

404.

## BOND ISSUE—WHEN SURPLUS GOES TO SINKING FUND.

## SYLLABUS:

*When by resolution of a board of county commissioners the necessity of securing the approval of the voters of a bond issue for certain specific improvements is recited and subsequently, after approval of such issue at an election and the letting of the contracts for such improvements, there remains an unexpended surplus from the amount of notes issued in anticipation of the bond issue, such surplus cannot be expended for other improvements not mentioned in such resolution, but must be transferred to the sinking fund and used for the redemption of the outstanding notes. The fact that the ballot voted upon was not specific as to the improvements contemplated does not alter the rule.*

COLUMBUS, OHIO, April 28, 1927.

HON. RALPH E. HOSKOT, *Prosecuting Attorney, Montgomery County, Dayton, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter of recent date, which reads as follows:

“The following situation has arisen in this county, on which the county commissioners desire to be advised and upon which I request your opinion:

On May 12, 1925, the county surveyor reported to the county commissioners fifteen (15) bridges, large and small, that were dangerous to travel and should be replaced with new bridges, and also recommended the construction of one new bridge, all of which was specifically set forth in the report.

On September 2, 1925, the commissioners, by resolution, in which the report was copied verbatim, found the report to be true and correct, and that the said bridges were unsafe for travel; that the total estimated cost of such improvements would be \$875,000.00; that there were no available funds for said purposes; that the matter should be submitted to the electors in November, 1925; that it was necessary to the public safety, convenience, benefit and welfare that said bridges be built; enumerated them specifically and requested the county auditor to certify his estimate of the life of the improvements and maximum life of the bonds to be issued therefor.

The ballot provided:

‘For an issue of bonds of Montgomery county, Ohio, for the purpose of removing certain bridges located in Montgomery county at the present time, inadequate and unsafe for public use and travel, and erecting and constructing new bridges in place thereof, in the sum of eight hundred and seventy-five thousand (\$875,000.00) dollars, and a levy of taxes outside of the existing limitations estimated by the county auditor to average 18-100 mills for a maximum period of twenty-five (25) years to pay principal and interest on such bonds.’

At the election the people voted favorably in the matter. The necessary proceedings have been had, notes issued to full extent, contracts let, a number of the bridges completed and some of the bonds sold.

After the letting of the contracts for the sixteen bridges, as enumerated in the said report and resolution, the actual cost thereof will be less, by approximately \$100,000.00 than the amount estimated, to-wit, \$875,000.00, and voted by the people.

The question, therefore, is: Can this \$100,000.00 be used in the repair of old bridges or the construction of new bridges?

This question is in view of the report of the county surveyor and the resolution of the commissioners enumerating the sixteen bridges and the vote of the people as set forth on the ballot above.

I would greatly appreciate an opinion at your earliest convenience."

You inquire whether a balance of one hundred thousand dollars remaining from a sum authorized by a vote of the people for the purpose of constructing fifteen bridges to replace those which have become dangerous and inadequate and one new bridge, for which notes have been issued as provided in Section 5654-1 of the General Code, may be expended in the repair of other old bridges and the construction of other new bridges.

The resolution of the board of county commissioners clearly sets forth the purpose for which the notes and bonds were to be issued and how the money raised thereunder was to be expended, if authority therefor was granted by a vote of the electors. In the resolution the commissioners determined that the question to be submitted to a vote was as to whether or not bonds should be issued and taxes levied for the purpose of replacing fifteen bridges that had become dangerous to public travel with new bridges and constructing one new bridge.

Although the ballot submitting this question to the electors was not as specific as the surveyor's report, which was adopted verbatim by the board of county commissioners in its resolution, in that said ballot did not describe and mention the number of bridges, yet it was the means taken in connection with the resolution of the board of county commissioners to advise the voters of the question being submitted, and the purpose for which the money which meant an increase in taxes was to be used.

Section 5638 of the General Code provides :

"The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed \$15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed \$18,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair, improve, or rebuild a public county building, the entire cost of which expenditure will exceed \$10,000.00; without first submitting to the voters of the county, the question as to the policy of making such expenditure."

Although you make no mention of the statute under which the commissioners in this instances proceeded, it is assumed that they proceeded under the authority vested in them by the above quoted section and not under authority of Section 5643 of the General Code, which is the only other section of the statutes which I find might be applicable.

Section 5649-9a of the General Code provides :

"The bond-issuing authority of any political subdivision may elect to submit any bond issue authorized by law to vote of the people. In such case and in every case on which said bond issuing authority is required to submit any bond issue to vote of the people, they shall pass a resolution which shall set forth the necessity of such bond issue, its purpose, amount and approximate maturities, and of the levy of a tax outside of the limitations of Section 5649-5b of the General Code, and all other limitations upon tax rates prescribed by law, to pay the interest on and to retire the said bonds. Said resolution shall also state approximately the dates and maturities of the bonds to be issued.

They shall certify such resolution to the county auditor at least sixty days prior to the November election at which it is desired to submit such question. Thereupon and more than fifty days prior to such November election the county auditor shall calculate the average annual levy throughout the life of the bonds which will be required to pay the interest on and retire such bonds, assuming that the amount of the tax list of such subdivision remains the same throughout the life of said bonds as the amount of the list for the current year, and if this is not determined, the estimated amount submitted by the auditor to the county budget commission. The auditor shall, not less than fifty days prior to such November election certify the amount of such average to the bond-issuing authority submitting the same. Thereupon the said authority, if it desires to proceed with the issue of said bonds, shall more than forty days prior to such November election, certify its resolution, together with the amount of the average tax levy 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, and they shall prepare the ballot and make other necessary arrangements for the submission of the question to the voters of the county at the ensuing November election."

It will be observed that the above quoted statute makes specific provision that the bond issuing authority shall pass a resolution which shall set forth the necessity of and the purpose for which the bonds are to be issued. This resolution is then certified to the county auditor at least sixty days prior to the November election.

Section 5649-9c of the General Code makes provision for the form of ballot in which the question is to be submitted, and inasmuch as this form provides for the declaration of the purpose for which the bonds are to be issued, it is obvious that the purpose as expressed in the form of the ballot should comply with the purpose expressed in the resolution of necessity as it is passed by the board of county commissioners.

In this instance in the resolution of necessity the board of county commissioners made specific reference to the number and designation of bridges in that they adopted the report of the county surveyor and made it a verbatim part of their resolution. The money authorized to be expended can therefore only be expended for the purpose as set forth in the resolution of necessity.

If the expenditure involved more or less than the sum mentioned in the resolution and ballot the voters had a right to be advised thereon, since they by virtue of law could either reject or approve such an issue.

It is to be assumed that the voters were advised of the contents of the resolution as adopted by the board of county commissioners in the first instance as well as the ballot presented to them for consideration. All records of the commissioners are open to the inspection of the public and the very foundation of the ballot itself is the resolution providing that the question of the issuance of bonds shall be submitted to a vote of the people. The ballot should be in substantial conformity with such resolution in that it should express the purpose for which the bonds are to be issued.

Section 5654 of the General Code provides as follows :

"The proceeds of a *special tax, loan or bond issue* shall not be used for any other purpose than that for which the same was levied, issued or made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is

not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund." (Italics the writer's.)

This statute limits the proceeds of a special tax, loan or bond issue to the purpose for which the tax was levied or the bonds issued. By the limitations made in this section, a tax payer cannot lawfully be taxed for the building of more than the fifteen bridges to replace those which had become dangerous and the one new bridge, as set forth in detail in the surveyor's report, and which was made a part of the resolution adopted by the board of county commissioners.

Section 5654-1, General Code, provides:

"Whenever the county commissioners of any county, the township trustees of any township, or the board of education of any school district, have duly authorized the issuance of bonds for the construction or improvement of roads, bridges, school houses, or other public buildings, such bond issuing authority may borrow money in anticipation of the issuance of such bonds in an amount not exceeding the estimated cost of such construction or improvement, and not exceeding the amount of bonds so authorized, and issue the notes of such political subdivision as evidencing such indebtedness.

The notes shall be made payable at a time not more than one year from their date and bear interest at not more than six per centum per annum. Such notes shall be the full general obligations of the political subdivision authorizing the same and for the payment of the same, the full faith, credit and revenues of such political subdivision shall be pledged.

Prior to the issuance of such notes the resolution authorizing the issuance of the bonds anticipated by such notes, shall be certified to the county auditor and a tax for such bonds included in the annual budget as required by law. *The bonds shall not be advertised for sale nor issued until the contract is let and shall be issued in an amount not exceeding the full amount of the accepted bid by more than the estimated amount of such other items of cost as may be legally included in the total cost of such construction or improvement;* provided, however, that where such issue of bonds is for the furnishing of a building, as well as the construction or improvement of the same, and a contract for such furnishings can not be let in time to make the bonds available for the payment of the notes issued for the construction of such building, the estimated cost of such furnishings may be used in lieu of the contract cost of the same. If the cost as thus determined is less than the amount of the bonds as previously authorized, the resolution authorizing such bonds shall be amended so as to reduce the issue, and a copy thereof certified to the county auditor.

Taxes levied for the retirement of said bonds and assessments levied to defray, in whole or in part, the cost of such construction or improvement and anticipated by said bonds, shall thereafter be reduced to the extent required by the reduction of such bonds. The par value received from the sale of said bonds and any excess funds resulting from the issuance of said notes shall be used to retire said notes."

This section expressly prohibits the advertisement for the sale and the issuance of bonds until the contract is let and the amount of bonds to be issued is expressly limited to the amount of the accepted bid as well as the estimated amount of such

other items of cost as may be legally included in the cost of such construction and improvement.

The purpose of the legislature in enacting this section is clearly apparent. It is to confine the amount of a bond issue to the actual cost of the improvement. This is to avoid the payment of interest upon principal in excess of such actual cost. For this reason short term notes are issued for the estimated amount to be later retired or taken up when bonds are issued, it being required by law that the amount of the bonds shall not exceed the actual cost of the improvement as determined by the contract price plus the estimated amount of such other items as may be legally included in the total cost of the improvement.

It is therefore my opinion that where the board of county commissioners has declared the necessity of making bridge improvements and the question of issuing bonds for such improvements has been submitted to the electors, and the issuance of such bonds has been approved, such bonds may not be issued to exceed the actual cost of the improvement or improvements. If the actual cost is not equal to the estimated cost the balance remaining as obtained by the issuance of the notes under authority of Section 5654-1 of the General Code shall be immediately transferred to the sinking fund of the county as provided in Section 5654 of the General Code to be used for the retirement of such notes.

Respectfully,

EDWARD C. TURNER.

*Attorney General.*

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405.

APPROVAL, NOTE OF CROOKSVILLE VILLAGE SCHOOL DISTRICT,  
PERRY COUNTY, OHIO, \$14,500.00.

COLUMBUS, OHIO, April 28, 1927.

*Retirement Board, State Teachers' Retirement System, Columbus, Ohio.*

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406.

APPROVAL, NOTE OF MANCHESTER VILLAGE SCHOOL DISTRICT,  
ADAMS COUNTY, OHIO, \$17,280.00.

COLUMBUS, OHIO, April 28, 1927.

*Retirement Board, State Teachers' Retirement System, Columbus, Ohio.*