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THE NATURE OF MUNICIPAL LEGISLATION

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The late Professor Freund in his book on Legislative Regulation[1] distinguished between regulative law and declaratory law and between governmental legislation and law legislation. If possible, it would be helpful to break the various aspects of municipal power and regulations into further classifications. Municipal councils frequently are said to have three kinds of powers, or there are in general three aspects of their activities which have been tagged as legislative, administrative and quasi-judicial. Whether a useful but tentative description of each of these powers, and especially whether any successful effort can be made to identify legislative acts as such, distinguished from the other activity, remains to be seen. Primarily, we shall be interested in law legislation.

The present writer does not hope to state oracularly what legislative acts are and to describe them in such fashion that doubts about them can be solved by the use of any formula. Ordinances are directed toward purposes so varied that we shall have to ask ourselves, not abstractly, which are legislative in character, but rather, it seems wise to try to discover for what reason a council's act is being questioned, which is before the court for examination.

Our study so far seems to develop these types of problems: (a) Some interested person seeks to have the ordinance subjected to a referendum, and the question arises: Is the proposed ordinance subject to be referred? (b) The method of legal attack upon an ordinance may be determined by whether it is legislative in nature or is something else. (c) The issue may be whether a permissible delegation of legislative powers has been made. (d) A legislative act may require for its validity a different kind of approval for its passage from that of some other acts. (e) The questions may arise as to the nature of appointments and salary adjustments of officers and employes. This, in part, arises also in (d) above. (f) There

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[1] (1932), pp 18-27.

are many specific issues such as the matter of the extension of municipal boundaries; whether motives of councilmen may be reviewed in some cases but not in legislative matters; whether there is liability for failure to legislate; whether it is possible, under what Freund calls legislative law, to lay down clear-cut tests as to what is municipal legislation as is occasionally attempted; and further, whether the courts in talking about legislative powers of municipalities always or usually refer to legislative rather than administrative acts.

I. *Legislation and the Referendum*

Many cities exist under statutes or charters which provide for referenda of the acts of the councils. It is usually declared that only legislative acts are so subject, the result being that in many cases it is necessary to decide whether a given ordinance is legislative or on the contrary is administrative or perhaps judicial in nature. Generally legislative acts are referrable. Emergency legislation, even of the law legislation type, however, is usually not referrable. This leads to the double inquiry: Is the act proposed in fact an emergency and if so, is it legislative?

In *Burdick* v *San Diego*,[2] a resolution for the erection of a city jail was held not to be legislative and not subject to referendum, though in an earlier case the selection of a site for a city hall had been held subject to it.[3] The different result was explained by the fact that in the *San Diego* case there had been several earlier resolutions covering the same matter, one designating the site, another appropriating the funds and a still later one varying slightly from the others in that it accepted aid from P W.A. The present resolution was therefore merely procedural and did not of itself establish a policy. We then have an implication that legislation when it is to be tested by referendum, establishes a policy respecting the public affairs of the municipality. So an ordinance whose object is the extension of an oil and gas drilling zone is legislative and referrable.[4]

In Washington an ordinance which revoked a temporary permit granted to a street railway company (to continue operations

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84 P 2d 1064 (Cal. App. 1938).
[3] Hopping v. Richmond, 199 Cal. 64; 248 P 225, 48 A.L.R. 509 (1926).
[4] State ex rel. Hunzicker v. Pulliam, 168 Okla. 632, 27 P. 2d 417 (1934).

after its franchise had expired) and which declared an intention to make permanent provision in the future for city transportation, was held not to be a legislative act subject to referendum.[5] It merely declared an intent to develop a policy but created no policy So an ordinance for the sale of a bus franchise[6] was not legislative but one providing for street lighting and the determination of rates to consumers was held declaratory of a policy and subject to referendum.[7] It is assumed that the policy of making the sale had already been initiated. In the same way, an ordinance authorizing the purchase of a site for a crematory is administrative and not subject to referendum. Whether or not the city should operate a crematory had heretofore been decided presumably and this was accordingly not a policy ordinance.

Following out the idea expressed in the *San Diego* case above, it was held in *Keigley* v *Bank*[8] that an ordinance which in regard to its particular content was legislative in form, but which was a general summing up of previous ordinances was not legislative unless there were material departures from the original acts. An example of departures would be the insertion of provisions for the calling of an issue of bonds at dates which differed from those originally provided and involved a new financial plan. Is a call for a referendum itself referrable? It was said in *Campbell* v *Eugene*[9] that to refer a call for a referendum was an idle thing to do and would get nowhere, and so was not referrable.

There is probably no clear guide as to what is legislative from the point of view of the referendum, unless it may be that a legislative act is one which declares a policy to be followed in city government. The referendum may tangle with highly practical matters in municipal administration in which on-the-spot judgment in particular cases is often necessary, which if honestly made should not be disturbed.

II. *The Delegation of Municipal Legislative Powers*

The doctrine of non-delegation of powers in American law probably grows out of the theory of separation of powers and is

[5] Neils v. Seattle, 185 Wash. 269, 53 P. 2d 848 (1936).
[6] Seaton v. Lackey, 298 Ky. 188, 182 S.W 2d. 336 (1944).
[7] State ex rel. Reeves v. Hillyer, 128 Ohio St. 294, 198 N.E. 2 (1934).
[8] 97 Utah 60, 89 P 2d 480 (1939).
[9] 116 Or. 264, 240 P. 418 (1925).

supported by the argument that there should be direct responsibility on the part of legislatures for their acts. It seems clear that separation of powers as a doctrine does not apply to municipal affairs any more than that a republican form of government should be adopted. There is, however, a deep-seated feeling even in the case of municipal corporations that legislative power qua legislative should not be delegated. This probably signifies the other alternative that the citizens should be able to control at the polls the ultimate policy of their legislators. This idea of close responsibility does not so much apply to purely administrative acts and delegation therein is a matter of practical necessity.

A brief comparison may be made at the outset between the delegation to the municipality by the legislature and delegation by the council to its own officers. No comprehensive study is intended of the former and only illustrations affecting taxation will be used.

Where a municipality is given broad powers of taxation for local requirements, may the state thereafter create a Board of Tax Commissioners which is to have general oversight and power to veto some items of local expenditure and perhaps increase others? This question has been answered both affirmatively and negatively. In Indiana, such power has been sustained.[10] It was argued by the city of Indianapolis[11] that the reductions made by such a board deprived the city of the inherent right of local self government, a view generally now discarded[12] and that the exercise of this power involved an exercise of both legislative and judicial powers. Both arguments were rejected. A state it was held may reserve a check upon the tax assessments of municipalities and lodge supervision in a state board which is not itself a municipal corporation nor local in its powers.

In Oregon, however, such power is positively rejected at least for home-rule cities. In *Portland* v *Welsch*,[13] the State Tax Supervising and Conservation Commission reduced in the city s budget certain salaries and rejected an item for street widening. It was

[10] Dunn v. Indianapolis, 208 Ind. 630, 196 N.E. 528 (1935). See 11 IND. L. JOUR. 189 (1936).

[11] Wimbish v. Hamilton, 47 La. Ann. 246, 16 So. 856 (1895).

[12] Biddeford v. Yates, 104 Me. 506, 72 A. 335 (1908).

[13] 154 Or. 286, 307, 59 P 2d 228, 236 (1936). In Ardmore v. Excise Board, 155 Okla. 126, 8 P. 2d 2, 10 (1932) the court adopted the theory of the inherent right of municipalities to local self government.

held that these being local items, the delegation to a state commission was invalid.

The delegation by a municipality to its own officers of various duties and powers could undoubtedly be withdrawn at will by the council. Delegation has been the subject of much litigation with respect to traffic, zoning, structures overlooking streets, licensing businesses and professions and other matters. In *Appeal of Blackstone*[14] a zoning ordinance prohibited the erection of certain types of structures within a named area but provided for possible variations and assured to protestants of a right of appeal from the decision of the building inspector to a Board of Adjustment, provided for in the ordinance. The privilege of variation was authorized where a literal enforcement of the ordinance would cause undue hardship. The plaintiff in that case desired to erect a second story to his garage but a license therefor was denied by the inspector and the denial was sustained by the board. On certiorari from this determination the plaintiff argued that this delegation to the inspector and to the board was a legislative matter and was invalid because no standards to govern the city's policy had been set up as guides. It was held, however, to be unnecessary to control the board's discretion in this way Likewise, standards were not required to guide an art jury which has been given authority to approve or disapprove of the erection of structures on or overhanging public highways.[15]

Other courts are more insistent that the council lay down standards for those officials invested with the duty of executing municipal ordinances. Thus, an ordinance giving discretionary powers to the superintendent of buildings to declare any structure a nuisance which is unsafe for the purpose for which it was used from the standpoint of danger by fire and which authorizes him to take such steps as are necessary for its abatement does not set up adequate standards for asserting municipal policy. The council itself must determine the conditions and the circumstances which would create an emergency like that contemplated.[16] A simple solution would seem to be that the superintendent should report

[14] 38 Del. 206, 190 A. 597 (1937).
[15] Walnut and Quince Corp. v. Mills, 303 Pa. 25, 154 A. 29 (1931). (Appeal dismissed 284 U.S. 573, 76 L. Ed. 498 (1931).)
[16] Lux v. Milwaukee Ins. Co., 322 Mo. 342, 15 S.W 2d 343 (1929). See also re Wilson, 32 Minn. 145, 19 N.W 723 (1884).

to the council such buildings as are unsafe and thereafter an ordinance declaring them to be a nuisance and removable would be in order. In another case it was held that the council cannot merely determine that the sale of liquor is to be limited to certain patrol districts and authorize the mayor to designate the boundaries of those districts. The districts must be specifically named by the council. So in a stop-gap zoning act, the council cannot declare that the building inspector shall temporarily determine what parts of the city belong in either of the three kinds of districts contemplated.[17] These cases are illustrative of the difficulties where legislative non-delegation is insisted upon.

In *Staley* v *Vaughan*,[18] the designation of what streets should be through-traffic streets was held to be a legislative matter not to be delegated to the police officers. The defendant had violated an order which had so designated a certain street and injury had resulted to the plaintiff because he had expected the defendant to stop at the stop sign. This determination, however, was held to be an administrative matter and was proper.

Ohio, however, in a case nearly identical with the *Staley* case seems to hold that not only must the city provide by ordinance for through streets, but must also name the streets.[19] Thus a degree of inflexibility is created which may not comport with public convenience. It would be clear a fortiori, then that an ordinance granting to a railway station master the power to determine what persons may park in front of the station, would be invalid not necessarily because the power would be legislative, but because the city could not confer authority to enforce police regulations upon one having no connection with the police force.[20]

The requirements of those courts which insist upon elaborate standards to be laid down by the council create serious practical difficulties in traffic control. In a note in his case book on Municipal Corporations,[21] Dean Stason comments upon this problem. He points out in his discussion of *Shreveport* v *Herndon*[22] that a

[17] See State ex rel. Srigley v. Woolworth, 169 N.E. 713 (Oh. App. 1929).
[18] 92 Colo. 6, 17 P 2d 299 (1932).
[19] Albrecht Grocery Co. v. Overfield, 168 N.E. 386 (Oh. App. 1929).
[20] Cincinnati v. Cook, 107 Oh. St. 223, 140 N.E. 655 (1929).
[21] 2nd Ed. 1946, p. 115.
[22] 150 La. 113, 105 So. 244 (1925). (Holding in general that ordinances granting the commissioner of public safety power to prescribe and enforce parking rules within areas and at periods designated by himself are invalid.)

strict enforcement of such a ruling makes the handling of traffic almost impossible even in small cities. He observes that there is now a tendency to describe such powers granted to police officers as discretionary powers rather than legislative. Thus, in Chicago an ordinance providing that officers are authorized to direct traffic "in accordance with this ordinance or in emergencies as public safety may require", was sustained.[23] In that case a policeman was directing traffic at a busy intersection. He directed a motorist either to drive straight ahead or make a left turn. The latter refused to obey and insisted upon making a right turn. After causing a traffic block he was arrested, tried and convicted for disobedience of this order and his conviction was sustained. Much, accordingly, appears in the magic of the word "administrative" when substituted for the word "legislative"

It thus appears that it is practically impossible to set up standards of policy in emergencies and an officer must in such cases exercise his own discretion.[24] Quick changes in parking rules often become necessary and all that should be required of the ordinance is that broad, general regulations be made for parking and traffic. Dean Stason thinks it would help if the more specific regulations were made by resolution rather than by ordinance. He has in mind, doubtless, the comparative informality and simplicity in the adoption of an ordinance for it could be hurried through. The present writer, however, would be more liberal in the extension of discretionary powers to police officers and would not require even a resolution. There is no immutable law requiring a close distinction between legislative and administrative functions in local government, and it will serve good government not to require standards of policy to be sharply defined.

Many problems of local government have been held to involve discretionary rather than legislative regulation. Thus, the power of making appointments to office may be delegated to the mayor since this power is not legislative.[25] The fixing of a date for the holding of an election has been regarded as not of such a legislative character as to prevent the delegation of it to a special board.[26]

[23] Chicago v. Marriotto, 322 Ill. 44, 163 N.E. 369, 60 A.L.R. 501 (1928).
[24] Cleveland v. Gustafson, 124 Oh. St. 607, 180 N.E. 59, 79 A.L.R. 1325 (1932).
[25] Clark v. State St. Trust Co., 270 Mass. 140, 169 N.E. 897 (1930).
[26] People v. Hoze, 55 Cal. 612 (1880).

Assuming the power in a council to subscribe for railroad stock exists, the actual subscribing may be delegated.[27] A statutory provision even that such a subscription shall not be made without the consent of the electors is not a wrongful legislative delegation;[28] nor the conferring upon the county judge authority to determine whether his chief clerk may act as purchasing agent for the county.[29] An example of non-delegable function may be found in *Seignious* v *Rice*[30] which may be justifiable as a matter of policy. An ordinance divided master plumbers into two classes. One class which consisted of those who had obtained their licenses before 1920 was relieved of the obligation to take a reexamination. It was left to the discretion of the Health Commissioner, however, to decide which of those licensed after 1920 should be re-examined. The court held that this power of selection was legislative and so not delegable. The levying of taxes and the determination of tax rates for the purpose of fixing salaries of officials and providing for city improvements is legislative.[31] Delegation here would scarcely be appropriate. The Kentucky court once declared that much of the activity of councilmen was administrative, mentioning in particular the acceptance of bonds, the granting and revoking of licenses, contracts for improvements and the acceptance of the completed work.[32]

III. *The Nature of Appointments and of Salary Adjustments*

For the present purpose, the principal interest in appointments arises from the matter of the reconsideration of them when made. A single illustration of the problem will suffice. In *De Woody* v

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[27] Cincinnati, etc., Ry. v. Commissioners, 1 Ohio St. 77 (1852).

[28] Paterson v. Society, 24 N.J.L. 385 (1854). See also Lux v. Milwaukee Ins. Co., 322 Mo. 342, 15 S.W 2d 343 (1929). (A provision in a statute that a municipal charter shall not take effect until approved by the electors is a mere acceptance and not a delegation.)

[29] State ex rel. Llewellyn v. Knox, 165 Tenn. 319, 521 S.W 2d 973 (1932).

[30] 273 N.Y. 44, 6 N.E. 2d 91 (1936).

[31] Cincinnati, etc., Ry. v. Commissioners, 1 Ohio St. 77 (1852); Portland v. Welch, 154 Or. 286, 307, 59 P. 2d 228, 236 (1936).

[32] Reuter v. Meacham Contracting Co., 143 Ky. 537, 136 S.W 1028 (1911). (There may be danger in such an abstract dictum when a specific application is to be made. It may be necessary to ask in what connection the question before the court arises. The court further said: "None of these things may be done by a purely legislative body like the legislature of a state.....); Wimbish v. Hamilton, 47 La. Ann. 246, 16 So. 856 (1895). See, for an enumeration of the non-legislative functions of a state legislature, GARNER, POLITICAL SCIENCE AND GOVERNMENT (1935).

Underwood,[33] the petitioner had been named by the mayor to the civil service commission and the appointment had been confirmed by the council. He had accordingly been notified of the confirmation and had accepted by letter. At the next session of the council the confirmation was rescinded. The rules of the council provided that any action taken by the council may be reconsidered at the next regular meeting on motion of a councilman who had voted with the prevailing side. The petitioner claiming that the reconsideration was invalid, sought a declaratory judgment to that effect. This precise situation was not provided for in the rules of procedure. The court held that where a collective body authorized to make an appointment is a legislative body, the act of appointment is intrinsically administrative or executive rather than legislative and that such a body has the power to reconsider. It seems, however, that after notification of the appointment and an acceptance of it, all the conditions are performed which makes the act final and makes reconsideration impossible.[34] *Thorne* v *Squier*[35] appears to be in square conflict with the *DeWoody* case, unless it can be distinguished by the rules of procedure adopted by the council. The *Thorne* case seems to the writer to reach a wholly undesirable result.

Are salary adjustments legislative or are they administrative acts? A conclusive answer probably cannot be made. In one case[36] an officer s salary was reduced during the depression by the council. The city at this time had adopted the city manager form of government. In theory at least, all things of an administrative character must first come before the manager who then makes a recommendation to the council on the matter at hand. The plaintiff argued that salary adjustments being administrative must be made only on the recommendation of the manager and in his case this had not been done. The court held that salary adjust-

[33] 34 N.E. 2d 263 (Oh. App. 1940).

[34] See U.S. v. Smith, 286 U.S. 6, 76 L. Ed 954 (1922). (When the senate confirms a nomination (Chairman of the Fed. Pow. Com.) and on the same day the President notifies the nominee and the latter accepts and takes the oath and enters upon his duties the appointment is completed and a reconsideration comes too late. Other illustrations may be found in 4 MCQUILLIN, MUNICIPAL CORPORATIONS (1949) Sec. 13.50. See also Secs. 13.48 and 13.49 and 89 A.L.R. 135-136).

[35] 264 Mich. 98, 249 N.W 497 (1933).

[36] Webb v. Beloit, 229 Wis. 51, 281 N.W 662 (1938), 38 MICH. L. R. 261 (1940).

ments were legislative[37] and the purpose of the adoption of the city manager act was to make the manager an administrative officer. The reason that the act was legislative was said to be because it was a condition precedent to legislative action. No indication was given as to the further legislative action contemplated. In *State* v *Billingham,*[38] the adjusting of salaries was also held to be legislative and so subject to referendum because it involved appropriations of money, but in Iowa it was held to be administrative and so not subject to referendum.[39]

IV *Some Methods of Attack Upon Ordinances*

We are told that while certiorari lies to review certain acts of councils it will not lie to review acts legislative in nature. This rule consequently requires courts at times to distinguish between legislative and non-legislative ordinances. In *Lechleidner* v *Carson,*[40] it was held that the discharge of a police officer was judicial, not legislative and so was subject to review on certiorari. The same may be said about the auditing of claims by the council where a refund is demanded.[41] Mandamus is not appropriate because its purpose is to coerce action rather than review it.

An ordinance granting a franchise, on the other hand, is legislative and not reviewable by certiorari.[42] A petition for a declaratory judgment is appropriate to review the council's legislative acts. A case involving an appointment to office and an attempted reconsideration of it held that this problem was administrative, but there is also authority that it is legislative.[43]

There are other cases where no discussion was had whether the ordinances under attack were legislative or otherwise. Some ask for a writ of mandamus to compel the issuance of a license which if issued would violate an ordinance;[44] in some there may be a

[37] See Munro, *Recent Municipal Experiments in the U.S.*, 17 Jour. Soc. and Comp. Legislation in the U.S., 82, 84 (1917). (No clear cut line between policy making and carrying out policy.)

[38] State v. Billingham, 183 Wash. 439, 48 P. 2d 602 (1935).

[39] Murphy v. Gilman, 204 Iowa 58, 214 N.W 679 (1927).

[40] Leckleidner v. Carson, 156 Ore. 636, 68 P. 2d 482 (1937).

[41] People ex rel. Hunter Arms Co. v. Foster, 288 N.Y.S. 295 (App. D. 1936).

[42] Tenny v. Columbia, 48 Wash. 150, 92 P 895 (1907). See 17 McQUILLIN, MUNICIPAL CORPORATIONS (1950) sec. 49.69.

[43] De Woody v. Underwood, 34 N.E. 2d 263 (Ohio App. 1940). See McQUILLIN, *ibid.* sec. 49.83.

[44] Matter of Stubbe v. Adamson, 220 N. Y. 459, 116 N.E. 372 (1917). (License to operate a garage in a zoned area denied); re McIntosh v. Johnson, 211 N. Y. 265, 105 N.E. 414 (1904).

petition for a writ of habeas corpus when the plaintiff had been arrested and held for trial for the violation of the sanitary code;[45] an injunction may be sought to prevent the enforcement of provisions of a building code;[46] or there may be an action on a contract which contract required the defendant to violate the building code.[47] The above-mentioned ordinances are probably to be regarded as legislative.[48]

V *Legislative Acts Subject To Veto*

The issue whether certain acts of the common council are legislative in nature or have a different character is sometimes tested by the question whether they are subject to the mayor's veto.

It is asserted that the English common law doctrine that the mayor is an integral part of the council has never prevailed in this country,[49] but such doctrines must of course yield to any conflicting charter provisions. In *Erwin* v *Jersey City,* the plaintiff sued for salary. He had been appointed corporation attorney. It was held that the appointment was not a legislative act and so was not subject to veto.[50] A resolution accepting a bid for property offered to be sold by the council was not legislative nor subject to veto[51] in Pennsylvania, but the contrary is held in North Dakota, at least where there is a resolution to repave certain streets and the acceptance of a bid for the performance of it.[52]

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[45] Knoblauch v. Warden, 216 N. Y. 154, 110 N.E. 451 (1915); People ex rel. Lieberman v. Vandecarr, 75 N. Y. 440, 67 N.E. 913 (1903); People v. Gnswold, 213 N. Y. 92, 106 N.E. 929 (1914). (Prosecution for violation of ordinance affecting the practice of dentistry); People v. Charles Schweinler Press, 214 N. Y. 395, 108 N.E. 639 (1915).

[46] Grimmer v. Tenement House Dept., etc., 204 N. Y. 370, 97 N.E. 884 (1912).

[47] Hart v. City Theatres Co., 215 N. Y. 322, 109 N.E. 497 (1915).

[48] See Mills v. Sweeney, 219 N. Y. 154, 110 N.E. 451 (1916) (Taxpayers suit to restrain payment for publication of ordinances sustained); Mayor v. The Dry Dock, etc. Co., 133 N. Y. 104, 30 N.E. 563 (1892) (Suit for penalty provided in an ordinance which required defendant to run trains every twenty minutes (recovery denied) which seem to be not legislative).

[49] Martindale v. Palmer, 52 Ind. 411 (1876); Jackson v. Cosby, 179 Md. 671, 22 A. 2d 453 (1941).

[50] Erwin v. Jersey City, 60 N.J.L. 141, 37 A. 732 (1897). See Rich v. McLaurin, 83 Miss. 95, 35 So. 337 (1903). (The election of police judge is not subject to veto. It was noted above, also, that the sale of a bus franchise was not subject to referendum as being legislative).

[51] Straub v. Pittsburg, 138 Pa. 356, 22 A. 93 (1890).

[52] State ex rel. Kettle River Quarries Co. v. Duis, 17 N. D. 319, 116 N.W 75 (1908). (The council by motion ratified a contract which had been earlier approved by the members individually, and the act was not regarded as the equivalent of a resolution, subject to veto.)

VI. *Other Types of Council Activities*

To define legislative acts and distinguish them from other activities, whether of the congress or state legislatures or municipal corporations in any brief, practical and systematic way would be a very difficult if not impossible task. The various treatises and casebooks on legislation afford surprisingly little help. Courts have occasionally indulged themselves in that pastime.

One of the more elaborate discussions about legislation and attempts at definition of it as well as matters akin to it may be found in *Opinions of the Justices of New Hampshire*.[53] The court there intimates that a legislative act is a law which provides a rule permanent and uniform and universal and is not a sudden or transient order. There is much learning in this opinion about matters bordering on law and legislation and the interpretation thereof. Other courts say that the proper test whether or not an act is legislative is that a legislative act has general application and does not amount merely to transient orders nor concern particular persons.[54] An ordinance, however, which exacts a license fee (for the operation of vehicles in one s business) is legislative and so is subject to referendum.[55] An ordinance that lays down a policy in the operation of city government is legislative. The actual carrying out of the policy in the operation of city government is legislative. The actual carrying out of the policy under another ordinance is administrative.[56]

The extension of Municipal boundaries is legislative[57] as also the setting apart of special tax districts for local improvements;[58] as also the prohibition of the storage of gasoline in a named area[59] and the abolishing of an office, but the dismissal of officers is ad-

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[53] 66 N.H. 629, 33 A. 1076 (1891).

[54] Long v. Portland, 53 Or. 9, 98 P. 149, 151 (1909).

[55] Erwin v. Jersey City, 60 N.J.L. 141, 37 A. 732 (1897), but see Straub v. Pittsburg, 138 Pa. 356, 22 A. 93 (1890).

[56] Monahan v. Funk, 137 Or. 580, 3 P 2d 778 (1931). (The mere determination of what property is to be purchased for a crematory site and the authorization for the drawing of warrants for it is administrative.)

[57] Moore v. Yonkers, 235 Fed. 485 (C.C. App. N.Y. 1916); State ex rel. Hunzicker v. Pulliam, 168 Okla. 632, 37 P. 2d 417 (1934); American Bunberg Corp. v. Elizabethtown, 180 Tenn. 373, 175 S.W 2d 535 (1943); Houston v. State ex rel. West University Pl., 171 S.W 2d 206 (Tex. Civ. App.) 142 Tex. 190, 176 S.W 2d 928 (1944).

[58] Londoner v. City & Co. of Denver, 52 Colo. 15, 119 P. 156 (1911).

[59] Larkin Co. v. Schwab, 242 N.Y. 330, 151 N.E. 637 (1926). (But mandamus will lie to compel the issuance of a license when the ordinance is unreasonable).

ministrative and so an opportunity to be heard is necessary.[60] An ordinance appropriating funds for baseball and hockey is not legislative and the councilmen are personally liable therefor.[61]

Some activities are thought of as judicial or quasi-judicial. Thus, in *Oklahoma City* v *Dolese*,[62] an ordinance forbidding the storing of coal at a certain location as a nuisance was held to be judicial and the owner was entitled to injunctive relief. The Court of Appeals of Kentucky has illustrated non-legislative acts such as the acceptance of bonds, the granting and revoking of licenses, the making of contracts for improvements and the acceptance of the completed work, suggesting that they are judicial or administrative;[63] and the same has been held respecting the purchase of property[64] and the subscribing for railroad stock.[65]

Is a city or its council liable for their failure to perform legislative duties? In a number of cases litigants have believed that an action would lie for such failures. Thus, where a city had express authority to remove obstructions and widen and deepen a river within its boundaries and failed to do so, the plaintiff deemed that he could recover the damages he had suffered from the failure, but it was held that he could not so recover;[66] nor is there liability for failure to perform the duty of naming enough commissioners in number to keep itself informed regarding the existence of defective sidewalks;[67] nor for not deciding what streets should be im-

[60] Breinig v. County, 332 Pa. 265, 2 A. 2d 842 (1938).
[61] Burns v. Esseling, 163 Minn. 57, 203 N.W 605 (1925).
[62] Oklahoma City v. Dolese, 48 Fed. 2d 734. See 17 McQUILLIN, MUNICIPAL CORPORATIONS (3rd Ed. 1950) sec. 49.69.
[63] Reuter v. Meacham Contracting Co., 143 Ky. 537, 136 S.W 102 (1911). The court might well have stopped here instead of proceeding with the assertion that legislatures have no non-legislative powers. On that point see GARNER, POLITICAL SCIENCE AND GOVERNMENT (1935) p. 594. See Morganstern Elec. Co. v. Coraopolis, 326 Pa. 154, 191 A. 603 (1937); Breinig v. County, 332 Pa. 265, 2 A. 2d 842 (1938). See also statement by Dean Fordham and Mr. Prendergast in 20 Cin. L. Rev. 313, 320 (1951), "It is worthy of note at this juncture that councils of non-charter cities have legislative powers only; they may not perform any administrative duties whatever." Dean Fordham explains this statement in a letter to the writer as being based on Sec. 4211 of the Ohio General Code and the quotation is a paraphrase of the language of the statute. He recognized, however, the difficulty of the assumption that "sharp lines can be drawn between what is legislative and what is administrative for the purpose of devolution of authority to local government bodies."
[64] Monahan v. Funk, 137 Or. 580, 3 P. 2d 778 (1931). (Not subject to referendum); Morganstern Elec. Co. v. Coraopolis, 326 Pa. 154, 191 A. 603 (1937); Breinig v. County, 332 Pa. 265, 2 A. 2d 842 (1938).
[65] Cincinnati, etc., Ry. v. Commissioners, 1 Ohio St. 77 (1852) (Delegable).
[66] Goodrich v. Chicago, 20 Ill. 445 (1858).
[67] Dewry v. Detroit, 15 Mich. 306, 312 (1867).

proved.[68] In *Detroit* v *Beckman*,[69] the original scheme for the construction of certain public works was defectively planned and an inadequate and carelessly drawn ordinance was enacted, but there was no liability on the part of the city on that account. The failure was attributable to the officers against whom the court said an action may lie.[70]

Legislative power is occasionally spoken of in an indefinable manner, so that it is difficult to determine whether or not the term is used comprehensively to include both law legislation and government legislation as Freund calls it, or simply law legislation. Thus, it is within legislative power for a council to extend its corporate limits. Is such an act legislative?[71] It indicates a policy with respect to local affairs. Or the summoning of a witness with subpoena duces tecum?[72] Where the purpose is in aid of legislation it would surely be legislative. Or the choosing of the site for an isolation hospital?[73] Or the changing of the grades of streets?[74] These two latter issues point toward administrative discretion. Or the reconsideration of appointments when they have reached a certain stage of completeness?[75] This seems to affect administration rather than the determination of a policy

The motives which influence the legislative acts of councilmen may not be inquired into. Presumably this is not true with respect to acts not legislative. In *Biddeford* v *Yates*,[76] the council having leased certain premises to a lessee for a period of years made a new lease while the old one still had a period to run, which new lease would take effect only after the terms of the present councilmen

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[68] Henderson v. Sandefur & Co., 74 Ky. (11 Bush) 550 (1875).

[69] Detroit v. Beckman, 34 Mich. 125 (1876).

[70] Detroit v. Beckman, 34 Mich. 125 (1876); Lansing v. Toolan, 37 Mich. 152 (1887).

[71] American Bunberg Corp. v. Elizabethtown, 180 Tenn. 373, 175 S.W 2d 535 (1943).

[72] La Guardia v. Smith, 288 N. Y. 1, 41 N.E. 2d 153 (1942).

[73] Jardine v. Pasadena, 199 Cal. 64, 248 P. 225, 48 A.L.R. 509 (1926).

[74] Macy v. Indianapolis, 17 Ind. 267 (1861); Pontiac v. Carter, 32 Mich. 104 (1875).

[75] De Woody v. Underwood, 34 N.E. 2d 263 (Ohio App. 1940). See also Pontiac v. Carter, 32 Mich. 104 (1875); 3 DILLON, MUNICIPAL CORPORATIONS (5th Ed. 1911) sec. 1144.

[76] Biddeford v. Yates, 104 Me. 506, 72 A. 335 (1908). See also Gardiner v. Bluffton, 173 Ind. 454, 89 N.E. 853, 90 N.E. 898 (1910) and Wood v. Seattle, 23 Wash. 1, 62 P 135 (1900); Kneier, *Judicial Review of the Motives of City Councils* in 19 GEO. L. REV. 148 (1931); 5 MCQUILLIN, MUNICIPAL CORPORATIONS (3rd Ed. 1950) secs. 16.90, 16.91. The latter does not distinguish between legislative and non-legislative acts in this regard.

had expired. The plaintiff was not permitted to question their motives. An ordinance, however, which detracts from the council's future legislative power by the contract which the council proposes to make, is invalid, and it seems appropriate for the court to protect the city in such a matter whatever the motive may have been. Thus, the council could not pass an ordinance permitting a nearby city to erect a garbage disposal plant within its borders in consideration of the release to it of a large debt owed to the city, for that would affect its legislative power over the garbage disposal plant area.[77]

Finally, it may be observed that legislative acts tend to take the form of ordinances, while resolutions tend toward being administrative and to work out the details in transitory matters.[78]

SUMMARY

There is no formula which can be relied upon persuasively to identify legislative acts of councils and distinguish them clearly from acts administrative. Even Professor Freund's suggestive classification into Law legislation and government legislation is difficult to apply consistently in municipal matters. The only reason for the attempt to describe and distinguish them is to promote the conduct of the business of municipal government that it may proceed in an orderly manner. In those states where local referenda are provided for by statute it would be highly confusing and impractical for all business to be obliged to await the outcome of a popular vote. Thus, legislative matters as such which establish a policy respecting public affairs alone should be so limited. Probably here we come most nearly to find a workable test. It is: Does the act in question establish a policy for the business of government? The writer believes that far too much stress is placed upon the supposed distinction when the issue is one of delegation of powers. Here there is no necessary general principle of no delegation, but the matter calls for sound judgment applied to city business. Some solution needs to be made in the case of appointments, salary adjustments and the matter of the mayor's veto, but it should be empirical rather than logical.

[77] Schwab v. Graves, 223 N.Y.S. 160 (App. D. 1927). See note in 16 NAT. MUN. REV. 794 (1927).

[78] See FORDHAM, LOCAL GOVERNMENT LAW (1949) p. 403; 5 MCQUILLIN, MUNICIPAL CORPORATIONS (1949) secs. 15.02; 15.08.

The council cannot be made liable for failure to act because such principle would alter the government of cities and would approach an attempt at direct individual control. The matter of veto by the mayor must be subject to some limitations which would be difficult to define by statute. In this embarrassment perhaps it is necessary to limit the use of it to legislative matters. So with reference to appointments and salary adjustments and the matter of the veto the test will be as much an empirical one as it will be of logical definition and distinction between that which is legislative and that which is administrative.