Members Brief

An informational brief prepared by the LSC staff for members and staff of the Ohio General Assembly

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Municipal Public Utility Home Rule

Municipal corporations have public utility home rule authority under the Ohio Constitution to own and operate public utilities, subject to a referendum by their residents, and to sell surplus utility products and services to customers outside municipal limits. While generally the state cannot infringe on municipal public utility home rule authority, courts have nonetheless found this authority to be subject to various limitations.

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Article XVIII of the Ohio Constitution grants municipal corporations (cities and villages) certain authority known as "home rule." Article XVIII, Sections 4, 5, and 6 provide specific public utility home rule authority to municipalities. Each of the public utility home rule sections are briefly discussed below.[1]

Article XVIII, Section 4 – own and operate public utilities

Article XVIII, Section 4 of the Ohio Constitution allows municipal corporations to "acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product 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." Section 4 also allows municipalities to acquire or expand its public utilities using eminent domain.

Since "public utility" is undefined by the Constitution, courts look at various factors to determine whether an entity is a "public utility" based on the facts in a particular case. These factors are whether the entity provides "an essential good or service to the general public which has a legal right to demand or receive this good or service," the good or service is required to be

[1] For more information on other municipal home rule authority, see the LSC *Members Brief*, Municipal Home Rule (PDF), which is available on LSC's website: lsc.ohio.gov.

provided "generally and indiscriminately" to the public, and the entity conducts "its operations in such a manner as to be a matter of public concern."[2] "Public utility" seems to include, for example, providers of water, sewer, electric, natural gas, and busing services due to various court cases concerning providers of these types of services.[3]

Eminent domain under Section 4

The Supreme Court has found that Section 4 allows the use of the municipal public utility eminent domain authority within or outside of corporation limits. Further, Section 4 does not limit municipal corporations to acquiring only existing public utilities using eminent domain but permits them to obtain property on which to build or expand a municipal public utility. There are some limitations on Section 4's eminent domain authority, including:

- A municipality cannot exercise public utility eminent domain authority outside its corporation limits unless the purpose is to supply public utility product or service to the municipality or its inhabitants.
- The authority cannot be used if it will result in the destruction of an existing public use (for example, a public road) or the destruction, including economic destruction, of an existing municipal or political subdivision public utility.
- Like the general limitation on Section 4 authority discussed below, municipal public utility eminent domain authority might be limited if it conflicts with the state police power.

Limitation on Section 4

Though the General Assembly generally lacks authority to impose restrictions or limit a municipality's authority to own and operate public utilities derived from Section 4, the Supreme Court has upheld state laws that affect municipal utilities in certain instances. Specifically, the Court has upheld such laws if (1) the statute's purpose is an exercise of the state's police powers and (2) the statute is not a substantial infringement on the municipality's authority.

For example, *Canton v. Whitman* involved a challenge to a state law that required the city of Canton to add fluoride to its municipal water supply. Canton claimed that the state requirement to add fluoride to its water supply violated its authority to operate a municipal utility under the state Constitution. However, the Supreme Court upheld the fluoride requirement because (1) the law was enacted pursuant to the state's police power to protect the public health and safety, and (2) Canton's right to own and operate a municipal water utility was not limited to a greater degree than with any other health and safety requirement.[4]

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[2] *City of St. Marys v. Auglaize County Bd. of Comm'rs*, 115 Ohio St.3d 387, 395-96 (2007); *City of Englewood v. Miami Valley Lighting, LLC*, 182 Ohio App.3d 58, 64-65 (Ct. App. Montgomery County 2009).

[3] *Ohio Power Co. v. Attica*, 23 Ohio St.2d 37 (1970) (electric); *Britt v. Columbus*, 38 Ohio St.2d 1 (1974) (sewer); *East Ohio Gas Co. v. Public Utilities Com.*, 137 Ohio St. 225 (1940) (natural gas); *Cleveland R. Co. v. North Olmsted*, 130 Ohio St. 144 (1935) (bus service); *Western Reserve Steel Co. v. Cuyahoga Heights*, 118 Ohio St. 544 (1928) (water).

[4] *Board of County Comm'rs v. Village of Marblehead*, 86 Ohio St.3d 43, 44-45 (1999); *Canton v. Whitman*, 44 Ohio St.2d 62, 63, 67-68 (1975).

Article XVIII, Section 5 – voter referendum

Article XVIII, Section 5 requires a municipality "proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor" to do so by an ordinance that takes effect 30 days after its passage. If a petition signed by 10% of the municipality's electors is filed with the municipal executive authority demanding a referendum on the ordinance within that 30-day period, the ordinance does not take effect unless it is approved by a majority of voters. The submission of the ordinance to voters is governed by the provisions of Article XVIII, Section 8 regarding the submission of a question to choose a charter commission.

The Supreme Court has found that Section 5 does not apply in certain instances, such as:

- If the municipality passes an ordinance that provides only for a reconstruction, alteration, rebuilding, enlargement, improvement, addition to, or other addition to an already existing municipal public utility, even if the change is substantial.
- When the ordinance allows a private utility company to use streets, alleys, and public ways to provide service to certain entities within the municipality, but does not require the company to provide service.
- If the municipal ordinance only declares the necessity of creating a municipal public utility without including a plan to finance the utility plans.
- When the primary purpose of the ordinance (for example, urban renewal) does not relate to the acquisition of public utilities, even if acquiring utilities is an incidental part of the ordinance.[5]

Article XVIII, Section 6 – service outside municipality

Article XVIII, Section 6 allows a municipal corporation that owns or operates a public utility to "sell and deliver . . . any transportation service of such utility and the surplus product of any other utility" to others outside the corporation limits, provided that, except for water or sewage services, the amount sold or delivered cannot exceed 50% of the total service or product supplied within the municipality.

Section 6 vests sole authority to sell municipal public utility service in the municipal corporation. Municipalities have no obligation to sell utility service to purchasers outside municipal limits unless there is a contract. Even if a municipal corporation enters into a contract to provide utility service outside its limits, it may attach conditions for continued service, such as an agreement to consent to municipal annexation. Crucially, the Supreme Court has held that the General Assembly lacks authority to require a municipality to provide public utility service to noninhabitants or to limit the price that it may charge for noninhabitant service. If a municipal

[5] *State ex rel. Taxpayers League of North Ridgeville v. Noll*, 11 Ohio St.3d 190, 191 (1984); *State ex rel. Wingerter v. City Council of Canton*, 7 Ohio St.2d 26, 27-28 (1966); *Galion v. Galion*, 154 Ohio St. 503, 506-07 (1951); *State ex. rel. Fostoria v. King*, 154 Ohio St. 213, 216-18 (1950); *Middletown v. City Com. of Middletown*, 138 Ohio St. 596, 605 (1941).

utility charges higher rates for noninhabitants under a contract, these rates will be upheld even if there is no justification for the different rate.[6]

Sections 4 and 6, when read together, allow a municipal corporation to buy public utility service (such as electricity) from another entity to serve its inhabitants, and to sell surplus product to noninhabitants. According to the Supreme Court, however, a municipal corporation cannot purchase surplus utility service for the sole purpose of reselling it all to noninhabitants. Yet, it is not clear whether that prohibition applies to the resale to noninhabitants of surplus service purchased for other reasons. Those reasons might include, for example, obtaining service at reduced cost, avoiding environmental impacts, or increased reliability. [7]

[6] *Bakies v. City of Perrysburg*, 108 Ohio St.3d 361, 365-66 (2006); *Fairway Manor v. Bd. of Comm'rs*, 36 Ohio St.3d 85, 89-90 (1988); *State ex rel. McCann v. Defiance*, 167 Ohio St. 313, 319 (1958).

[7] *Clev. Elec. Illuminating Co. v. City of Cleveland*, 167 Ohio St.3d 153, 159, 163 (2021) (judgment only); *Clev. Elec. Illuminating* at 163 (DeWine, J., concurring in judgment only in part and dissenting in part); *Toledo Edison Co. v. City of Bryan*, 90 Ohio St.3d 288, 293 (2000).