

that the authorities of the municipality therein have no jurisdiction over the ditch, yet it is plain that the provisions of Section 6443 give to county commissioners complete jurisdiction and there are no other provisions of law which take it away. Whatever jurisdiction the municipality has over the ditch is concurrent with that of the commissioners.

Coming now to your second question as to whether or not a petition presented by the mayor of the city is sufficient compliance with the law to authorize the commissioners to act under the petition.

Under an earlier form of the drainage laws as they were written prior to the recent codification it was provided by Section 6494, General Code, that the council of a municipal corporation might authorize the mayor to present a petition, signed by him officially and addressed to the county commissioners, to locate and construct a ditch described in the resolution or they might authorize the mayor to sign officially a petition for a ditch to be presented to the county commissioners by parties interested whose lands are without the limits of the corporation. In the later codification this statute in such form was omitted and there was substituted in its place Section 6442, which I have quoted above.

It will be noted that in Section 6443 and succeeding sections of the General Code, the word "owner" is used as descriptive of the person who might present a petition and in Section 6442, supra, the word "owner" is defined as including the mayor or council of a city or village. It would, therefore, seem to be clear that such definition of the word "owner" is determinative of the question here under consideration.

Answering your questions specifically it is my opinion that:

1. The county commissioners have jurisdiction over the ditch which you have described as running through the city of Bellefontaine, and
2. The county commissioners are authorized to act when a petition for a ditch improvement is presented to them by the mayor of the city of Bellefontaine.

Respectfully,

EDWARD C. TURNER,

Attorney General.

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NOTES—ISSUANCE IN ANTICIPATION OF FUNDS ARISING FROM AN AUTHORIZED BOND ISSUE MADE UNDER SECTION 5654-1, GENERAL CODE, MAY BY RESOLUTION BE MADE TO BEAR DATES FOR FUTURE DELIVERY—AUTHORITY OF FISCAL OFFICER TO CERTIFY.

SYLLABUS:

An issue of notes in anticipation of funds arising from an authorized bond issue made under Section 5654-1 may by resolution be made to bear dates for future delivery, and when such notes are sold, and a binding contract with proper security entered into with the purchaser, whereby the purchaser agrees to take the notes and advance the money thereon when delivered in the future, the fiscal officer of the subdivision authorizing the issue, may certify that the money for the improvement is in the treasury or in process of collection.

COLUMBUS, OHIO, April 19, 1927.

HON. GEORGE H. BLECKER, *Prosecuting Attorney, Mansfield, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication which reads as follows:

"I have been informed that your office some time last year issued an opinion construing Sections 5654-1 and 5660 of the General Code in substance as follows:

That if a political subdivision had passed a resolution under Section 5654-1 to borrow money and that if said political subdivision should receive a letter from a bank or banks agreeing to take the notes in a sum not exceeding the amount authorized in the resolution when and as the money is needed from time to time, that the auditor or other fiscal officer would have the authority under Section 5660 G. C. to certify that the money required to meet a contract is in the treasury or in process of collection to the credit of the appropriated fund,—if such an opinion has been rendered by the office and you still consider the same a proper interpretation of the act I would appreciate it if you would send me a copy of the opinion.

However, if your department has not issued an opinion on the above question as to the auditor or other chief fiscal officer of a subdivision who holds a letter from a bank agreeing to loan money under a resolution to borrow by virtue of Section 5654-1 I would appreciate it very much if you would give me your opinion as to whether or not that would be a sufficient compliance of Section 5660 G. C.

Section 5654-1 reads in part as follows:

"Whenever the county commissioners of any county, the township trustees of any township, or the board of education of any school district, have duly authorized the issuance of bonds for the construction or improvement of roads, bridges, school houses, or other public buildings, such bond issuing authority may borrow money in anticipation of the issuance of such bonds in an amount not exceeding the estimated cost of such construction or improvement, and not exceeding the amount of bonds so authorized, and issue the notes of such political subdivision as evidencing such indebtedness. * * *"

Section 5660 reads as follows:

"No expenditure, excepting from the proceeds of bonds, shall be made unless authorized by appropriation both as regards purpose and amount, nor shall any expenditure be made from the proceeds of bonds unless duly authorized or directed. No contract, agreement or other obligation calling for or requiring for its performance the expenditure of public funds from whatsoever source derived, shall be made or assumed by any authority, officer, or employee of any county or political subdivision or taxing district, nor shall any order for the payment or expenditure of money be approved by the county commissioners, council or by any body, board, officer or employee of any subdivision or taxing district, unless the auditor or chief fiscal officer thereof first certifies that the money required to meet such contract, agreement or other obligation or to make such payment or expenditure has been lawfully appropriated or authorized or directed for such purpose and is in the treasury or in process of collection to the credit of the appropriate fund free from any previous and then outstanding obligation or certification which certificate shall be filed with such authority, officer, employee, commissioners, council, body or board, or the chief clerk thereof. The sum so certified shall not thereafter be considered unencumbered until the county, subdivision or district is discharged from the contract, agreement, or obligation or so long as the order is in force. Taxes and other revenues in process of collection or the proceeds to be derived from lawfully authorized bonds, notes, or certificates

of indebtedness sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury or in process of collection and in the appropriate fund."

I take from your communication that the political subdivision about which you inquire has duly authorized the issuance of bonds for some one of the purposes for which bonds may be issued under Section 5654-1 of the General Code and has borrowed money in anticipation of the sale of such bonds and issued notes evidencing such indebtedness. Some bank has advised the proper authorities of such political subdivision by letter that they will take the notes and advance the money as needed, and your inquiry is whether or not under such circumstances the fiscal officer of the subdivision may certify that the money for the desired purpose is in the treasury or in process of collection within the meaning of Section 5660, *supra*.

It will be noted from the provisions of Section 5660, *supra*, that no contract, agreement or other obligation involving the expenditure of money shall be made or assumed until the auditor or chief fiscal officer certifies that the money required for the same is in the treasury or in process of collection to the credit of the appropriate fund and free from any previous and then outstanding obligation or certification. The expression: "In the treasury or in process of collection" is defined so far as it applies to notes in the last few lines of the portion of Section 5660 which is quoted above. It is there said in substance that legally authorized notes sold and in process of delivery shall be deemed for the purpose of this section (Section 5660) as being in the treasury or in process of collection.

Your inquiry therefore narrows down to the question whether under the circumstances which you have outlined the notes can be said to be sold and in process of delivery.

The former opinion of this department to which you apparently refer in your communication was not issued last year; but an opinion rendered September 24, 1925, reported in the Opinions of the Attorney General for that year at page 616 is pertinent to your inquiry. In that opinion there was an answer given to the following question:

"May notes be issued in installments as the money is needed for construction in view of the provisions of Section 7 of Senate Bill No. 94?"

Section 7 of Senate Bill No. 94 referred to in this question was codified as Section 5660, *supra*. The attorney general in that opinion said:

"Section 5654-1 of the General Code provides that the notes may be issued in an amount not exceeding the estimated cost. There does not seem to be any prohibition against the issuance of an amount of notes less than the estimated cost, but the amount for which the contract shall be let shall be governed by the amount of the notes sold and in process of delivery.

Should it be possible that separate contracts might be let as the construction progresses, then notes could be issued and sold in such amounts as would provide funds for letting separate contracts. This probably would not be workable generally.

In cases where such plan of construction cannot be adopted, and it is necessary to let the contract as a whole, then it is not permissible under the provisions of Section 7 of house bill No. 94 to issue the notes in installments as the money is needed. However, there is no inhibition against the delivery of notes at a near, future date, or delivery dates may be given for the notes to be issued by the resolution authorizing the same, provided they have been sold at a bona fide sale and are in process of delivery at the time the certificate of the fiscal officer is furnished."

It will be noted that the Attorney General in the above opinion does not pass on the question of when the fiscal officer may certify that the money is in the treasury or in process of collection but limits the opinion to the question asked, that is whether or not notes may be issued in installments, and says that when the plan of construction is such that the contract therefor must necessarily be let as a whole, notes may be issued for future delivery at a near future date when the resolution authorizing the notes set out different dates in the future "provided they *have been sold at a bona fide sale* and are *in process of delivery* at the time the certificate of the fiscal officer is furnished."

The opinion presupposes a bona fide sale and process of delivery of notes to be delivered in the future before the fiscal officer can furnish the certificate required by Section 5660, *supra*.

I am in accord with the opinion above referred to, so far as it goes, but it does not go so far as to answer your inquiry. It is clear that a bona fide sale must be made of the notes, and when this is done the requirement of being in process of delivery is met if a binding agreement is made with someone to take up the notes as issued in accordance with the terms of the resolution authorizing their issue and the sale made in pursuance thereof. The only question therefore to determine is whether, after a bona fide sale has been made, a letter from a bank or other person to the effect that they will take up the notes and advance the money thereon when the notes are delivered is a binding agreement. It is my opinion that unless the letter be backed up with proper and sufficient security, it would not be such a binding agreement as to justify the saying that the notes were in process of delivery. If, however, the resolution authorizing the issuing of the notes provided for their issuance for future delivery and a bona fide sale was made of the notes in accordance with the terms of the resolution, a letter in such terms as to constitute a binding contract accompanied with proper and sufficient security to guarantee the performance of the contract as made by such letter would be sufficient to justify the conclusion that the money to meet a contract, agreement or other obligation would be deemed to be in the treasury or in process of collection, and the fiscal officer might so certify.

Respectfully,

EDWARD C. TURNER,
Attorney General

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APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND THE MIDDLE STATES CONSTRUCTION COMPANY, COLUMBUS, OHIO, FOR STACK FOUNDATIONS FOR STATE SCHOOL FOR THE DEAF, COLUMBUS, OHIO, AT EXPENSE OF \$32,790.00—SURETY BOND EXECUTED BY THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

COLUMBUS, OHIO, April 20, 1927.

HON. HERBERT B. BRIGGS, *State Architect and Engineer, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Highways and Public Works for the Department of Public Welfare, and The Middle States Construction Company, of Columbus, Ohio. This contract covers the construction and completion of General Contract for NEW BUILDING FOR HOT WATER HEATING SYSTEM, including Stack Foundations, (exclusive of Brick Stack, Plumbing, Heating and Ventilating and Electrical