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BONDS—ISSUANCE OF GENERAL OBLIGATION BONDS OF MUNICIPALITY—PROPOSED BY INITIATIVE PETITION—AMOUNT OF ISSUE WOULD MAKE NET INDEBTEDNESS OF MUNICIPALITY EXCEED ONE PER CENT BUT NOT FIVE PER CENT OF TOTAL VALUE OF ALL PROPERTY IN MUNICIPALITY—LISTED AND ASSESSED FOR TAXATION—PROPOSED LEGISLATION MUST CONFORM TO RESOLUTION OF NECESSITY—SECTION 2293-19 G. C.—ENACTMENT OF SUCH LEGISLATION REQUIRES AFFIRMATIVE VOTE OF MAJORITY OF ELECTORS VOTING ON ISSUE—SECTION 4227-1 G. C.

SYLLABUS:

Where the issuance of general obligation bonds of a municipality is proposed by initiative petition and the amount of such issue would make the net indebtedness of the municipality exceed one per cent but not five per cent of the total value of all property in such municipality as listed and assessed for taxation, the proposed legislation must conform to the resolution of necessity required by Section 2293-19, General Code. Pursuant to Section 4227-1, General Code, the enactment of such legislation requires the affirmative vote of a majority of the electors voting on the issue.

Columbus, Ohio, October 20, 1950

Hon. Thomas H. Blakely, Prosecuting Attorney
Lake County, Painesville, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I respectfully request your opinion on Section 4227-1 of the General Code of Ohio, which reads in part as follows:

“* * * No ordinance or other measure proposed by initiative petition and approved by a majority of the electors voting upon the same in such municipal corporation shall be subject to the veto of the mayor.”

Together with that part of Section 2293-23 of the General Code which reads in part as follows:

“* * * If fifty-five per cent of those voting upon the proposition vote in favor thereof, the taxing authority of such subdivision shall have authority to proceed under sec-

tions 2293-25 to 2293-29 of the General Code of Ohio, inclusive, with the issue of such bonds and the levy of a tax outside of the ten-mill limitation, sufficient in amount to pay the interest on and retire such bonds at maturity * * *.

“The facts briefly are as follows :

“An initiative petition providing for the issuance of \$2,000,-000.00 in bonds for the construction of a sewer system and a levy of tax outside of all constitutional limitation to pay the interest on and retire said bonds, has been filed with the clerk of the Village of Eastlake, and by her certified to the Lake County Board of Elections, as required by law.

“The specific question involved is whether or not the Lake County Board of Elections should state on the ballot that the percentage of affirmative vote required is 55% or a majority?

“We wish to call your attention to the fact that Section 4227-1 of the General Code provides for a majority vote on any initiated petition, whereas, the uniform bond act under Section 2293-23 provides for an affirmative vote of 55%.”

I wish to point out, at the outset of this discussion, that the same will be limited to the question of a proposed issuance of bonds. The question of whether or not the proposed ordinance proposes the construction of a public utility and whether or not the same is restricted by Section 5 of Article XVIII of the Constitution of Ohio will not be considered. On the latter problem, your attention is called to the apparently divergent views expressed by the Court of Appeals for Columbiana County in the case of *Ohio Power Company v. Davidson, et al.*, 49 O. App. 184, 2 O. O. 448, 195 N. E. 871 (petition in error dismissed, *Davidson v. Ohio Power Company*, 128 O. S. 614), and that of the Court of Appeals for Butler County in the case of *Goodman v. City of Hamilton, et al.*, 21 O. App. 465.

From the brief statement of facts which you have recited, it appears that the initiative petition proposes the issuance of general obligation bonds of the municipality for the construction of a sewerage system. For the purpose of this discussion, it is assumed that the amount of the proposed bond issue will make the net indebtedness of the municipality exceed one per cent but not exceed five per cent of the total value of all property in such municipal corporation as listed and assessed for taxation. It is further assumed that the municipal council of the village has passed no ordinance with respect to the necessity of the issuance of these bonds.

The financing of public improvements, while inferred from the powers granted, is not specifically provided for by the Constitution, except with respect to the issuance of mortgage revenue bonds as authorized by Section 12 of Article XVIII. Authority to issue other types of bonds for such purposes are provided for by various provisions of the General Code. General obligation bonds, i.e. bonds payable from an ad valorem tax to be levied on all the taxable property of the subdivision, are governed by the provisions of the Uniform Bond Act, Section 2293-1, et seq., General Code. This act authorizes the taxing authority of any subdivision to issue the bonds of such subdivision for the purpose of acquiring or constructing any permanent improvement which such subdivision is authorized to acquire or construct (Section 2293-2, General Code), and defines a taxing authority (Section 2293-1, paragraph (c), General Code) as follows:

“‘Taxing authority’ or ‘bond issuing authority’ shall mean in the case of any county, the county commissioners; in the case of a municipal corporation, the council or other legislative authority of such municipal corporation; in the case of a school district, the board of education; in the case of a joint township hospital district, the joint township hospital board; and in the case of a township, the township trustees.”

The several sections of the act then prescribe a definite procedure to be followed in the issuance of such bonds. *State, ex rel., etc. v. Flick*, 153 O. S. 295. One of these sections, Section 2293-19, provides as follows:

“The taxing authority of any subdivision may submit to the electors of such subdivision the question of issuing any bonds which said subdivision has power to issue. When it desires or is required by law to submit any bond issue to the electors, it shall pass a resolution, declaring the necessity of such bond issue and fixing the amount, purpose and approximate date, interest rate and maturity, and also the necessity of the levy of a tax outside of the limitation imposed by Article XII, section 2 of the constitution to pay the interest on and to retire the said bonds. It shall certify such resolution to the county auditor at least sixty days prior to the election at which it is desired to submit such questions. Thereupon and more than fifty days prior to such election the county auditor shall calculate and certify to the taxing authority the average annual levy, expressed in dollars and cents for each one hundred dollars of valuation as well as in mills for each one dollar of valuation, throughout the life of the bonds which will be required to pay the interest on, and retire, such bonds, assuming that they are all issued in one series and that

the amount of the tax list of such subdivision remains throughout the life of said bonds the same as the amount of the tax list for the current year, and if this is not determined, the estimated amount submitted by the auditor to the county budget commission. Thereupon the said taxing authority, if it desires to proceed with the issue of said bonds, shall, more than forty days prior to such election, certify its resolution, together with the amount of the average tax levy, expressed in dollars and cents for each one hundred dollars of valuation as well as in mills for each one dollar of valuation, estimated by the county auditor, and the maximum number of years required to retire the bonds, to the deputy state supervisors of elections of the county who shall prepare the ballots and make other necessary arrangements for the submission of the question to the voters of the subdivision."

The resolution required by this section is commonly called the resolution of necessity, or jurisdictional resolution. It constitutes a condition precedent to the authorization of the election provided for in Section 2293-23, General Code, and to the issuance of the bonds, (*State, ex rel. et al. v. Bockrath, et al.*, 152 O. S. 77). This resolution is the initial legislative step in the bond issuing proceedings, where the bonds proposed to be issued are required by law to be submitted to a vote of electors. Having assumed that the amount of the proposed issue will make the net indebtedness of the municipality exceed one per cent but not five per cent of the assessed value of the property, such issue would be required to be submitted to the electors by the provisions of Section 2293-14, General Code, which reads in part as follows:

"The net indebtedness created or incurred by a municipal corporation without a vote of the electors, shall never exceed one per cent of the total value of all property in such municipal corporation as listed and assessed for taxation.

"The net indebtedness created or incurred by a municipal corporation shall never exceed five per cent of the total value of all property in such municipal corporation as listed and assessed for taxation. * * *"

Since such resolution is a condition precedent to the authorization of the election, no election on the question of issuing such bonds could be held without the enactment of such resolution.

As pointed out above, the Uniform Bond Act provides a definite procedure for the issuance of bonds by taxing authorities. The vote required in Section 2293-23, General Code, has reference to the election held pursuant to the provisions of Sections 2293-19, 2293-21 and 2293-22,

General Code. Conversely, it would have no application to questions and issues presented otherwise than pursuant to the proceeding therein provided.

The question then arises whether or not the resolution of necessity required by said Section 2293-19, General Code, may be enacted by initiative petition. It will be observed that said section refers to the "taxing authority" passing the required resolution and from Section 2293-1, General Code, quoted in part above, the "taxing authority" of a municipal corporation is defined as the council or other legislative body. If these sections were to be considered alone, one might be led to the conclusion that such resolution could only be enacted by the legislative authority of the municipality. However, Section 1f of Article II of the Constitution of Ohio provides as follows:

"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."

Sections 4227-1 to 4227-12, inclusive, General Code, prescribe the manner in which such powers shall be exercised. On this point, the third branch of the syllabus in the case of *Cincinnati v. Hillenbrand*, 103 O. S. 286, 133 N. E. 556, reads as follows:

"Section 1f, Article II of the Constitution, especially reserves the initiative and referendum powers to 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 4227-1, General Code, prescribes the procedure with respect to initiative petitions and requires the affirmative vote of but a majority of the electors voting upon the issue to enact the proposed ordinance or other measure into law. Section 4227-3, General Code, then provides in part as follows:

"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 and pay 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 measures relating thereto.
* * *

There can be little doubt that the resolution required by Section 2293-19, General Code, is legislative in nature. Therefore, the above two sections, when construed together with Section 1f of Article II of the Constitution and the Uniform Bond Act, would clearly indicate that the resolution of necessity required by Section 2293-19 may be enacted by initiative petition and is the only legislative action with respect to the issuance of such bonds which may be so initiated. Upon enactment, the subsequent steps prescribed in the Uniform Bond Act would then have to be followed in order to issue the proposed bonds.

The theory which I have hereinbefore followed in approaching the answer to your question was recognized in the case of *Heffner v. Krinn*, 98 O. S. 1, although an opposite conclusion was reached. The holding in that case was based upon the particular statutes in effect at the time and was decided several years prior to the enactment of the Uniform Bond Act. The court in that case, on pages 11 and 12, stated:

“If it were proposed to issue bonds in excess of these limitations, then Sections 3942 and 3943, General Code, would apply, and the preliminary resolution required by Section 3943, General Code, would be essential to the validity of all subsequent proceedings. This preliminary resolution would be the first ‘measure required to be passed,’ within the meaning of that term as used in Section 4227-3, General Code, as amended 103 Ohio Laws, 211, and would be the only legislation or other measure to which the act of April 17, 1913 (103 O. L., 211), would apply.

“If that resolution were initiated by petition and adopted by the electors of the municipality, it would then become the duty of the city council to adopt such further ordinances or other measures as the law requires to complete the legislation necessary to make and pay for the proposed public improvement.”

In direct answer to your question you are advised, therefore, assuming the proposed initiated ordinance meets the requirements of the resolution of necessity required by Section 2293-19, General Code, that a majority vote is required for the adoption of said ordinance.

Respectfully,

HERBERT S. DUFFY,
Attorney General.