

and providing for the employment of an engineer constitutes an exception to the general provision in section 2792.

It is therefore my opinion that if the county surveyor so desires, and no sanitary engineer is employed, he may perform the duties of the sanitary engineer. In connection with the performance of such duties undoubtedly he could use the same office force, deputies and assistants which he uses to perform other duties in connection with his department.

Respectfully,

C. C. CRABBE,
Attorney General.

2797.

COUNCIL OF MUNICIPALITY MAY ENACT LEGISLATION WITHIN THE SCOPE OF ITS POWERS EVEN THOUGH INCONSISTENT WITH A LAW PROPOSED BY INITIATIVE PETITION, PENDING DECISION THEREON AT THE ELECTION.

SYLLABUS:

There is no provision of the constitution or statutes which prevents the council of a municipality from passing legislation within the scope of its powers inconsistent with a law that has been proposed by an initiative petition, pending the decision thereon at the election.

COLUMBUS, OHIO, Sept. 22, 1925.

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

GENTLEMEN:—You request my opinion on a state of facts submitted by the solicitor of the city of Hamilton, the pertinent part of which is:

“An ordinance was introduced in the city council authorizing and directing the director of public service to enter into a ten-year contract for the purchase of artificial gas to be used by the city in supplying its inhabitants with gas. See section 3618-1 of the General Code. Council refused to pass such ordinance. Thereupon an initiative petition with the required number of signatures was filed with the city auditor to initiate the ordinance rejected by council and which will be voted on by the people at the coming November election. Can council, after the filing of such initiative petition and until voted upon in November, pass any legislation which would conflict in any manner with the provisions of the initiative ordinance? If council would proceed and lease the gas distribution system and if hereafter the people of the city would vote in favor of the ordinance, the city would find itself in the embarrassing situation of having a contract for a large supply of gas and have no gas mains or other facilities through which it could supply the inhabitants of the city with such gas. It occurred to me that until this question is decided at the polls in November, the council could do nothing to in any way affect the situation and the result of the election.”

In substance your inquiry is whether after an initiative petition has been filed

with reference to a given matter, the hands of council are tied with respect to taking action upon a similar matter inconsistent with the proposed initiative law.

Section 1f of article II of the Ohio constitution provides:

“The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipality 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.”

Section 5 of article XVIII also relates to the power of a municipality to exercise the right of referendum upon ordinances relating to the acquiring, constructing and operating of a public utility. However, as heretofore pointed out in an opinion found in Reports of the Attorney General for the year 1924, page 33, the case of *Shyrock vs. Zanesville*, 92 O. S. 383, it was indicated that municipalities exercise such power in the manner provided by statutes, although it was also indicated in the same opinion that the restrictions in section 1d of article II apply to municipalities.

As pointed out in the case of *Cincinnati vs. Hillenbrand*, 103 O. S. 286, sections 4227-1 to 4227-12, General Code, prescribe the manner in which the powers of initiative and referendum shall be exercised by a municipality.

In considering these sections it will be observed that section 4227-1 provides for the proposing of laws by initiative petition and requires such petition to be signed by not less than ten per cent of the electors of a municipal corporation. The section further in substance provides that when a petition is properly filed the city auditor shall certify the same to the board of deputy state supervisors of elections, which board shall submit such proposed ordinance for the approval or rejection of the electors at the next succeeding regular or general election occurring forty days after the filing of such initiative petition. The section further provides that no ordinance approved by the electors shall be subject to veto by the mayor.

The next section sets forth in substance that any ordinance or other measure passed by the council shall be subject to the referendum, except as hereinafter provided.

The following section enumerates the instances in which a referendum may not be had.

Nowhere in the sections referred to or in the constitution can there be found any provision to the effect that the legislative powers of council are in any wise suspended on account of an initiative petition having been filed. It is obvious that the fact that such petition is filed in no wise indicates that it will become a permanent ordinance. From all that is known now it cannot be definitely determined that it shall become a law, and the council within the scope of the powers granted to it, may legislate the same as if no such petition had been filed.

The solicitor points out a peculiar predicament in which he states the municipality may find itself unless council is prevented from passing legislation pending the decision upon the proposed initiative law. The answer to this objection is that unless the action of council should constitute an exception within the provisions of section 4227-3, it is subject to referendum. This then will afford a remedy whereby the electors of a city may express themselves upon the action of council.

On the other hand, if prior to the November election council should have enacted a law which had become permanent, inconsistent with the proposed initiative law, in that event, the good judgment of the electors of a municipality undoubtedly would be exercised to the extent of defeating the proposed legislation.

Respectfully,

C. C. CRABBE,
Attorney General.