

Note from the Attorney General's Office:

1975 Op. Att'y Gen. No. 75-063 was overruled by
1976 Op. Att'y Gen. No. 76-022.

OPINION NO. 75-063**Syllabus:**

The phrase "unanimous consent of all members of the board present", as used in R.C. 305.23, means that all three members of the Board of County Commissioners must vote and agree on any expenditure over one thousand dollars where twenty-one days have not elapsed since the introduction of the expenditure proposition.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, September 18, 1975

I have before me your request for my opinion as to the meaning of certain language in R.C. 305.23. You state:

"Do the words 'unanimous consent of all the members of the board present,' as found in R.C. 305.23, require that an affirmative vote be cast by all three members of the Board of County Commissioners in order to waive the twenty-day waiting period which is imposed by this section upon propositions involving expenditure of \$1,000.00 or more?"

The statute in question reads:

"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.)

There is no question raised here concerning the requirement that a vote must be "unanimous" in order to waive the twenty-day waiting period specified in R.C. 305.23. Rather, the issue concerns how many members of the board must be present when the vote is taken. The issue is whether the language of R.C. 305.23 which is emphasized above should be read as:

unanimous consent of all the members of
the board who are present,

or

unanimous consent of all the members
of the board being present.

With that explanation in mind but without any prior decision clearly determining what is required under R.C. 305.23, it is appropriate to consider the questioned phrase in context, construing it reasonably so as to identify a construction of the language which is feasible of execution. See R.C. 1.42 and 1.47.

Under General Code Section 2414 (the predecessor of R.C. 305.23) the court in Matheny v. White, 3 Ohio Op. 357, 359 (C.P. 1935) held that two members of the board of county commissioners did not have the authority to award contracts (for \$6,250.00) within 11 days after introduction of the proposal. It is not clear, however, whether that finding was based on a vote where only two members were present or a vote of all three with one dissenting vote. Accordingly, the Matheny case cannot be considered clearly dispositive of the issue raised here.

The Superior Court of Cincinnati addressed a vote by county commissioners on an \$11,000 proposition made under Revised Statute 851 (the predecessor to both General Code Section 2414 and R.C. 305.23) in State ex rel. Ampt v. Hamilton County Comm'rs, 14 Ohio Dec. 228 (1900). While that case did involve one negative vote - and is therefore not controlling in the instant case - the court did explain the nature of the twenty-day waiting period by stating at 233:

"It is trite law now that statutes giving power to public officers and boards to expend money, or incur liability for the taxpayers to meet, are to be strictly construed, and that every protection is to be thrown around the taxpayer, so as to guard against wastefulness and extravagance on the part of such boards and officers."

If the critical phrase were to be read as "who are present," it is evident that an anomalous result would occur. R.C. 305.08 requires that two of the three commissioners be present to constitute a quorum. Accordingly, where two members are present, there must be agreement between them if any proposition is to pass. With that in mind it is difficult to understand why the legislature used the word "unanimous" if it intended to allow waiver of the twenty-day period by only two county commissioners. Use of the word "unanimous"

in a situation where only two people are involved is nonsensical. It is even more difficult to understand why the legislature used the word "present" in the phrase "unanimous consent of all the members of the board present" if the legislature had not intended to require all members to be present and to agree on avoidance of the twenty-day time period.

Based upon the foregoing, were one to conclude that R.C. 305.23 requires only two members to be present and agree on the waiver, one must (a) assume a nonsensical use of the word unanimous, (b) torture the legislature's use of the word "present", and (c) conclude that the voting requirement provisions of R.C. 305.23 were meant only as a repetition of the quorum requirement contained in R.C. 305.08.

On the other hand if one were to determine that the language in R.C. 305.23 requires all members to be present and all members to agree if the twenty-day waiting period is to be avoided, no anomaly is evident. Further, when one considers that this stricter voting requirement applies only where larger dollar amount expenditures are involved, it is apparent that what the legislature intended in R.C. 305.23 was to provide additional safeguards where public moneys are involved.

It is also appropriate to point out that the language of R.C. 305.23 is not precisely the same as that contained in General Code Section 2414 or Revised Statute 851. The critical phrase in those predecessors reads as follows:

Rev. Stat. 851:

"[E]xcept by the unanimous consent of all the members present of the board. . . ."

Gen. Code 2414:

"[U]nless by unanimous consent of all members present of the board. . . ."

It can readily be seen that this prior language, though grammatically more awkward, does clearly require all three members to vote and agree upon a proposal to avoid the twenty-day period. This minor change in statutory language, however, cannot justify a conclusion that the legislature, in enacting R.C. 305.23, intended to change the required vote. The change in phrasing is best understood as one done for grammatical purposes only. Had the legislature intended to change the substantive requirement, it is apparent that the change would have been clearly identified - but it is not.

Thus, I conclude, and you are so advised, that the phrase "unanimous consent of all members of the board present", as used in R.C. 305.23, means that all three members of the Board of County Commissioners must vote and agree on any expenditure over one thousand dollars where twenty-one days have not elapsed since the introduction of the expenditure proposition.