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MUNICIPAL COUNCILS—ALL ACTIONS ARE SUBJECT TO REFERENDUM EXCEPTING THOSE SPECIFICALLY EXEMPTED BY SECTION 4227-3 G. C.

SYLLABUS:

All actions of municipal councils are subject to the referendum excepting actions specifically exempted from such procedure by the provisions of section 4227-3 G. C.

COLUMBUS, OHIO, January 25, 1924.

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

GENTLEMEN:—You have requested my opinion as follows:

“We are in receipt of an inquiry from Mr. R. A. Baskin, solicitor of several villages of Cuyahoga County, as follows:

‘I am solicitor of several villages of Cuyahoga County and have been considerably bothered in determining the question of what acts on the part of the council are subject to the referendum law, section 4227-2 G. C. It is my opinion that said section only relates to legislative acts and not to administrative proceedings.

In talking this matter over with attorneys skilled in municipal law, I find that there is considerable confusion and difference of opinion concerning this question; some taking the view that any measure of council except those specifically excluded by the statute is subject to the referendum provisions.

You would confer quite a great favor upon me if you would let me know what your views are as regards this matter; possibly an opinion from the Attorney General upon this complexing problem would be of general interest throughout the state.’

Your opinion relative to this matter will be greatly appreciated.”

The question you present necessarily requires a consideration of the provisions of section 1f, article II of the Amended Constitution of Ohio of 1912, which provides:

“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.”

While the amended constitution of 1912 contains a comprehensive direction as to all of the procedure to put into effect the initiative and referendum as a state wide proposition, the above section is the only provision in the constitution which specifically refers to such power to be exercised by a municipality, with the exception of section 5 of article XVIII, which provides a referendum upon ordinances relating to the acquiring, constructing and operating of a public utility by a municipality as provided for in section 4 of article XVIII.

However, in the case of *Shyrook vs. Zanesville*, 92 O. S., 383, it was in substance decided that a municipality exercised such power in the manner provided by the statutes; that the constitution left the detailed procedure to the legislature in such cases, whereas it had specified the details of such procedure in state-wide referendums. However, it was further held that the restrictions provided in section 1d of article II, apply to municipalities. Said section provides:

"Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be sent forth in one section of the law, which section shall be passed only upon a yea and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum. (Adopted Sept. 3, 1912.)"

In the case of *Cincinnati vs. Hillenbrand*, 103 O. S. 286, it was held:

"Section 1f, article II of the Constitution, especially reserves the initiative and referendum powers of the people of each municipality on all questions which municipalities are now, or hereafter may be, authorized by law to control by legislative action, and provides 'that such powers shall be exercised in the manner now or hereafter provided by law.' Sections 4227-1 to 4227-12, General Code, inclusive, prescribe the manner in which such powers shall be exercised.

Section 4227-4, General Code, provides that any initiative or referendum petition may be presented in separate parts but each part of any initiative petition shall contain a full and correct copy of the title and text of the proposed ordinance or other measure. An initiative petition which includes a correct copy of the title and text of a proposed ordinance is sufficient to authorize the submission thereof to the people if the requirements of the statute in other respects are complied with."

From an analysis of the foregoing opinions it seems quite clear that a municipal referendum may be had upon all matters upon which council is "authorized by law to control by legislative action," excepting the acts mentioned in section 1d, of article II, above referred to. This, of course, brings us to the real question:

What are the matters which municipal councils are authorized by law to control by legislative action as contradistinguished from actions which are not legislative? In other words your request seeks the line of demarcation of acts of council that are legislative and those that are otherwise, if there are such.

It will be evident that it would be much more desirable to attempt to decide a concrete case rather than to proclaim a general rule in view of the difficulties presented. However, a general consideration will be attempted.

Section 4227-2 G. C. provides in part:

"Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided."

In the following section the legislature had attempted to definitely specify the exceptions which are referred to in the preceding section. Said section provides:

"Whenever the council of any municipal corporation is by law required to pass more than one ordinance or other measure to complete the legislation necessary to make any payment for any public improvement, the provisions of this act shall apply only to the first ordinance or other measure required to be passed and not to any subsequent ordinances and other meas-

ures relating thereto. Ordinances or other measures providing for appropriations for the current expenses of any municipal corporation, or for street improvements petitioned for by the owners of a majority of the feet front of the property benefited and to be especially assessed for the cost thereof as provided by statute, and emergency ordinances or measures necessary for the immediate preservation of the public peace, health or safety in such municipal corporation, shall go into immediate effect. Such emergency ordinances or measures must, upon a yea and nay vote, receive the vote of two-thirds of all the members elected to the council or other body corresponding to the council of such municipal corporation, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure. The provisions of this act shall apply to pending legislation providing for any public improvement."

To determine just what is included within the meaning of the term "ordinance or any other measure" as referred to in section 4227-2, is the difficulty presented.

Section 4224 G. C., which relates to the actions of village councils and material to consider in connection with the question presented, provides:

"The action of council shall be by ordinance or resolution, and on the passage of each ordinance or resolution the vote shall be taken by 'yeas' and 'nays' and entered upon the journal, but this shall not apply to the ordering of an election, or direction by council to any board or officer to furnish council with information as to the affairs of any department or office. No by-law, ordinance or resolution of a general or permanent nature, or granting a franchise, or creating a right, or involving the expenditure of money, or the levying of a tax, or for the purchase, lease, sale, or transfer of property, shall be passed, unless it has been fully and distinctly read on three different days, and with respect to any such by-law, ordinance or resolution, there shall be no authority to dispense with this rule, except by a three-fourths vote of all members elected thereto, taken by yeas and nays, on each by-law, resolution or ordinance, and entered on the journal. No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto."

In reviewing the cases referring to legislative acts of a council as distinguished from other actions a number of fine distinctions have been drawn by the courts in reference to ordinances and resolutions. These cases, however, have arisen in most instances under the construction of the statute which requires ordinances of a general nature to be published. However, in the case of *McFarland vs. Norwood*, 26 O. C. C. (N. S.) 22, it was indicated by the court that an action of council could be by motion, by law or possibly by other form of procedure. In the case of *Railway vs. Norwalk*, 17 O. N. P. (N. S.) 580, it was held:

"A resolution ordinarily is a declaration of a council, or a legislative body evincing some purpose or intent to do some act not the doing of the act itself. Ordinarily it is the intention to enter upon some enterprise of public moment, something authorized by law that it may do. An ordinance ordinarily provides a rule of conduct and is a law binding upon a community. They are declarations of a rule of conduct for the enforcement of a right or the creation of a duty."

In the case of *McFarland vs. Norwood*, supra, it was held that an ordinance to appropriate land for a street improvement is the action which is subject to the referendum rather than the preliminary *resolution* to proceed. In this case it was pointed out that section 4227-2 originally contained the word "resolution" in conjunction with the words "ordinances or any other measure" and that the same was thereafter eliminated by the legislature. However, there was a dissenting opinion in this case and an examination of the opinion will disclose that the peculiar facts and history of the case had much to do in persuading the court to the decision announced to the end that the referendum might be upheld as indicated in the following language used by the court:

"It would seem better to permit the election to proceed and thus test the desire of the people under the referendum vote. * * * To hold otherwise would curtail rather than extend the right of referendum * * * which * * * should be favored rather than restricted."

In other words it is apparent that one of the controlling features of this case was the protection of the right to a referendum.

The same Court of Appeals in 9 Ohio Appeals, 221, held that the referendum was applicable to "resolutions," declaring the necessity of a street improvement.

In an opinion of the Attorney-General found in Reports for the year 1920 at page 485, it was held:

"It is clearly apparent that confirmation necessarily requires, and is, action of council, and that being true the confirmation may be made by resolution * * *."

This decision arose in connection with the powers of council to confirm appointments in pursuance to the provisions of section 4384 G. C.

After a thorough consideration of this question I am unable to state that there is a definite line of demarcation between the legislative acts of council and other actions. In fact the action of council for the most part is legislative and it is probable that its actions in the confirmation of appointments, the making of contracts, etc., partake of the nature of legislation. Neither am I able to point out definitely in view of the decisions upon the question, that there is any material distinction between a resolution, ordinance or by-law, in so far as its operative effect is concerned. In fact it is my opinion that the term "ordinance or any other measure" includes every legitimate act of council. In any event it seems clear to me that the legislature has attempted to subject all of the acts of such council to the provisions of the referendum with the exceptions heretofore noted. Whether or not this broad provision violates the provision of the constitution which relates to the legislative acts is a question which has not yet been decided by the court. Until the courts have indicated, in view of the amended constitution and the enactments made in pursuance thereto, that there are acts of council which are not subject to the referendum other than those mentioned in section 4227-3 G. C. I am constrained to hold that there are no such actions. This is in accord with a number of judicial interpretations which resolve such doubt in favor of the people exercising their will in municipal affairs.

Respectfully,
C. C. CRABBE,
Attorney General.