

2927.

APPROVAL, CONTRACT OF STATE OF OHIO WITH S. P. STEWART & SON FOR ARCHITECTURAL SERVICES ON DORMITORY FOR WOMEN AT BOWLING GREEN STATE NORMAL COLLEGE, BOWLING GREEN, OHIO.

COLUMBUS, OHIO, March 13, 1922.

HON. LEON C. HERRICK, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted to me for approval a contract (four copies) between The State of Ohio, acting by the Department of Highways and Public Works, and S. P. Stewart & Son. This contract is for architectural services on dormitory for women, at Bowling Green State Normal College, Bowling Green, Ohio.

I have before me the certificate of the Director of Finance that there is an unencumbered balance legally appropriated sufficient to cover the obligations of this contract.

Said contract has been approved and the same is herewith returned to you together with all other data submitted to me in this connection.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2928.

APPROVAL, BONDS OF SUMMERFIELD VILLAGE SCHOOL DISTRICT IN AMOUNT OF \$35,000, TO PURCHASE SITE AND ERECT AND FURNISH A SCHOOL HOUSE.

COLUMBUS, OHIO, March 14, 1922.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2929.

TAXES AND TAXATION—BOARD OF PARK COMMISSIONERS—AUTHORITY OF SAID APPOINTIVE BOARD TO LEVY TAXES FOR SPECIAL TAXING DISTRICT OTHER THAN COUNTY OR TOWNSHIP, LEGAL—SEE SECTION 2976-10 G. C.—APPROVAL OF ELECTORS OF PARK DISTRICT NOT REQUIRED.

1. *Section 2976-10 of the General Code is constitutional. The constitution does not prevent the delegation of the tax levying power to appointive officers of a special*

taxing district other than a county or township created by the general assembly.

2. *The tax levy provided for by section 2976-10 does not require the approval of the electors of the park district.*

COLUMBUS, OHIO, March 14, 1922.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—By letter of recent date the Commission transmitted to this department a communication received by it from the probate judge of Summit county, and requested an opinion upon the questions submitted therein. The letter of the probate judge is in part as follows:

“Under section 2976-10 of the General Code, certain rights are given the Board of Park Commissioners, which Park Commissioners are created under section 2976-1 et seq., to levy taxes for the purposes as designated in section 2976-7 of the General Code.

The first question that comes to me is, can this Park Board, which is not elected but appointed, go ahead and spend money in anticipation of a tax levy, which they levy, and which has no review as far as I can see?

Second. Has said Tax Board of Commissioners the right to levy tax for the use of the district the same having been submitted to a vote, as section 2976-10i indicates?”

The sections of which those referred to in the probate judge’s letter are parts, provide for the creation of park districts, which “may include all or a part only of the territory within a county,” save that “the boundary lines thereof shall be so drawn as not to divide any existing township or municipality within such county.” (Sec. 2976-1.)

Districts are to be created by application to the Probate Court on the part of a majority of the resident electors residing within the proposed district (Sec. 2976-2). A hearing must be had of which public notice must be given (Sec. 2976-3). If the court is of opinion “that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application,” with power to amend or change the limits of the territory, subject to the limitation already imposed (Sec. 2976-4). Thereupon the probate judge is to appoint three commissioners, and thereafter as their terms expire he is to appoint their successors (Sec. 2976-5) who “shall constitute the Board of Park Commissioners of such district, and such board shall be a body politic and corporate, and shall be capable of suing and of being sued as in this act provided” (Sec. 2976-6). The board is to have the power to take property and to appropriate it by condemnation proceedings (Sec. 2976-7). It is given the power to levy assessments upon specially benefited land to defray not to exceed fifty per cent of the total cost of any development or improvement that it undertakes (Sec. 2976-9). It is to receive all unexpended balances of tax levies previously made on any portion of the district under the laws providing for county park improvements (Sec. 2976-10a). It is to have its own depository of funds, though the county treasurer is to be the custodian of them, and is to pay out funds on the warrant of the county auditor (Sec. 2976-10b). Provision is made for annexing territory to the park district, which may include a part only of an existing township or municipality (Sec. 2976-10d), and may include territory in another county (Sec. 2976-10e). The Board of Park Commissioners is vested with police powers in making rules and regulations for the preservation of good order within and adjacent to such parks, and the pro-

tection and preservation of property and natural life therein. These rules and regulations are to be published, and violation of them is made a misdemeanor, punishable by fine, which when collected shall be paid into the treasury of such park board (Sec. 2976-10g). The employes of the board are given the powers of police officers, for which, however, they must qualify by taking oath and giving bond (Sec. 2976-10h).

The two sections particularly inquired about then provide as follows:

“Sec. 2976-10. Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. After the budget commission of the county in which said district is located shall certify such levy, or such modification thereof as they deem advisable to the county auditor, it shall be by him placed upon the tax duplicate, and the board may then borrow money in anticipation of the collection of such tax, and issue the negotiable notes of such board therefor in an amount not in excess of seventy-five per cent of the proceeds of such tax, based upon the amount of the current tax duplicate. Such notes shall not be issued for a period longer than one year, and shall be payable out of the proceeds of such levy, and to the extent of such notes and the interest which may accrue thereon, such levy shall be exclusively appropriated to the payment of such notes, and shall be used for no other purpose whatsoever. Any portion of such notes remaining unpaid through any deficiency in such levy, shall be payable out of the next ensuing levy, which shall be made by said board in the next ensuing year in an amount at least sufficient to provide for the payment of said notes, not, however, in excess of one-tenth of one mill.”

“Sec. 2976-10i. Upon or before the first day of September in any year the Board of Park Commissioners, by resolution, may submit to the electors of the district the question of levying taxes for the use of the district. Such resolution shall declare the necessity of levying such taxes, shall specify the purpose for which such taxes shall be used, the annual rate proposed, and the number of consecutive years such rate shall be levied; and such resolution shall be forthwith certified to the board of deputy state supervisors and inspectors of elections in each county in which any part of such district is located, and the question of the levy of taxes as provided in such resolution shall be submitted to the electors of the district at the next ensuing general election. The ballot shall set forth the purpose for which said taxes shall be levied, the annual rate of levy, and the number of years of such levy. If a majority of the electors voting upon the question of such levy shall vote in favor thereof, such taxes shall be levied and shall be in addition to the taxes authorized by section 2976-10 of the General Code, and all other taxes authorized by law; provided that the rate submitted to the electors at any one time shall not exceed one-tenth of one mill annually upon each dollar of valuation. When a tax levy shall have been authorized as herein provided, the Board of Park Commissioners may issue bonds in anticipation of the collection of such levy, provided that such bonds shall be issued only for the purpose of acquiring and improving lands; and such levy, when collected, shall be applied in payment of the bonds so issued and the interest thereon; provided further that the amount of bonds so issued and outstanding at any time shall not exceed one per cent of the total tax valuation in such district. Such bonds shall bear interest at

a rate not to exceed six per cent per annum, shall be signed by a majority of the members of such park board, and shall be sold in the manner specified by law for the sale of municipal bonds, except that before advertising such bonds for sale at public sale, it shall be necessary only to offer said bonds for sale to the Industrial Commission of Ohio as provided by law."

Here then is legislation, the import of which is not ambiguous. Unless this legislation violates the constitution in some respect, it must be given full effect.

The first question raised by the probate judge seems to imply a doubt on constitutional grounds.

No provision of the constitution has been found with which these statutes in any wise conflict. The constitution nowhere provides that appointive officers may not be authorized by the General Assembly to levy taxes. It is true that there may have been a general impression to the effect that the taxing power may not be delegated to appointive officers. The sources of this impression will be presently examined, but it is certainly true that there is in the constitution no express general provision to this effect.

One inference from which a constitutional limitation of this character might be construed, grows out of the fact that the taxing power is essentially legislative. From this it follows that the General Assembly is the only authority that can actually exercise this power, because it is the repository, subject to the reserved right of the initiative and referendum, of all the legislative power of the state; but the essence of this legislative power is the determination of the purposes for which taxes may be levied, and the conditions upon which they shall be levied. That the General Assembly may delegate the administration of taxation, including the function of determining the rate of levy and the necessity of raising revenue, to local agencies of its own creation, is too elementary to be the subject of discussion. The agencies to which the General Assembly may delegate the function of determining the rate of taxation for a purpose for which it (the General Assembly) has already determined that taxes ought to be levied on occasion, are not required by any inference growing out of the fact that the taxing power is legislative, to be of any particular character. Of course, it is usual in the creation of municipal corporations, for example, to commit this function to the local legislature known as the council, and yet even in doing that the General Assembly has heretofore in several instances made the action of council purely ministerial. Reference may be made to section 4513 of the General Code providing that trustees of the sinking fund (a board of appointive officers) are to determine the amount necessary to be levied for the future payment of bonds issued, for the payment of final judgments, for the payment of interest on bonded indebtedness, rents due on perpetual leaseholds, and the expenses incident to the management of the sinking fund, which amounts the council is positively required to include in its formal levy of taxes. It is clear here that the real power is vested in the trustees of the sinking fund, and it is difficult to see how any constitutional question that might exist would be obviated by the mere formality of using the council as a conduit for the exercise of that power.

Again, in section 7639 of the General Code, amended 109 O. L. 237, a board of library trustees (appointive officers), are authorized to certify to the board of education of a school district (elective officers) the amount of money needed for the operation of a school library during the ensuing year, and it is made the mandatory duty of the board of education to levy such sum as will realize the amount

so certified. It is not perceived that making a levy through the ministerial agency of the board of education adds anything to its constitutional validity.

In short, it is believed that there is nothing in the constitution requiring the function of determining the amount of tax levies for a purpose which the legislature has authorized to be committed by the legislature to a body of elective officers. However, there are certain instances in which this result follows for particular constitutional reasons. The constitution contains the following provisions:

“Art. X, Section 1. The General Assembly shall provide, by law, for the *election* of such county and township officers as may be necessary.”

“Art. X, Section 7. The commissioners of counties, the trustees of townships, and similar boards, shall have such power of local taxation, for police purposes, as may be prescribed by law.”

As a result of these provisions it has been held in several cases that the function of determining the rate of taxation for purposes that pertain to the county or township as such can be delegated only to elective county or township officers, and probably only to the county commissioners or township trustees as the case might be. The reason for this is that the determination of local revenues for county or township purposes is an official act, so that a person who is authorized to make such determination is by that authority alone constituted an “officer” of the subdivision on behalf of which he acts. Then the provision in article X, section 1 that all county and township officers shall be elected causes the result that no one but an elective officer can constitutionally be authorized to determine the rate of taxation for county or township purposes.

The question arises here as to the application of article X, section 7. In general, this section has been held to be not a limitation on the power of the General Assembly. *State ex rel. vs. Commissioners*, 35 O. S. 458. So that the General Assembly may itself require a mandatory levy to be made by county commissioners. But the question is as to whether the phrase “and similar boards” as used in section 7 constitutes a limitation, in that local taxing powers cannot be delegated to boards or officers which are not “similar” to the commissioners of counties and the trustees of townships in respect of the manner of their appointment or election. This is the only real question which the provisions of the constitution seem to raise in connection with this act. The section is found in an article which deals with county and township “organizations.” In the opinion of this department the phrase “and similar boards” found in section 7, relates to boards constituting a part of county and township organizations, and does not relate to boards or officers which are not a part of the organizations of the local governmental subdivisions with which the article deals.

It is believed that the above quoted provisions of article X of the constitution are responsible for the belief that the local taxing power must be reposed in elective officers. No other basis has been found for it. For example, in article VI of the constitution dealing with education, it is required that the General Assembly shall secure a thorough and efficient system of common schools throughout the state, and shall provide by law for the organization, administration and control of the public school system, but it is not required that boards of education shall consist of elective officers, nor is there any impediment in the way of designating to local boards of education consisting of appointive officers the power of determining tax rates for school purposes authorized by the legislature.

These observations clear the way of all but one question. May the General Assembly create taxing districts other than the subdivisions that are recognized by the constitution or specially authorized by the constitution for local governmental purposes? This question has been determined in this state as well as elsewhere, and it is held that the General Assembly may do this. The first branch of the syllabus in *Bowles vs. The State*, 37 O. S., 35, is as follows:

“The legislature, in the exercise of the general power of taxation, as distinguished from the power of local assessment, may create a special taxing district without regard to municipal or political subdivisions of the state, and may levy a tax on all property within such district, by a uniform rule, according to its true value in money, for the purpose of defraying the expenses of constructing and maintaining public roads therein.”

We have it then that the General Assembly is authorized to create taxing districts without reference to boundaries of regular governmental subdivisions. Our next question is whether the district so established is a part of the county in which it is established in the sense that the administration of its affairs pertains to the county. This question goes beyond the scope of the subject of taxation; for if the special district is to be regarded as merely a subdivision of the county other than a township, then the persons authorized to exercise official functions must be county officers and must be elected whether they are to levy taxes or to exercise some of the police powers which the park commissioners are authorized to exercise. But this question has likewise been answered in the negative in the recent cases sustaining the law creating the county board of education. *Cline vs. Martin*, 94 O. S. 420.

See, generally, *Miami County vs. Dayton*, 92 O. S. 215.

If then a separate taxing district may be created for a particular purpose, and if the district is independent of and does not constitute a part of the county, so that its officers are not county officers, it seems clearly to follow that such appointive officers as the General Assembly may provide for its management and control may lawfully exercise by delegation the function of determining tax rates for the purposes which the legislature had previously authorized. This statement answers the first question submitted by the probate judge.

The second question is answered by the statement that the levy required to be submitted to a vote under section 2976-10i is a levy in addition to that authorized by section 2976-10. This is expressly stated in section 2976-10i of the General Code. In order to make the levy authorized in section 2976-10, therefore, no approval by the electors is necessary.

Respectfully,
JOHN G. PRICE,
Attorney-General.