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ROAD IMPROVEMENT—STATE HIGHWAY—CO-OPERATION AND FINANCING BY COUNTY—SPECIFIC CASE DISCUSSED.

SYLLABUS:

Method of financing a county's portion of the cost of improving a state highway where the county is co-operating with the state discussed in the light of circumstances set out in the opinion.

COLUMBUS, OHIO, December 1, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, as follows:

“Plans have been prepared and some months back advertisement of receipt of bids was made. Bids were received and all rejected.

In the meantime we have let a contract for the improvement of adjacent sections on this road. The contractor, who has the work, is hauling his material over the sections above noted. It is not advisable, in my opinion to take bids on Sections B-2 and C-1 until near the completion of the adjacent sections. However, the Board of Commissioners of Franklin County claim to be in a predicament in regard to finances. I enclose herewith a memorandum on this subject sent to me under date of November 12th, and signed by B. A. Y., Assistant Clerk, Board of County Commissioners, Franklin County.

Briefly, it appears that the Commissioners borrowed \$67,000.00 on notes at 5½% interest; this loan did not include the sum of \$1842.50, representing the interest on same for six months. The county officials are pressing me to sell the job on account of their apparent inability to pay the interest in any other way except by the issuance of bonds in consequence of the awarding of the contract.

I do not care to embarrass the county officials. It seems to me, however, that the object of our highway law is to build roads as economically as possible and not to let contracts in order to obviate financial difficulties such as this case.

Kindly advise me whether there is any other way in which the county can proceed, either to cancel these notes or of renewing them in contemplation of a future sale of this project.”

The letter of the Assistant Clerk of the Board of County Commissioners of Franklin County, attached to your communication, is as follows:

“Upon receipt of a letter from the State Highway Director, dated August 11, 1928, transmitting resolution approving plans and determining to proceed, final resolution and county auditor's certificate covering I. C. H. No. 546, Sections 'B-2 and C-1', the Board of County Commissioners of Franklin County, Ohio, borrowed \$67,000.00, 5½% interest, from the First Citizens Corporation, Columbus, Ohio, evidencing such indebtedness by a note for a period of six months effective August 15, 1928, to temporarily finance the construction of the above named highway.

Said money was borrowed pursuant to the provisions of Section 5654-1 and in anticipation of a bond sale to redeem said note. Said note did not include the sum of \$1842.50, representing the interest on same, it being the intention of the Board to include the interest in the total sum at the time of selling bonds after the contract price had been ascertained. Therefore, if a contract for the highway is not entered into in time to enable the Board to sell bonds to redeem the note, the county will be unable to meet the interest on the indebtedness. The time is growing very short, due to the fact that prior to the bond sale, it is necessary that a public hearing requiring two weeks' advertisement be given the property owners in the matter of assessments, which assessments cannot be figured by the engineering department until after the contract price has been ascertained. This hearing completed, a four weeks' advertisement for the sale of bonds must be published."

While your letter does not so state, I am advised that the proceeding is one which comes under the law in effect prior to the enactment of the Norton-Edwards act by the last General Assembly. An application for state aid was made by the commissioners of Franklin County prior to the effective date of the Norton-Edwards Act and hence the proceeding was pending so as to enable it to be completed after that act went into effect under the provisions of the old statutes. It is unnecessary to detail the various steps incident to a state aid project. I may state, however, that the proceeding is initiated by an application for state aid by the county commissioners and thereafter various steps are provided which culminate in an agreement on the part of the county to assume that part of the cost and expense of the improvement over and above the amount to be paid by the state. This is covered by Section 1218 of the Code, prior to its amendment by the last Legislature, which then provided:

"Each contract made by the state highway commissioner under the provisions of this chapter shall be made in the name of the state and executed on its behalf by the state highway commissioner and attested by the secretary of the department. No contract shall be let by the state highway commissioner in a case where the county commissioners or township trustees are to contribute a part of the cost of said improvement, unless the county commissioners of the county in which the improvement is located shall have made a written agreement to assume in the first instance that part of the cost and expense of said improvement over and above the amount to be paid by the state. Where the application for said improvement has been made by township trustees, then such agreement shall be entered into between the state highway commissioner and the township trustees. Such agreement shall be filed in the office of the state highway commissioner with the approval of the attorney general endorsed thereon as to its form and legality. The provisions of Section 5660 of the General Code shall apply to such written agreement to be made by the county commissioners or township trustees and a duplicate of the certificate of the county auditor or township clerk made in compliance with the provisions of said section shall be filed in the office of the state highway commissioner.

The state highway commissioner shall not proceed to the opening of bids for any work to be let by him until the provisions of this section relating to the making of an agreement by the local authorities have been fully complied with, and if at the time fixed for the opening of bids, such

provisions have not been fully complied with or if for any other reason the state highway commissioner should at said time find himself without full authority to immediately proceed to determine the lowest and best bidder and to award and enter into a contract, it shall be the duty of the state highway commissioner to forthwith cancel the letting of said work, return all bids, unopened, and thereafter readvertise the letting of the work at such time as he may be fully authorized to forthwith proceed to determine the lowest and best bidder and award and enter into a contract."

From this section it is clear the county commissioners were required to have funds available before entering into any final agreement as therein provided. The authority to issue bonds to pay the county's portion of this class of improvement is found in Section 1223 of the General Code, as follows:

"The county commissioners, in anticipation of the collection of such taxes and assessments or any part thereof, and whenever such construction, improvement or repair is being done upon their application, may, whenever in their judgment it is deemed necessary sell the bonds of said county in any amount not greater than the aggregate sum necessary to pay the respective shares of the estimated compensation, damages, cost and expense payable by the county, township or townships and the owners of the lands assessed or to be assessed for such improvement, but the aggregate amount of such bonds issued and outstanding at any one time and to be redeemed by a tax levy upon the grand duplicate of the county shall not be in excess of one per cent of the tax duplicate of such county. In computing such one per cent bonds to be redeemed by special assessments or by tax levies upon the interested township or townships shall not be taken into account. Bonds issued under authority of this section shall state for what purpose issued and bear interest "at a rate not to exceed six per cent per annum, payable semi-annually, and in such amounts, and to mature in not more than ten years after their issue, as the county commissioners shall determine. Prior to the issuance of such bonds the county commissioners shall provide for the levying of a tax upon all the taxable property of the county to cover any deficiency in the payment or collection of any township taxes, or any deficiency in the levy, payment or collection of any special assessments, anticipated by such bonds. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the construction, improvement or repair of the highway for which the bonds are issued. If bids are made for a portion of the proposed issue, the commissioners may accept a combination of bids, if by so doing the bonds will produce the best price to the county, and at the request of the purchaser the bonds may be issued in denominations of one hundred dollars or multiples thereof, notwithstanding any provision of the resolution providing for their issue. Where such construction, improvement or repair is made upon the application of the township trustees such township trustees are hereby authorized to sell the bonds of the interested township in any amount not greater than the estimated compensation, damages, cost and expense of such construction, improvement or repair, and under like conditions hereinbefore prescribed for county commissioners. The making of the special assessment hereinbefore referred to shall not be a condition precedent to the issuance of bonds under the provisions of this section and such special assessments may be made either before bonds are issued under the provisions of this section or after the issuance of such bonds."

The preceding section authorizes a levy of taxes for this purpose in anticipation of the collection of which bonds may be issued as provided in Section 1223. This section, standing alone, would apparently not require the issuance of notes, but Section 5654-1 of the Code, which was first repealed by the last Legislature and then re-enacted as part of the Norton-Edwards Act, provides that county commissioners shall not issue bonds for road improvements until after the contract therefor has been let, and authorizes the issuance of notes in anticipation of bonds. It accordingly follows that the issuance of notes is mandatory in order that there may be a proper certification upon the contract. Apparently this has been the course pursued in the present instance, the county commissioners having authorized the issuance of bonds, and, at the same time, authorized the issuance of notes in anticipation of the bond issue. The notes have been sold and the money is in the treasury available for the county's proportion of the cost of the improvement. The money was obtained in August, 1928, but, by reason of the rejection of all bids for the improvement after the first advertisement, and the subsequent construction work on an adjacent section of the road, no contract for the improvement has been let and I infer that you prefer to postpone any award of the contract until after the work now in process on the adjacent portion of the road be completed. In the meantime, however, the notes which were of six months maturity are about to become due and the county is placed in the position of having no source from which the interest and principal thereof may be paid at maturity. Of course the proceeds of the note issue are still intact and I assume that this money has been placed on deposit in the county depositories and it is drawing interest at the depository rates. This sum is doubtless less than the 5½% which the notes bear. The difference between the 5½% rate and the depository rates represents the amount which must be paid at the maturity of the notes for which the commissioners state there is no source of revenue. It would, of course, be legal to pay this difference in interest from general funds, but I am assuming that this cannot be done without curtailing the amount of money necessary for other county purposes.

You inquire, first, whether the county can now cancel these notes. It would, of course, be possible to pay at maturity the notes and the interest due thereon from funds of the county, provided the commissioners be released from their agreement by you and the project wholly abandoned. I cannot, of course, judge whether such a course would be justifiable. If I understand you correctly, you do not suggest that the improvement is not proper but simply indicate that a delay in making the improvement would be advisable.

I am accordingly of the opinion that there is no justification for the cancellation of these notes unless the project be abandoned and the commissioners released. When you use the word "cancellation", I infer that you mean thereby the payment of the notes without any further action, since there would, of course, be no justification at all for any attempt to avoid the liability thereon, such as "cancellation" might imply.

You further inquire whether there is any method of renewing the notes in contemplation of future letting of the contract for the improvement.

The maturity of the notes was fixed at six months. Under authority of Section 5654-1 of the General Code the county had the statutory right to issue notes to mature not later than one year after their date and hence in this instance the county commissioners did not in the first place go as far in the issuance of these notes as their authority extended. I am informed that the original bond resolution

provided for an issue in the aggregate amount of \$68,842.50, which represented the estimated cost of the improvement plus the sum of \$1842.50, representing interest on the principal amount for six months which it was proposed to capitalize in the issuance of the bonds. In the first instance I believe it would have been proper for the county commissioners to have capitalized more than the six months interest.

Section 2293-11 of the General Code provides as follows:

"The cost of construction by a subdivision of any public utility may include interest payable during construction on bonds and notes 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 ultimately is to be paid."

This section authorizes the capitalization of one year's interest on any bond issue, provided that such amount be necessary to take care of interest maturing previous to the receipt of the taxes or assessments from which the interest is ultimately to be paid.

Section 2293-25 of the Code is as follows:

"Whenever the taxing authority of a subdivision has legal authority to, and desires to issue bonds without vote of the people, it shall pass a resolution or ordinance declaring the necessity of such bond issue, its purpose and amount. In such resolution or ordinance the taxing authority shall determine, and in any case where an issue of bonds has been approved by a vote of the people, the taxing authority shall by ordinance or resolution determine, whether notes shall be issued in anticipation of the issue of bonds, and, if so, the amount of such anticipatory notes, not to exceed the amount of the bond issue, the rate of interest, the date of such notes and their maturity, not to exceed two years. Such notes shall be redeemable at any interest period. A resolution or ordinance providing for the issue of notes in anticipation of the issue of bonds shall provide for the levy of a tax during the year or years while such notes run, not less than that which would have been levied if bonds had been issued without the prior issue of such notes."

You will observe that this requires the levy to be made at the time notes are to be issued, which levy shall be not less than that which would have been levied if bonds had been issued without the prior issue of notes. I assume, therefore, that the bond resolution in this case has been certified to the county auditor and a levy made in an amount enough to satisfy the requirements of the bond issue as set forth in the bond resolution. Since this action was taken in August, 1928, it is quite obvious that the first collection for the purposes of this bond issue will be received in the February tax settlement of 1930, since it was too late to be placed upon the duplicate of 1928. If the bonds were issued at this time, their maturity could not be earlier than September 1, 1930, if maturing annually or the first day of March if they are issued with semi-annual maturities. The levy will, therefore, be received in time to take care of maturities, but should interest payment dates

be fixed six months prior to the maturities, no provision or levy would be available for payment and it would be necessary for the county to capitalize such interest in the method authorized by Section 2293-11 of the Code, *supra*. I am not advised as to the course the county proposes to pursue, but I infer that the only interest proposed to be capitalized is that upon the notes, aggregating \$1,842.50. I therefore conclude that there will be no interest coupon due earlier than the first maturity of the bonds, at which time the levy will be available.

The problem resolves itself into a determination whether at this time the commissioners may renew the notes in view of the fact that they originally had authority to fix a maturity of one year. I see no objection to such course provided the matter of interest on the notes may be cared for. In order to do this, however, it would be necessary to increase the face value of the notes by the amount of the first six months' interest, making the aggregate of the notes the sum of \$68,842.50. By so doing the interest for the first six months would be paid and there would remain to be provided the interest on the new notes for another six months. Since no levy will be available therefor and the county commissioners assert there is no other source for the payment of additional interest, the only possible way that it could be secured is by capitalization. There is apparently no specific statutory authority for the capitalization of interest on notes, but I am of the opinion that the authority to capitalize one year's interest would extend either to the capitalization of interest on notes or bonds, as the case may be.

While in the first instance the commissioners only authorized the capitalization of six months' interest, I see no reason why they should not now amend their bond resolution so as to capitalize an additional six months' interest. It must, of course, be borne in mind that the aggregate capitalization of interest shall not exceed one year.

Stated concretely, in my opinion the commissioners could pay off the present notes and interest thereon by renewal notes aggregating the sum of \$68,842.50, which notes must be of not more than six months' maturity, provided that at the same time the bond resolution be amended to increase the amount of bonds to be ultimately issued by the sum representing the interest upon such new notes. Upon the issuance of the bonds after the contract is let, there would be available sufficient to pay the contract price together with the amount necessary to pay the interest on the notes. At the maturity of the first bond, there would be available the February tax collection in 1930 to pay the maturing bonds and interest.

While this is a possible solution of the difficulty presented, I realize that the county officials would have serious objection to this course for the reason that it imposes an additional interest charge which in their opinion is unnecessary. If the contract were let, the bonds could be sold and the obligation to pay further interest would cease. It may be, however, that, as you suggest, the greater economy would be effected by deferring action in awarding the contract at this time. I cannot, of course, judge of this and would not attempt to do so, since it is a matter that rests primarily within your best judgment. It should be borne in mind, however, that steps already taken in this proceeding are such as to commit the state to the policy of making the improvement in question. When the actual contract is to be let is a matter for the exercise of your discretion within reasonable limits.

Respectfully,
EDWARD C. TURNER,
Attorney General.