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1. VOTING MACHINES — BOARD OF COUNTY COMMISSIONERS UNDER NO MANDATORY DUTY TO ADOPT SAME BECAUSE OF RECOMMENDATION, BOARD OF ELECTIONS.
2. COUNTY COMMISSIONERS UPON SUCH RECOMMENDATION MAY ADOPT VOTING MACHINES, EVEN THOUGH DULY FILED PETITION BY REQUISITE NUMBER OF ELECTORS TO SUBMIT MATTER TO ELECTORS IS FILED — PETITION REQUESTS BOARD OF ELECTIONS TO SUBMIT MATTER TO ELECTORS.
3. WHERE VOTING MACHINES, ADOPTED FOR COUNTY BY COMMISSIONERS, UPON RECOMMENDATION, BOARD OF ELECTORS — SUCH BOARD OF ELECTORS SHOULD NOT SUBMIT MATTER TO ELECTORS, WHERE PETITION FILED AFTER SUCH RECOMMENDATION.

SYLLABUS:

1. The Board of County Commissioners is under no mandatory duty to adopt voting machines for the county merely because the Board of Elections has recommended such adoption.

2. The Board of County Commissioners may adopt voting machines for the county upon the recommendation of the Board of Elections even though after such recommendation a petition signed by the requisite number of electors is duly filed, requesting the Board of Elections to submit the matter of adopting voting machines for the county to the electors.

3. The Board of Elections should not submit the matter of adopting voting machines to the electors if such voting machines have been adopted for the county by the Board of County Commissioners upon the recommendation of the Board of Elections even though a petition signed by the requisite number of electors has been duly filed, requesting such submission where such petition was filed after the recommendation of the Board of Elections.

Columbus, Ohio, April 17, 1942.

Hon. Paul J. Reagen, Prosecuting Attorney,
Warren, Ohio.

Dear Sir:

Your request for my opinion is as follows:

“On August 7, 1941, the Board of Elections of Trumbull County, Ohio, passed the following resolution:

'RESOLVED That the Board of Election recommends that the Board of County Commissioners of this County acquire voting machines for use in elections in Trumbull County.

RESOLVED That the Board of Election provide sufficient money in its budget for election costs and expenses to enable the use of voting machines under whatever system of acquisition the Board of County Commissioners chooses, and the Board of Election requests such appropriation from the Board of County Commissioners.

RESOLVED That when the Board of County Commissioners elects to acquire voting machines, the Board of Election approves of the use therefor of funds heretofore or hereafter appropriated to it for costs and expenses of election in an amount sufficient to accomplish the acquisition of voting machines under the method chosen by the Board of County Commissioners.'

On behalf of the Board of Commissioners of Trumbull County, Ohio, I am requesting your opinion as follows:

1. In view of the above resolution, is it mandatory, under Section 4785-161 of the Ohio General Code, for the Board of County Commissioners to acquire voting machines for this County?

2. In the event it is mandatory, do the Commissioners have the authority, under said Section, to proceed to place on the ballot the question of the issuance and sale of bonds to finance their acquisition?

3. In the event a bond issue is disapproved, would it be mandatory for the Commissioners to proceed and acquire the voting machines by one of the other two methods set forth in Section 4785-161 of the Ohio General Code?"

In addition to the questions propounded in such letter you have also in a later communication stated that a petition has been filed by two per cent of the electors voting at the last preceding general election in Trumbull County, requesting that the Board of County Commissioners place the matter of adopting voting machines upon the ballot for determination by electors at the next election, and you ask whether the Board of County Commissioners is by reason of such petition required to place the matter before the electors at the November election or can it disregard the petitions and go forward in purchasing the voting machines upon the resolution of the Board of Elections.

Section 4785-161, General Code, as amended by the Ninety-Fourth General Assembly, provides as follows:

"Voting machines may be adopted for use in elections in any county or municipality in the following manner:

1. By the board of county commissioners of such county or the legislative authority of such municipality on the recommendation of the board of elections; or

2. By the affirmative vote of a majority of the electors of such county or municipality voting upon the question of the adoption of voting machines in such county or municipality.

If a petition signed by two percent of the electors voting at the last preceding general election held in a county or municipality be filed with the board of elections, such board shall submit to the electors of such county or municipality, as the case may be, at the next general election occurring not less than ninety days thereafter the question, 'Shall voting machines be adopted in the county (or municipality) of.....?' Upon the filing of such petition, the board of elections shall forthwith notify the board of county commissioners, or the legislative authority of the municipality, thereof, and such board of county commissioners or the legislative authority of such municipality, as the case may be, shall forthwith determine whether it would prefer to purchase such machines in whole or in part for cash and if so whether it will be necessary or advisable to issue bonds to provide funds for such purchase of such voting machines, if adopted. If such board or legislative authority determines that it is necessary or advisable to issue bonds therefor it shall by resolution provide for the submission on the same ballot, but as a separate issue, of the question of issuing such bonds. The question of issuing such bonds shall be submitted in the manner and form provided in the act known as the uniform bond act; and such bonds, if approved, shall be issued in conformity with the provisions, and subject to the limitations, of the uniform bond act. If sixty-five per centum (65%) of the electors voting on the question so submitted shall vote in the affirmative voting machines shall thereby be adopted.

Upon the adoption of voting machines either by the action of the board of county commissioners of a county or by the legislative authority of a municipality, on the recommendation of the board of elections, or by the affirmative vote of a majority of the electors voting on the question of the adoption of voting machines, as hereinabove provided for, it shall be the duty of such board of county commissioners or such legislative authority, and they shall have the power, to acquire the necessary number of one of the makes of voting machines which have been previously approved in the manner provided by law, by any one or by any combination of the following methods: (a) By purchasing same and paying the purchase price therefor in cash out of the proceeds of the issuance and sale of bonds, provided, that the question of issuing bonds for such purpose, shall have been submitted to the vote of the electors of the county or municipality, as the case may be.

as herein provided for, and provided further, that the issuance of such bonds shall have been approved as provided by law; or (b) By purchasing same and paying the purchase price thereof in a series of consecutive annual approximately equal installments the number of which shall not exceed the estimated number of years of usefulness of such machines, as determined by the fiscal officer of the county or municipality, as the case may be, and by issuing to the seller negotiable promissory notes of the county or municipality, as the case may be, evidencing the annual installments so to become due, specifying the terms of purchase and bearing interest at a rate not exceeding four per cent per annum, which notes shall not be subject to the provisions of sections 2293-1 to 2293-44, both inclusive, of the General Code. The legislation authorizing the issuance of such notes shall make provision for levying and collecting annually by taxation amounts sufficient to pay the interest on such notes and to provide for the payment of the principal thereof when due, provided, however, that the amount of such tax so levied each year may be reduced by the amount by which revenues available for appropriation for the payment of the expenses of conducting elections shall be appropriated for and applied to the payment of such interest and the payment of the principal of such notes; or (c) By leasing same under contracts of lease which shall provide for the rental thereof and also may provide for an option to purchase same or parts thereof at a fixed price with the rentals paid to be applied to the purchase price. Payments under such contracts of lease may be made by the county or municipality, as the case may be, out of funds of the county or municipality not otherwise appropriated and which may be appropriated therefor by the county commissioners or the legislative authority of the municipality, out of funds theretofore or thereafter from time to time appropriated by the county commissioners to the board of elections for the costs and expenses of elections, with the approval of the board of elections, and out of the funds the county commissioners or legislative authority, as the case may be, are authorized to provide by a levy and collection thereof annually by taxation."

This section provides alternative methods for the adoption of voting machines in a county, viz: (1) By the Board of County Commissioners on the recommendation of the Board of Elections; or (2) by the affirmative vote of the majority of the electors of the county voting upon such question at the first general election occurring not less than ninety days after a petition, signed by two per cent of electors voting at the last preceding general election held in such county, has been filed with the Board of Elections.

The first method requires action by both the Board of Elections and the Board of County Commissioners. The Board of County Commissioners has no authority to act until the Board of Elections recom-

mends the adoption of voting machines. However, the Board of County Commissioners is not required to follow the recommendation of the Board of Elections and it may decline to adopt voting machines upon such recommendation. You will note that the language used in Section 4785-161, General Code, *supra*, is permissible rather than mandatory. The particular words of the Section which are controlling are the words "voting machines may be adopted." Similar language is ordinarily construed as being permissive in character and as vesting discretion rather than as imposing a mandatory duty. Thus, in *State, ex rel. Dworken, v. Court of Common Pleas*, 131 O.S., 23, 25, it was said:

"In the recent case of *State, ex rel. Wendling Bros. Co., v. Board of Education of Magnolia Rural School Dist.*, 127 Ohio St., 336, 188 N.E., 566, it was said, in effect, that in interpreting a statute, the word 'may' used therein should be given its ordinary, permissive and discretionary force, unless the sense of the entire enactment requires a construction equivalent to 'shall' or 'must.'

For statements of the same tenor, compare *State, ex rel. Methodist Children's Home Association of Worthington, v. Board of Education of Worthington Village School Dist.*, 105 Ohio St., 438, 444, 138 N.E., 865, 867; *State, ex rel. John Tague Post No. 188, American Legion, v. Klinger et al., County Comms.*, 114 Ohio St., 212, 214, 151 N.E., 47, 48.

Many other cases of similar import from Ohio and elsewhere could be cited. Let it suffice to call particular attention to *Bechtel v. Board of Supervisors of Winnebago County*, 217 Iowa, 251, 254, 251 N.W., 633, 635, wherein it is remarked:

'The great weight of American authority is that the word "may" when used in a statute is permissive only, and operates to confer discretion, unless the contrary is clearly indicated by the context of the statute.'

I am therefore of the opinion, in specific answer to your first question, that the Board of County Commissioners is under no mandatory duty to adopt voting machines for a county merely because the Board of Elections has recommended such adoption, and if the Board of County Commissioners is under no duty to adopt voting machines upon such recommendation, a fortiori, they are under no duty to acquire voting machines for the county.

Since the Board of County Commissioners is under no mandatory duty to adopt and acquire voting machines for the use of the county merely because of the recommendation of the Board of Elections of

such county, the second and third questions contained in your first communication do not require any answer.

In your supplemental communication you ask whether the Board of County Commissioners may act upon the recommendation of the Board of Elections, notwithstanding the fact that subsequent to such recommendation a petition signed by the required number of electors was filed, requesting that the Board of County Commissioners place the matter of adopting voting machines on the ballot at the next election.

Section 4785-161, General Code, *supra*, does not require the County Commissioners to submit to the electorate the matter of adopting voting machines, but this duty is enjoined upon the Board of Elections and I assume that you intended to ask my opinion as to whether the Board of Elections must place such matter on the ballot rather than the Board of County Commissioners.

The jurisdiction of the Board of County Commissioners to act was properly invoked when the recommendation of the Board of Elections was made and it cannot be defeated by the subsequent filing of a petition signed by two per cent of the electors voting at the last general election. As I have stated heretofore, the Section contemplates alternative methods of adopting voting machines and I do not believe that in law one is superior or of greater authority than the other. At first blush it might seem that a vote of the people is of superior dignity and greater force than action by the Board of County Commissioners upon the recommendation of the Board of Elections. An examination of the statute in question, however, will not support such conclusion and, furthermore, it seems to me that such argument would be contrary to the spirit of the decision of the Supreme Court in the case of *State, ex rel. Singer, v. Cartledge*, 129 O.S., 279, in which it was held that a city council of a non-charter city has power to amend or repeal an initiated ordinance theretofore adopted by the electors of the city.

The Board of County Commissioners therefore, if it sees fit, may adopt voting machines for the county upon the recommendation of the Board of Elections, even though, after such recommendation, a petition requesting the submission of such matter to the voters has been signed by the requisite number of electors and filed.

If voting machines are adopted by the Board of County Com-

missioners upon recommendation of the Board of Elections and if a petition signed by the requisite number of electors has been duly filed, it does not seem to me that the Board of Elections should submit the matter to the electorate. Before the election could be held the machines would have been purchased and it would be a vain thing and a useless expense to submit the matter to the voters. It is true that the literal language of Section 4785-161, General Code, supra, does require such submission when a petition with the requisite signatures is properly filed, but in my opinion this particular portion of the Section is inapplicable where machines have been duly adopted by the Board of County Commissioners upon recommendation of the Board of Elections. A statute, even though mandatory in form, should never be construed as requiring the performance of a vain or a useless thing. Thus, in *Kent v. Bierce*, 6 Ohio, 336, 349, it was said by Wright, J., in delivering the opinion of the court:

“The proper answer to this is, that courts are not to presume the legislature intend to require an impossible, vain, or useless thing to be done; * * *”

The same rule is even more forcefully expressed in the fifth paragraph of the syllabus of *State, ex rel. Stauss, v. County of Cuyahoga*, 130 O.S., 64, as follows:

“Notwithstanding the mandatory character of a statute, it can not command the doing of a vain thing. * * *”

For these reasons I am of the opinion, in specific answer to the questions contained in your supplemental communication, that the Board of County Commissioners of Trumbull County may now act upon the recommendation of the Board of Elections and adopt voting machines for the county. If the Board of County Commissioners does so act and adopts voting machines, the Board of Elections should not submit such matter to the voters as requested by petition. On the other hand, if the Board of County Commissioners rejects the recommendation of the Board of Elections, the Board of Elections should of course submit the question to the voters as requested by the petition.

To summarize, my conclusions are:

1. The Board of County Commissioners is under no mandatory

duty to adopt voting machines for the county merely because the Board of Elections has recommended such adoption.

2. The Board of County Commissioners may adopt voting machines for the county upon the recommendation of the Board of Elections even though after such recommendation a petition signed by the requisite number of electors is duly filed, requesting the Board of Elections to submit the matter of adopting voting machines for the county to the electors.

3. The Board of Elections should not submit the matter of adopting voting machines to the electors if such voting machines have been adopted for the county by the Board of County Commissioners upon the recommendation of the Board of Elections even though a petition signed by the requisite number of electors has been duly filed, requesting such submission where such petition was filed after the recommendation of the Board of Elections.

Respectfully,

THOMAS J. HERBERT
Attorney General.