

utes. In view of this provision it will be necessary that such action as above indicated be had and properly evidenced by a transcript of the minutes of the controlling board before the consideration of this conveyance can be legally expended.

It is further suggested that the proper delivery of the already executed deed submitted with the abstract will be sufficient to convey the premises when properly delivered.

The abstract of title in two parts, the warranty deed and blue print of the premises are herewith returned.

Respectfully,  
C. C. CRABBE,  
*Attorney General.*

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2799.

APPROVAL, BONDS OF VILLAGE OF GARFIELD HEIGHTS, CUYAHOGA COUNTY, \$14,000.00.

COLUMBUS, OHIO, Sept. 23, 1925.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

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2800.

BONDS—HOUSE BILL 339 (SECTION 5654-1 G. C.) CONSTRUED—PROVISIONS OF SECTION 1224 G. C. DISCUSSED.

SYLLABUS:

1. *The mandatory provisions of house bill No. 316, passed by the 86th general assembly, providing that the bonds cannot be advertised for sale nor issued until the contract is let, require the issuance of notes as provided in said act, to provide available funds for the issuance of the certificate of the fiscal officer as required by senate bill No. 94, that such funds are available to let the contract.*

2. *The authorized bonds may be advertised for sale and issued as soon as the contract is let for the improvement.*

3. *Section 2295-11, General Code, provides that not to exceed one year's interest may be included in the cost of construction of any building, utility, or improvement. Such amount of interest may be included in the estimate for such improvement and included in the authorized issue and paid out of the proceeds of the sale of the bonds, or from any excess left from the issue of notes.*

4. *The provision of house bill No. 316, "such other items of cost as may be included in the total cost of construction," includes interest on notes issued, inspection, compensation and damages, and supplementary contracts under section 6948 G. C., but does not include advertising and printing bonds, except in the case of assessment bonds.*

5. In cases of an unforeseen contingency, as provided in section 6948, General Code, contracts for extra work may be paid from the proceeds of notes to the extent that any surplus exists from said issue after payment of all items of estimated cost, but to no greater extent.

6. Contracts can only be let to the extent that notes providing funds to pay the same have been sold and in process of delivery. An issue of notes, following an authorized bond issue, may be sold in installments in cases where the contracts can be let for amounts equal to or for less than that for which the notes have been sold and in process of delivery. The notes may also be authorized by resolution to bear different dates of issue.

7. Section 6948-1, General Code, provides that county commissioners may provide for road improvements by force account. When the estimated cost of construction or repair of roads is in excess of three thousand dollars per mile, county commissioners may provide that such improvement shall be made by force account after inviting and receiving competitive bids.

The director of highways is required under section 1224, General Code, as amended in house bill No. 339, to proceed by contract let to the lowest and best bidder after advertisement in all cases where the total expenditure exceeds three thousand dollars per mile.

COLUMBUS, OHIO, Sept. 24, 1925.

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

GENTLEMEN:—Your recent request for a written opinion is as follows:

"We respectfully request you to furnish this department with your written opinion upon the following questions:

"Question 1. Under section 5654-1, house bill No. 316, may the county commissioners, township trustees or boards of education issue and sell bonds for the construction of roads, bridges or public buildings without first issuing notes?

"Question 2. May such bonds be sold before the contract for construction is completed?

"Question 3. In the event that notes are issued, how may the interest on the same be provided for?

"Question 4. Does the provision that 'such other items of cost as may be included in the total cost of construction,' include the following: Interest on notes issued, advertising, printing bonds, inspection, compensation and damages and supplementary contracts under section 6948, General Code?

"Question 5. In case of an unforeseen contingency, as provided for in section 6948 G. C., may contracts for extra work be paid from the proceeds of notes, which notes were authorized for the payment of the estimated cost of an improvement?

"Question 6. 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?

"Question 7. Under the provisions of house bill 339, if the estimated cost of construction or repair of a road is in excess of \$3,000.00 per mile, may such work be done by force account after receiving bids?"

House bill No. 316, 86th general assembly, provides as follows:

"Sec. 5654-1. 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. The notes shall be made payable at a time not more than one year from their date and bear interest at not more than six per centum per annum. Such notes shall be the full general obligations of the political subdivision authorizing the same and for the payment of the same, the full faith, credit and revenues of such political subdivision shall be pledged. Prior to the issuance of such notes the resolution authorizing the issuance of the bonds anticipated by such notes, shall be certified to the county auditor and a tax for such bonds included in the annual budget as required by law. The bonds shall not be advertised for sale nor issued until the contract is let and shall be issued in an amount not exceeding the full amount of the accepted bids by more than the estimated amount of such other items of cost as may be legally included in the total cost of such construction or improvement; provided, however, that where such issue of bonds is for the furnishing of a building, as well as the construction or improvement of the same, and a contract for such furnishings cannot be let in time to make the bonds available for the payment of the notes issued for the construction of such building, the estimated cost of such furnishings may be used in lieu of the contract cost of the same. If the cost as thus determined is less than the amount of the bonds as previously authorized, the resolution authorizing such bonds shall be amended so as to reduce the issue, and a copy thereof certified to the county auditor. Taxes levied for the retirement of said bonds and assessments levied to defray, in whole or in part, the cost of such construction or improvement and anticipated by said bonds, shall thereafter be reduced to the extent required by the reduction of such bonds. The par value received from the sale of said bonds and any excess funds resulting from the issuance of said notes shall be used to retire said notes."

Section 7 of senate bill No. 94, 86th General Assembly, provides in part 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 such 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, em-

ployee, 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. \* \* \*

The pertinent parts of house bill No. 316 seem necessarily to be read 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. \* \* \*. The bonds shall not be advertised for sale nor issued until the contract is let and shall be issued in an amount not exceeding the full amount of the accepted bid by more than the estimated amount of such other items of cost as may be legally included in the total cost of such construction or improvement; \* \* \*."

In order to comply with senate bill No. 94, as above quoted, it will be necessary to provide the money for letting the contract by the issuance of the notes as provided in house bill No. 316.

It therefore seems that a mandatory condition exists which will require the issuance of the notes in all cases as a means of raising the money before awarding the contract, for the reason that the bonds cannot be advertised for sale, nor issued, until the contract has been let.

The fact that the legislature has provided that notes may be issued raises the presumption that there may have been an intention in the passage of the act to provide for the optional issuance of the notes, but in view of the fact that no exceptions seem to be written in the act, which recites that the bonds shall not be advertised nor issued until the contract is let, it will therefore appear that a mandatory condition arises requiring the issuance of the notes as the means of raising money for the purpose of furnishing the certificate as required by senate bill No. 94 for the letting of the contract.

Your second question:

"May such bonds be sold before the contract for construction is completed."

is governed by the provisions of the above quoted act, that is, that bonds shall not be advertised for sale nor issued until the contract has been let. There does not appear any other inhibition as to the issuance of the bonds, so this question may be answered in the affirmative. This conclusion may be emphasized by the provisions of the act "shall be issued in an amount not exceeding the full amount of the accepted bid by more than the *estimated* amount of such other items of cost, \* \* \*." The fact that the bonds may be issued upon the basis of estimated items of cost must necessarily create the conclusion that it is the intention to issue the bonds before the contract has been fully completed.

Section 2295-11, General Code, provides as follows:

"The cost of construction of any building, utility or improvement may be construed to include interest payable during construction on bonds issued for such construction. A sum not to exceed one year's interest on any bond issue may be included in the amount of the issue to the extent necessary to care for interest maturing previous to the receipt of the taxes or assessments from which such interest is to be ultimately paid."

Under the provisions of this statute, sufficient interest may be included in the estimate and in the amount for which the bonds may be authorized, and for which the notes may be issued. It is true that the amount of the face of the notes will include such amount of interest and that the money to meet such interest will not be available until the money is raised by taxation or by the sale of the authorized bonds after the contract has been let.

Section 5654-1, General Code, section 1 of house bill No. 316, provides in part that bonds shall be issued in an amount not exceeding the full amount of the accepted bid by more than the estimated cost of such other items of cost as may be legally included in the total cost of such construction or improvement. The item of cost must necessarily be construed as a legal item of cost as defined in section 2295-11, General Code, and shall be included in the amount for which the bonds are ultimately issued and applied in the payment of the interest on the notes.

You request information as follows:

“Does the provision that ‘such other items of cost as may be included in the total cost of construction,’ include the following: Interest on notes issued, advertising, printing bonds, inspection, compensation and damages and supplementary contracts under section 6948, General Code?”

As quoted herein, section 2295-11, General Code, provides that not to exceed one year's interest may be included as a part of the cost of construction of an improvement.

Section 1223, General Code, provides that bonds of a county may be issued in an amount not greater than the aggregate sum necessary to pay the respective shares of the estimated compensation, damages, costs and expense.

Section 6929, General Code, provides that bonds of a county may be issued in an amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement. In applying the provisions of this statute, it probably cannot be said that the cost of advertising and printing bonds is any part of the items as designated in these statutes.

In the Opinions of the Attorney General, 1913, volume I, page 360, a discussion of this question is found as follows:

“I am of the opinion that the silence of the Municipal Code upon the subject at hand is to be interpreted in the light of the express provisions of closely related statutes. The purposes for which a municipal corporation may issue bonds are specifically set forth in the statutes. Thus section 3939, General Code, mentions a large number of specific objects for the accomplishment of which bonds may be issued. The whole subject is fully treated of in the chapter of the Municipal Code which is entitled ‘Borrowing Money.’ This chapter will be searched in vain for any provisions expressly authorizing a municipal corporation to borrow money for the purpose of paying the expenses of legal advertising. In each instance, for example, in which a specific improvement is contemplated, the thing for which the money is borrowed, is the making of the improvement. When bonds are sold their proceeds constitute one of the funds of the municipality. This fund is available only for the purposes properly within the purview of the improvement itself. Similarly, when money is borrowed and bonds are issued for an object other than the making of a specific improvement, a fund is thereby created which is available only for the object stated. Unless, therefore, the payment of the expense of advertising the sale of the bonds can be regarded as one of the purposes of the improvement, or as related

to and a part of the object for which the money is borrowed, such an expenditure is not a proper one to be made from such a fund. \* \* \*

"Section 3896, General Code, provides what may be included in the cost of an improvement for which special assessments are to be levied and specifically authorizes the including therein of 'The expense of \* \* \* printing and publishing the notices and ordinances required,' together with 'any other necessary expenditure.' Under this language it would seem that the expense of advertising special assessment bonds may be included in the assessment.

"Inasmuch, then, as the bonds themselves are issued in anticipation of the assessment, such bonds are not required to be limited in amount to the cost of construction alone but the amount thereof may include all the items of expense mentioned in said section 3896. In other words special assessment bonds are not bonds issued for the purpose of a specific improvement in the technical sense; but they are bonds issued in anticipation of the assessment."

In construing the various statutes applicable, it will be observed that a fine distinction is drawn concerning the items of advertising and printing bonds, but in view of the foregoing questions, which seem to be based on good logic, it appears that such items have not been intended in the statutes providing for the purposes for which bonds may be issued, except in the case of assessing bonds.

Inspection is a necessary item of expense in making improvements and as such must be provided for in the estimated cost of the construction of such improvement. Compensation and damages to property owners for property taken, or destroyed or injured, in making an improvement, must likewise be a charge item that is necessary to prepare the ground work for the improvement to be based upon, and must be construed in view of statutory provision as within the intention of the legislature as a part of the "total cost of the improvement."

Section 6948, General Code, provides as follows:

"In case of an unforeseen contingency not contemplated by the contract, allowances for extra work may be made by the county commissioners, but they must first enter into a new contract in writing for such extra work. In all cases where the amount of the original contract price is less than ten thousand dollars, and the amount of the estimate for such extra work exceeds five hundred dollars, the preceding sections relating to advertising for bids shall apply to the letting of contracts for such extra work. If the amount of the original contract price is ten thousand dollars or more, the preceding sections relating to advertising for bids shall apply to all cases where the estimate for such extra work exceeds five per cent. of the original contract price for such work. If the estimate for such extra work is less than five hundred dollars, in all cases where the amount of the original contract price is less than ten thousand dollars, or if the estimate for such extra work is less than five per cent. of the original contract price in all cases where the original contract price is ten thousand dollars or more, the contract for such extra work may be let by the county commissioners at private contract without publication or notice, but no contract shall be awarded for such extra work at any price in excess of the original contract unit price for the same class or kind of work, if such there be, in connection with such contract. In case of any new class or kind of work, the county commissioners and contractor shall agree as to the price to be paid. The contractor shall submit his bid in writing, and if accepted by the commis-

sioners they shall immediately enter their acceptance on the journal. The costs and expenses of such extra work shall be paid by the county commissioners out of any funds available therefor, and the amount shall be charged to the cost of construction of said improvement and apportioned as the original contract price for the said improvement."

This statute specifically provides that such supplementary contracts shall be paid out of any funds available therefor, and the amount shall be charged to the cost of construction of said improvement. However, in cases where the "unforeseen contingency" is of great magnitude, and the estimate has been low then a difficult problem is presented for the reason that there will be insufficient funds available for the payment of the same out of the authorized bond issue, the amount for which the notes have been issued.

House bill No. 316 provides that such bond issuing authority may borrow money in anticipation of the issuance of such bonds in an amount not exceeding the amount of the estimated cost of such construction or improvement, and not exceeding the amount of the bonds so authorized, and issue notes, etc. It would therefore appear that under the provisions of section 6948, General Code, money for such purposes may be applied to the extent of the amount for which the bonds have been authorized, and the notes issued, after the application of the funds for all other purposes specifically included in the estimate.

Following this conclusion, contracts for extra work may be paid in so far as funds are available from the issue of the notes for the payment of all other legal items of cost and expense which have been included in the estimate, but to no greater extent.

By the provisions of section 7 of senate bill No. 94, as herein quoted, specific provision is made that no contract agreement or other obligation shall be made or assumed, unless the auditor or chief fiscal officer 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. It further provides that 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 be deemed in the treasury or in process of collection and in the appropriated funds. It is therefore a simple process of application that a contract cannot be let until the notes have been sold and in process of delivery.

Section 5654-1, 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.

Section 1224, General Code, as amended by the 86th general assembly, provides in part as follows:

" \* \* \* In maintaining, repairing, resurfacing, reconstructing or widening intercounty highways or main market roads, the director of highways and public works shall proceed by contract let to the lowest and best bidder, after advertisement as provided in section 1206 of the General Code. The director may, however, proceed by employing labor, purchasing materials and furnishing equipment, where the total expenditure per mile of road does not exceed three thousand dollars."

Section 6948-1, General Code, as amended in the same act provides in part as follows:

"If the county commissioners deem it for the best interest of the public, they may, in lieu of constructing such improvement by contract, proceed to construct the same by force account. Where the total estimated cost of the improvement exceeds three thousand dollars per mile, the commissioners shall be required to invite and receive competitive bids for the work, before ordering the same done by force account. The provisions of this section shall apply both to new construction and to repair work. \* \* \*"

There seems to be an emphasized distinction with respect to force account work in these two sections. Under the provision of section 1224, General Code, the director of highways may proceed by force account when the cost does not exceed three thousand dollars per mile, while the county commissioners may proceed by force account whenever they deem it for the best interests of the public, and in cases where the cost exceeds three thousand dollars per mile, then the board shall first invite and receive bids before ordering the same done by force account. There does not seem to be any other statutory limitation as to amount after inviting and receiving competitive bids for the work in excess of three thousand dollars per mile.

Respectfully,

C. C. CRABBE,

*Attorney General.*

2801.

APPROVAL, FINAL RESOLUTIONS ON IMPROVEMENTS IN: GEAUGA, ADAMS, ATHENS, COLUMBIANA, DELAWARE, FAIRFIELD, HURON, MAHONING, PUTNAM, RICHLAND AND WARREN COUNTIES.

COLUMBUS, OHIO, Sept. 24, 1925.

*Department of Highways and Public Works, Division of Highways, Columbus, Ohio.*

GENTLEMEN:—I am in receipt of your letter of September 23rd, 1925, enclosing for my approval, among others, certified copies of final resolutions on the following improvements:

Hambden-Andover road, I. C. H. No. 475, Sec. C, types A and B, Geauga county.

West Union-Portsmouth road, I. C. H. No. 119, Sec. A, Adams county.

Athens-Marietta road, I. C. H. No. 157, Sec. E, Athens county.

Ohio River road, I. C. H. No. 7, Sec. B, proposals 1 and 2, Columbiana county.