local self-government. He said that issue comes up in the courts, where it must be decided whether an action is local self-government or is the exercise of a police power. He said, if it is a police power, the court must decide if it conflicts with state law.

Mr. Davisson continued that the recommendation tries to clarify the distinction between those two powers. He said Ohio did not have a residential building code for years, and this has always been an issue of local government control. He said a building code was defined as a police power, so now Ohio has a residential building code with standards that must be followed throughout the state. He said the recommendation is trying to limit the number of times it is a close call and clarify the issue.

Describing his experience in Obetz, Mr. Davisson said it is a chartered community, a situation that creates some confusion although every municipality has home rule power whether it is chartered or not. He said Ohio is smart, diverse, hardworking state, and home rule allows people who live locally to be able to control what works locally for them.

Mr. Hunter noted one issue that affected the 1912 convention was the concern over liquor laws, and whether local municipalities could prohibit liquor establishments in their communities. He said, although delegates set up a broad home rule power, they were afraid a prohibition fight would leak into their rules. As a result, he said, they adopted a very broad rule. Mr. Hunter said,

as a municipal attorney, he needs the ability to be flexible with the plans of the city. Mr. Davisson added that home rule also is important to municipalities' main economic development engine.

Mr. Hunter and Mr. Davisson having concluded their presentation, Chair Gilbert asked if there were questions.

Gov. Taft asked whether, if adopted, the recommendation would allow a distinction between chartered and statutory municipalities. Mr. Hunter answered that the self-execution portion of the section means that both types of municipality have all the powers of local self-government. He said chartered cities have powers in Article XVIII, Section 7, which allows them to develop different forms of government. He said municipalities have different forms of government, such as a city manager, a weak or strong mayor, and these different forms are what distinguish a chartered city from a statutory one in terms of home rule. But, although that was what was intended, the original language just uses the word "municipalities," which does not account for the fact that court decisions have held that chartered cities are determined to have home rule.

Gov. Taft followed up, asking whether there is an example of an attempt by a statutory city to do by statute something prohibited by a court. Mr. Hunter said civil service laws are a good example. He said both statutory and chartered cities are subject to civil service laws, but chartered cities can adopt different procedures for implementing civil service laws locally, but statutory cities cannot because it is procedural and so they are subject to state law.

Mr. Davisson said an example is of an employer who wants to move to Ohio, and his two choices for a location are a chartered and a non-chartered municipality. In a chartered municipality, the employer can determine how the bidding laws work and quickly can have the municipality take local action to overcome those laws. In a non-chartered municipality, the employer would have to follow the Revised Code and it may take two or three months longer because they have to follow statutory bidding procedures. He said the problem is that, because of this distinction, some municipalities cannot compete for that employer to relocate there. He said this recommendation would place all municipalities on equal footing, whether or not they are a chartered municipality.

Chair Gilbert asked how residency would be affected. He noted the example that some municipalities have required city employees to live within city limits. Mr. Davisson said his understanding is that requirement has been overcome in Ohio, meaning a municipality cannot compel city employees to live there. He said it is a tough question whether that is an issue of statewide concern. He said the recommended amendment would not change that result. Mr. Hunter added there are good reasons why a city might want its police and fire employees to live within city limits, since, being nearby, they would be better able to respond to emergencies.

Gov. Taft asked how inserting the word "direct" would help. Mr. Hunter said they were trying to direct the conversation away from the statewide concern doctrine by indicating the law cannot just be of statewide concern but has to be in direct conflict. Gov. Taft wondered about the case that provided the statewide concern doctrine. Mr. Hunter said the Supreme Court announced that doctrine in *McElroy v. Akron*, 173 Ohio St. 189 (1962).

Chair Gilbert said legislative members often ask what litigation would result from this recommended change. Mr. Hunter said he sees less rather than more litigation would occur because the new language would allow everyone to know where the boundaries are. He said they were trying to clarify the separation between the local government power and the police power.

Referencing the 1912 convention, Gov. Taft noted the delegates decided to remove the words “affecting the welfare of the state.” Mr. Hunter said his committee thought that was going a little too far, noting that prohibition was such an issue in 1912 that the convention delegates did not want to create a firestorm by using that language. He said his committee did not want to cause the same firestorm now.

Chair Gilbert thanked the speakers for presentation, noting their testimony will be part of the record.

Chair Gilbert then turned the committee’s attention to sections remaining for review. He noted there were some sections that are controversial but, nevertheless, were deserving of attention from the General Assembly, such as Article XV, Section 11, requiring marriage to be between one man and one woman, and Article XV, Section 6, relating to casino gaming. Chair Gilbert suggested the committee could present ideas regarding remaining sections as a final report, asking input from the committee on this plan.

Gov. Taft said the committee has now heard from the Ohio Municipal League, in response to his inquiries about Article XVIII. He said the committee also could hear from the County Commissioners Association of Ohio regarding changes they might recommend. He noted that one area of concern is Article II, Section 20, relating to commissioners’ terms of office and compensation; however, that section has been assigned to the Legislative Branch and Executive Branch Committee. He said he could check with that committee to see if they would allow a transfer of that section.

Chair Gilbert asked the committee’s consensus regarding a final report. Gov. Taft suggested the committee wrap up by indicating sections that they have not been able to deal with but have heard from the public in terms of letters or communications. He said that would allow the committee to document the issue. Chair Gilbert said that could be prepared and sent out so that the committee could have it on hand for a final meeting.

Reports and Recommendations:

Article VII, Section 1 (Support for Persons with Certain Disabilities)

Chair Gilbert recognized Shari L. O’Neill, interim executive director and counsel, for the purposes of providing a second presentation of the committee’s report and recommendation for Article VII, Section 1, relating to support for persons with certain disabilities. Ms. O’Neill described that the report recommends that Section 1 be changed to read:

Facilities for and services to persons who, by reason of disability, require care or treatment shall be fostered and supported by the state, as may be prescribed by the General Assembly.

She continued that the report describes the background of the section, and discusses the committee's consideration of the topic. She added the report also documents the presentations by specialists on mental health and disabilities who assisted the committee's review. She said the report indicates the committee's decision to change the section by modernizing the language and clarifying the state's responsibility with regard to people who are in need of assistance.

Chair Gilbert asked for a motion to approve the report and recommendation, which was provided by Gov. Taft and seconded by Sen. Sykes. A roll call vote was taken, and the motion passed unanimously.

Article VII, Sections 2 and 3 (Directors of Public Institutions)

Chair Gilbert continued to recognize Ms. O'Neill for the purpose of providing a second presentation on a report and recommendation for Article VII, Sections 2 and 3, relating to directors of public institutions.

Ms. O'Neill described that the report reflects the committee's determination that these sections should be repealed for the reason that they are obsolete. Chair Gilbert asked for a motion to approve the report and recommendation, which was provided by Gov. Taft, with Representative Bob Cupp seconding the motion. A roll call vote was taken, and the motion passed unanimously.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:20 a.m.

Approval:

The minutes of the May 11, 2017 meeting of the Education, Public Institutions, and Local Government Committee were approved at the June 8, 2017 meeting of the full Commission.

/s/ Edward Gilbert

Edward Gilbert, Chair