

**OPINION NO. 76-022****Syllabus:**

The provisions of R.C. 305.23 allow for the passage of a proposition by the affirmative vote of all members of a board of county commissioners who are present, and only a quorum of the board, pursuant to R.C. 305.08,

need consider the proposition. (1975 Op. Att'y Gen. No. 75-063 overruled.)

**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
**By: William J. Brown, Attorney General, March 22, 1976**

You requested my opinion on the number of board members required to be present where action is sought to be taken by county commissioners under R.C. 305.23, which provides:

"No proposition involving an expenditure of one thousand dollars or more shall be agreed to by the board of county commissioners, unless twenty days have elapsed since the introduction of the proposition, unless by the unanimous consent of all the members of the board present, which consent shall be taken by yeas and nays and entered on the record." (Emphasis added.)

It is apparent that this provision is designed to provide for expenditures of one thousand or more dollars without the required 20 day waiting period - upon a unanimous vote of at least all of the commissioners who are present when the vote is taken. In 1975 Op. Att'y Gen. No. 75-063, however, it was concluded that all of the commissioners, rather than just a quorum, must be present and unanimously vote in favor of the proposition in order to waive the 20 day waiting period.

The principal basis for the conclusion reached in 1975 Op. Att'y Gen. No. 75-063 was an apparently anomalous result reached if R.C. 305.23 only required a quorum to be present for the unanimous vote. Further, it seemed that without the construction of R.C. 305.23 outlined as proper in 1975 Op. Att'y Gen. No. 75-063, the safeguard of a 20 day waiting period was readily avoided.

It has now come to my attention that the issue addressed in 1975 Op. Att'y Gen. No. 75-063 is not clearly disposed of as earlier concluded. The anomaly outlined in that earlier opinion is resolved upon further analysis and, as explained below, the safeguard against high dollar amount expenditures (a 20 day waiting period) is not as readily avoided if only the unanimous vote of a quorum is required. Further, I have now been informed that the historic administrative construction of R.C. 305.23 is that of requiring a unanimous vote only of a quorum of the board of county commissioners. All this does, then, lead me to conclude that under R.C. 305.23 a proposition may be agreed to, if a quorum of the board of county commissioners unanimously votes its approval so that the waiting period may be avoided.

The focus of analysis is properly on the phrase within R.C. 305.23: "unanimous consent of all the members of the board present." The critical question is whether the phrase requires each and every member to consent or whether it only requires consent "of the board" as an entity, so that the unanimous vote of a quorum operates as consent "of the board."

In 1975 Op. Att'y Gen. No. 75-063 it was pointed out that since a board of county commissioners is a three mem-

ber board, two of which constitute a quorum, use of "unanimous" in R.C. 305.23 was nonsensical. That is, where two members may act on behalf of the board and where both must vote in favor of a proposition in order for it to pass, a "unanimous vote" requirement adds nothing. However, when one considers that if R.C. 305.23 does not require all members to be present, but that they may in fact be present in a given situation, use of the word "unanimous" has a substantial impact in elevating the affirmative vote which would not otherwise be required. Accordingly, use of the word unanimous in R.C. 305.23 does make considerable sense. It ensures complete agreement that the 20 day waiting period be waived. See Seyler v. Blasly, 32 Ohio Op. 2d 444 (CP Hamilton 1965).

It had also been pointed out that the word "present" contained in R.C. 305.23 must have been intended as a requirement that all of the members participate in a vote under R.C. 305.23. However, there is equal weight to the position that the word "present" modifies "all members of the board" in such a way as to allow a vote to be successful even if only those who are present vote in favor of a proposition. This alternate position is the better of the two. If "all members of the board" were not modified it would apparently carry the requirement that each member participate. Inasmuch as the legislature must be considered to have intended real meaning by use of "present" as a modifier, it becomes clear that "present" removes the required participation of each board member. See R.C. 1.47(B). Otherwise "present" adds nothing to the statutory provision. See Seyler v. Blasly, supra.

As mentioned above, there is a third factor to be considered. Absent the provisions of R.C. 305.23 there would be no extraordinary voting requirement for higher dollar amount expenditures. A majority vote would be enough to carry a proposition into effect. R.C. 305.23, however, provides for a waiting period which may only be avoided upon a unanimous vote. That means that any single commissioner need only be present and either vote against the proposition or abstain from voting. Thus, the net result of R.C. 305.23 is to add a safeguard (the waiting period), and any attempt to shortcut the safeguard pursuant to R.C. 305.23 can easily be negated by the action of a single commissioner. Analyzed from this practical fact point of view it is apparent that the safeguard design of R.C. 305.23 is not undercut by the conclusion that only two commissioners must be present and vote in favor of a proposition under R.C. 305.23.

It is also important to recognize that the historic administrative construction of R.C. 305.23 is one of allowing a proposition to be effective without a waiting period if only two commissioners are present and vote in favor of the proposition. As a matter of statutory interpretation this historic treatment can not be ignored. See R.C. 1.49(F).

Accordingly, it is my opinion, and you are so advised, that the provisions of R.C. 305.23 allow for the passage of a proposition by the affirmative vote of all members of a board of county commissioners who are present, and only a quorum of the board, pursuant to R.C. 305.08, need consider the proposition. (1975 Op. Att'y Gen. No. 75-063 overruled.)