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MUNICIPALITY—SECTIONS 4 AND 5, ARTICLE XVIII, OHIO CONSTITUTION ARE SELF EXECUTING—DUTY OF COUNCIL ON FILING OF REFERENDUM PETITION—“REGULAR MUNICIPAL ELECTION” DEFINED—ACQUIRING OF PUBLIC UTILITY BY MUNICIPALITY DISCUSSED.

SYLLABUS:

1. *The provisions of Sections 4 and 5 of Article XVIII of the Ohio Constitution authorizing any municipality to proceed by ordinance to acquire a public utility, and of Section 12 of the same article authorizing such municipality to issue mortgage bonds therefor which impose no liability upon the municipality, and secured only upon the property and revenues of the public utility, etc., are self-executing; and the ordinance therefor is not required to be submitted to the municipal electors unless, before its effective date, a referendum be demanded as provided in Section 5.*

2. *Upon the filing of a proper petition for such referendum it is the mandatory duty of the council of such municipality forthwith to provide by ordinance for the submission of the original ordinance to the electors at the next regular municipal election, if one shall occur not less than sixty nor more than one hundred and twenty days after the passage of the ordinance providing for such submission; otherwise the submission shall be made at a special election to be called and held within such time.*

3. *The words “regular municipal election”, as used in Section 8 of Article XVIII of the Constitution of Ohio, refer to and mean the next general election, held on the first Tuesday after the first Monday in November in the odd numbered years.*

4. *A special election for the purpose of voting upon an ordinance to acquire a public utility and issue bonds therefor, as provided in Sections 4, 5 and 8 of Article XVIII of the Constitution of Ohio, may be called and held on the same date as any primary or other election, provided that all steps incident to the calling of a special election be taken.*

COLUMBUS, OHIO, April 25, 1927.

HON. J. R. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication as follows:

“At the request of the Board of Elections of Defiance county, I submit herewith the following facts for your consideration, and your opinion thereon:

The Council of the city of Defiance, Ohio, are about to pass an ordinance under the provisions of Article 18, Section 12, of the Constitution of Ohio for the issuance of \$405,000 worth of bonds for the erection of a Municipal Light Plant for the city of Defiance, and in accordance with the power granted to said council under Sections 4 and 5 of Article 18 of the Ohio Constitution relating to municipal corporations. The bonds to be issued are beyond and outside of all limitations authorized by other statutes regulating the issuance of bonds for the municipality. Said bonds under this constitutional provision are to be a lien, only, upon the physical property of the municipal light plant, and not a charge upon the other property, or of general faith and credit of the city of Defiance.

QUESTION:

Is such Ordinance when properly passed self executing or must it be voted upon by the qualified electors of the municipality of Defiance before these bonds can be issued?

Citizens of Defiance are now circulating a petition for a referendum vote on this ordinance. Under the provisions of Section 8 of Article 18 of

the Ohio Constitution, it will be necessary for the City Council to pass an ordinance for the submission of this question to the electors at the next regular municipal election, if one shall occur not less than sixty days nor more than one hundred and twenty days after its passage.

QUESTION:

Shall this question be submitted to the people at the August, 1927, primary, or, in other words, is the primary election to be held in August of this year, at which time municipal officials will be nominated at a general municipal election, within the meaning of Section 8 of Article 18 of the Ohio Constitution?"

The pertinent sections of the Constitution authorizing the acquisition or construction of a public utility and the issuance of bonds of the character which you mention, must be referred to in a consideration of the questions raised.

Section 4 of Article XVIII of the Constitution is as follows:

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

The provisions of Section 5 of Article XVIII are in these words:

"Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission."

Section 12 of Article XVIII, which authorizes the issuance of bonds, is in the following language:

"Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purpose may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenue of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

The answer to your first question may be made by reference to a prior opinion of this department, found in Opinions of the Attorney General for the year 1919, at page 385. I quote the last paragraph of that opinion as follows:

"I am of the opinion, therefore, that Xenia may proceed by ordinance to acquire a water works plant or system, and issue mortgage bonds therefor which impose no liability upon the municipality, and secured only upon the property and revenues of the public utility, etc., as authorized by Section 12, without submitting the ordinance to the municipal electors, unless before the effective day of the ordinance a petition signed by ten per centum of the municipal electors is filed with the executive authority of the municipality demanding a referendum on the ordinance."

A very comprehensive consideration of these sections of the Constitution is found in the case of *State ex rel vs. Weiler*, 101 O. S. 123, where it is held that they are self executing and their terms are available to every municipality irrespective of whether or not a charter has been adopted. I call attention to the language of the court on page 127, where it is said:

"Section 5, Article 18, defines the procedure and requires that municipalities shall act by ordinance, upon which a referendum may be had in the manner therein set forth."

Answering your first inquiry specifically, the ordinance authorizing the erection of the municipal light plant and providing for the issuance of bonds will, under the express provisions of Section 5 of Article XVIII of the Constitution, become effective within thirty days after its passage, unless during such thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the mayor demanding a referendum on such ordinance.

In considering your second question, it is necessary to examine the provisions of Section 8 of Article XVIII of the Constitution, since by the express provisions of Section 5, above quoted, the referendum "shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission." The pertinent portion of section 8 is as follows:

"The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, 'Shall a commission be chosen to frame a charter.' The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. * * *"

I do not believe that by the reference to the provisions of Section 8 in Section 5 it is meant that the ordinance authorizing the construction of the utility must contain a provision for the submission of the question to a vote. This is clear from the fact that the referendum provision in Section 5 is manifestly not mandatory, as I have before pointed out. The effect of the reference is to make it the mandatory duty of council, upon the filing of the referendum petition, forthwith to provide by ordinance for the submission of the original ordinance to the electors. If the ordinance providing for the submission is passed more than sixty days and less than one hundred and twenty days prior to the next municipal election, such submission shall be made at that time. If no such election is within such time, then the ordinance shall provide for the calling of a special election within such dates.

Municipal elections under the general law are held in the odd numbered years (General Code, Section 4836). Your question narrows itself down to the inquiry

whether or not the August Primary may be regarded as a regular municipal election.

An examination of the other provisions of the Constitution of Ohio fails to throw any light upon the question. Without attempting to analyze all of the various provisions of the statute in which reference is had to various types of election, I deem it sufficient to call your attention to the case of *Yeatman vs. State*, 28 O. C. A., p. 10. The court in that case made an exhaustive analysis and review of all of the provisions of the constitution and statutes in an effort to arrive at a proper definition of the terms "regular," "primary," "general" and "special", when used with reference to elections. The conclusion of the court pertinent to our present consideration is found on page 13 in the following paragraph:

"It therefore appears that the provisions of the Constitution and the General Code recognize 'regular' elections and 'primary' elections, and 'general' elections and 'special' elections. *The term 'regular election' seems to be used in the same way and to mean the same thing as the term 'general election'.*"

I see no reason to disagree with the conclusion of the court just quoted and am therefore of the opinion that the words "regular municipal election", as used in Section 8 of Article XVIII of the Constitution, has reference to the November election in the odd numbered years only.

In answer to your second inquiry, therefore, I am of the opinion that the August Primary at which municipal officers are to be nominated, is not a "regular municipal election" within the meaning of that term as used in Section 8 of Article XVIII of the Constitution and that the proposed ordinance to which you refer cannot be submitted to the people by a referendum at that time unless such date be designated as the date of a special election and all the necessary steps incident to the calling of a special election be taken.

Respectfully,

EDWARD C. TURNER,

Attorney General.

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**SPECIAL ASSESSMENTS—SERVICE UPON THE BOARD OF EDUCATION
OF NOTICE OF PASSAGE OF THE RESOLUTION OF NECESSITY—
NO AUTHORITY TO SERVE BY PUBLICATION—ASSESSMENT OR-
DINANCES.**

SYLLABUS:

1. *When it is sought to levy special assessments for street improvements on school property the notice of the passage of the resolution of necessity provided for in Section 3818, General Code, should be served on the board of education having title to said school property in the manner provided for the service of process on said board of education in civil cases. There is no authority to make such service by publication.*

2. *When properties of a board of education against which special assessments are levied do not appear in the assessment ordinance adopted in past years such assessment cannot be collected at this time.*

COLUMBUS, OHIO, April 25, 1927.

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

GENTLEMEN:—I am in receipt of your communication, requesting my opinion in answer to the following questions: