

19.

ORDINANCES—ENACTED IN MUNICIPALITY BY INITIATIVE—MAY
BE AMENDED OR REPEALED BY COUNCIL IN ABSENCE OF
CHARTER PROVISIONS TO THE CONTRARY.

SYLLABUS:

Ordinances proposed and enacted by the people of a city or village by virtue of the power of the initiative are subject to the same limitations as are other ordinances of a municipality and may be amended or repealed at the will of the municipal council, unless the power to do so is qualified or limited by charter provisions.

COLUMBUS, OHIO, January 16, 1933.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion in answer to the following questions:

“1. May the council of a municipality in the State of Ohio, repeal or amend, by ordinance, an initiated ordinance now in effect, which established the salaries of city employes?”

2. If such initiated ordinance which established the salaries and compensation of city employes, can be repealed by said council, can the repealing ordinance be passed as an emergency measure, which would prevent referendum on said repealing ordinance?”

The Constitution of Ohio in Article II, Section 1, thereof provides:

“The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.”

The first of the aforesaid powers reserved by the people is designated the “initiative”. (Section 1a, Article II, Constitution of Ohio.)

The second aforesaid power reserved to the people is designated the “referendum”. (Section 1c, Article II, Constitution of Ohio.) Section 1f, Article II of said Constitution, reads as follows:

“The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.”

In pursuance of the power of the General Assembly to provide by law for the exercise of the initiative and referendum powers by a municipality there have been enacted Sections 4227-1 to 4227-13, General Code, which prescribe the manner in which the powers of the initiative and referendum reserved to the people of each municipality by the terms of the Constitution, shall be exercised. Section 4227-12, General Code, provides:

"The provisions of sections 4227-1 to 4227-13 inclusive shall not apply to any municipality that has or may hereafter adopt its own charter which contains an initiative and referendum provision for its own ordinance and other legislative measures."

It will be found that practically all municipalities that have adopted charters by authority of Section 7, of Article XVIII of the Constitution of Ohio, have incorporated in those charters provisions for the exercise of the powers of the initiative and referendum that are somewhat different from those contained in Sections 4227-1 to 4227-13, of the General Code. The provisions of these sections are controlling in municipalities that have not adopted charters and in those municipalities that have adopted charters but have not provided therein for the exercise of the powers of the initiative and referendum different from the manner prescribed by the statutes.

This opinion is necessarily limited to matters pertaining to the initiative and referendum in municipalities that have not adopted charters and to those municipalities that have not, by their charters, adopted provisions with reference to the initiative and referendum that are inconsistent with general laws.

By force of Section 6, of Article XIII, and of Section 2, of Article XVIII of the Constitution of Ohio, the General Assembly is enjoined to provide by general laws for the organization and government of cities and villages within the state. In pursuance of these provisions of the Constitution, laws have been enacted providing for the government of cities and villages whereby the legislative power of those cities and villages is reposed in an elective body known as a council. See Sections 4206 and 4215, General Code.

Legislative power in the abstract, is somewhat difficult to define with strict accuracy. Generally speaking, it may be said to be the power to enact laws or ordinances for the people within a particular jurisdiction.

As noted above, Section 1, of Article II of the Constitution of Ohio declares that:

"The legislative power of the state shall be vested in a general assembly * *"

It will be observed that the provision is not that the legislative power, as conferred by the Constitution, shall be vested in the General Assembly, but that the legislative power of the state shall be so vested. That includes all legislative power which the object and purposes of the state government may require, and we must look to other provisions of the Constitution to see how far and to what extent legislative power is qualified or restricted. *Baker vs. Cincinnati*, 11 O. S. 534. Except as legislative power is limited by the Constitution of Ohio or the Federal Constitution the legislature of Ohio has full power of legislation. Although the people have reserved legislative power through the initiative and referendum, the power of the legislature to act upon all proper subjects of legislation is wholly unchanged. The exercise of the power reserved in the people through the medium of the initiative and referendum, so far as state legislative power is concerned, must be exercised in the manner and to the extent only, fixed by the Constitution and laws enacted in pursuance thereof.

Similar observations might be made with reference to the exercise of the power of the initiative and referendum in cities and villages with reference to

municipal matters. It will be noted by the provisions of Section 4206 and 4215, General Code, that:

“The legislative power of each city”

and

“The legislative power of each village”

shall be vested in and exercised by a council. It is not the legislative power granted by law or the Constitution that shall be vested in and exercised by a council but the legislative power of “each city” and “each village” that is vested in this council. By virtue of these provisions the council of municipalities has full power of legislation, except as that power may be limited by other provisions of law.

The reservation to the people of the power of initiating legislation and the power of the referendum on legislation already enacted does not have the effect of in any wise limiting the power of the council to legislate. Its power to act on all proper subjects of legislation is wholly unchanged. Through the initiative, the people have provided against non-action by their duly constituted representatives in the legislative branch of government and through the referendum an appeal may be taken directly to the people from affirmative action by those representatives.

The power of the initiative and referendum is a concurrent power of legislation with the duly constituted authorities rather than a limitation on the power of those authorities or a restriction of that power.

Unless provision is made by either the Constitution or by laws duly enacted, an initiated ordinance or law, after it has been duly enacted in accordance with law, stands on an equal footing with legislation that was enacted by methods other than the exercise of the power of the initiative. It would have been within the power of the people at the time of framing the Constitution to provide therein that a law enacted in pursuance of the power of the initiative should not be repealed for a certain length of time or in some particular manner, but this was not done. It would no doubt be within the power of the General Assembly to provide by law that measures enacted by means of the initiative in municipalities should not be repealed except in some particular manner other than by action of the council, but no such provision will be found in the law.

Some municipalities, that have adopted charters, have provided in those charters that ordinances enacted through the medium of the initiative should not be repealed by the council of the municipality unless a certain specific procedure is followed: For instance, it is provided in Section 48, of the Charter of the City of Columbus that:

“No ordinance adopted by an electoral vote shall be repealed or amended within two years after its passage, except by an electoral vote. But an ordinance to repeal or amend any such ordinance may, by resolution of the city council, be submitted to an electoral vote at any regular election, or at any special municipal election called for some other purpose, provided notice of the intention so to do be published by the council not more than sixty nor less than thirty days prior to such election, in the manner required for the publication of ordinances.”

A leading case on this question is the case of *Kadderly vs. Portland*, 44 Oreg. 118, 74 Pac. 710. It may be observed at this point that the Constitution of the State of Oregon contains practically the same provisions with reference to the initiative and referendum as does the Constitution of Ohio. The eighth branch of the syllabus of the *Kadderly* case is as follows:

“Statutes proposed and enacted by the people are subject to the same constitutional limitations as legislative statutes, and after their adoption they exist at the will of the legislature just as do other laws.”

In the course of the opinion of this case the court said with reference to the initiative and referendum amendment to the Constitution of the State of Oregon:

“Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people.

Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will.”

The *Kadderly* case, *supra*, is a leading case with respect to matters with which it deals and has been referred to many times by the courts of different states.

An examination of the constitutional and statutory provisions relating to the exercise of legislative power by the council of a city or village, in Ohio, discloses that there are no provisions, either constitutional or statutory, which limit or qualify the legislative power of the council of a city or village in any different manner or to any different extent with reference to the exercise of that power in amending or repealing an ordinance of the municipality which has been enacted by virtue of the exercise of the power of the initiative within the municipality, than that power is limited or qualified with respect to the repealing or amendment of other ordinances.

I am therefore of the opinion, in specific answer to the questions submitted:

1. In the absence of charter provisions to the contrary, the council of a municipality in the State of Ohio may repeal or amend an initiated ordinance now in effect which established the salaries of municipal employes, in the same manner and to the same extent that it might repeal or amend such an ordinance which had not been enacted by virtue of the power of the initiative.

2. Assuming that circumstances are such that an ordinance repealing a previous ordinance fixing the salary of municipal employes may be passed as

an emergency measure, and the municipal council so declares, and properly passes such a measure according to law, such repeal or amendment will be effective even though the previous ordinance which is being repealed or amended had been enacted by virtue of the power of the initiative.

Respectfully,

JOHN W. BRICKER.

Attorney General.

20.

APPROVAL, BONDS FOR THE FAITHFUL PERFORMANCE OF HIS
DUTIES AS TREASURER OF THE STATE OF OHIO—HARRY
S. DAY.

COLUMBUS, OHIO, January 16, 1933.

HON. HARRY S. DAY, *Treasurer of State, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval, fourteen bonds guaranteeing the faithful discharge of various duties imposed upon you by law. Nine of these bonds are as follows:

Surety Company.	Penal Sum.
American Surety Company of New York.....	\$25,000
Globe Indemnity Company.....	50,000
Hartford Accident and Indemnity Company.....	50,000
The Western and Southern Indemnity Company.....	25,000
Indemnity Insurance Company of North America.....	50,000
The Fidelity and Casualty Company of New York.....	150,000
National Surety Company.....	150,000
Fidelity and Deposit Company of Baltimore, Maryland.....	50,000
Maryland Casualty Company.....	50,000

The above listed bonds, in the total penal sum of \$600,000.00, are given pursuant to section 297, General Code, which provides:

“Before entering upon the discharge of the duties of his office, the treasurer of state shall give a bond to the state, in the sum of six hundred thousand dollars with twelve or more sureties approved by the governor, conditioned for the faithful discharge of the duties of his office. Such bond, with the approval of the governor and the oath of office indorsed thereon, shall be deposited with the secretary of state and kept in his office.”

While the above statute would seem to require twelve or more sureties, yet when said section is read with section 9571, General Code, one or more surety companies may legally supply the bond to be given by the Treasurer of State under the former section.

It will be necessary, under the terms of section 297, *supra*, that the Governor of Ohio indorse his approval on the bond.