

the Controlling Board to the release of funds has been obtained in accordance with Section 11 of House Bill 510 of the 88th General Assembly. In addition, you have submitted a contract bond upon which D. H. Roth and J. T. Timmons appear as sureties, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the workmen's compensation act have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1104.

BOND ISSUE—STATUTORY REQUIREMENTS OF SECTION 2293-21, GENERAL CODE, REGARDING NOTICE OF THE ELECTION TO AUTHORIZE SUCH ISSUE, MANDATORY—NON-COMPLIANCE INVALIDATES SECTION.

SYLLABUS:

The requirement of Section 2293-21, General Code, that the notice of an election to authorize the issuance and sale of bonds shall be published in one or more newspapers of general circulation in the subdivision once a week for four consecutive weeks prior to such election, stating the amount of the proposed bond issue, the purpose for which such bonds are to be issued, the maximum number of years during which such bonds shall run and the estimated average additional tax rate outside of the fifteen mill limitation, as certified by the county auditor, is mandatory, and a failure to strictly comply with that requirement of the section invalidates the election.

COLUMBUS, OHIO, October 25, 1929.

HON. R. L. THOMAS, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

“Council of the city of Youngstown desire to widen one of the main thoroughfares in said city, and finding it necessary to submit to the electors of said city the question of issuing bonds for the city's portion of said improvement, passed a resolution to that effect, which was certified to the Deputy State Supervisors and Inspectors of Elections of Mahoning County on the 4th day of September, 1929. This resolution called for an additional levy of four-fifths of a mill for five years outside of all limitations. Seventy-five per cent of the cost was to be borne by the city of Youngstown and twenty-five per cent to be borne by the property owners.

Subsequent thereto, on the 14th day of October, 1929, the council of the city of Youngstown desiring to change the portion of the cost to be assumed by the city of Youngstown from seventy-five per cent to fifty per cent passed a resolution to amend the resolution certified to the Board of Elections on September 4th, which resolution was certified to the Board of Elections on October 15, 1929.

In view of the provisions of Sections 5625-15 to 5625-17, we desire to know if the Board of Elections should prepare the ballot to conform to the resolution certified to them on October 15, 1929."

Although I do not have before me the legislation of the council of the city of Youngstown referred to in your inquiry, I assume the object of this legislation is to provide both for the acquisition of additional property and the improvement of that property by grading and possibly paving and otherwise improving the same in order to accomplish the widening of a certain street in that city.

In addition to whatever authority a municipality may have by reason of its home rule powers to lay out and improve public streets in the municipality, the power to widen streets is granted to a municipality in specific terms by Section 3939 (16) General Code.

The Constitution of Ohio, Article XVIII, Section II, authorizes a municipality when appropriating private property for a public improvement, to provide money therefor in part, by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, are limited to not more than fifty per cent of the cost of such appropriation.

Section 3812, General Code, grants to the council of a municipal corporation special power to levy and collect special assessments, and authorizes the council of such municipal corporation to assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation any part of the entire cost and expenses connected with the improvement of any street by grading, draining, curbing, paving, repaving, repairing or constructing sidewalks thereon, and Section 3820, General Code, authorizes the corporation to pay such part of the cost and expense of improvements for which special assessments are levied as council deems just.

The widening of a street by the acquisition of the necessary property therefor, and the improvement of said property by grading, paving or otherwise, clearly constitutes the making of a permanent improvement for which a municipality lawfully may issue bonds. Section 2293-2, General Code.

Inasmuch as you state in your letter that "council * * * finding it necessary to submit to the electors of said city the question of issuing bonds for the city's portion of said improvement passed a resolution to that effect", I take it that these bonds could not have been issued, because of the present net indebtedness of the municipality, without submitting the question of issuing the bonds to popular vote. At any rate, whether it was necessary, because of this fact, to submit the question to the voters or not, council determined to submit the question. You will note from the provisions of Section 2293-19, General Code, that council may, if it so desires, submit the question of issuing bonds to the voters even though the bonds might have been issued without such submission.

At any rate, council in this instance did determine to submit the question of whether or not these bonds should be issued and the improvement made. Having done so, the procedure in the submission of the question, outlined in Section 2293-19, et seq., of the General Code, should be followed. Sections 2293-19, and 2293-21, General Code, read as follows:

Sec. 2293-19. "The taxing authority of any subdivision may submit to the electors of such subdivision the question of issuing any bonds which such subdivision has power to issue. When it desires or is required by law to submit any bond issue to the electors, it shall pass a resolution, declaring the necessity of such bond issue and fixing the amount, purpose and approximate date, interest rate and maturity, and also the necessity of the levy of a tax outside of the fifteen mill limitation to pay the interest on and to retire the

said bonds. It shall certify such resolution to the county auditor at least sixty days prior to the election at which it is desired to submit such questions. Thereupon and more than fifty days prior to such election the county auditor shall calculate and certify to the taxing authority 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 they are all issued in one series and that the amount of the tax list of such subdivision remains throughout the life of said bonds the same as the amount of the tax list for the current year, and if this is not determined, the estimated amount submitted by the auditor to the county budget commission. Thereupon the said taxing authority, if it desires to proceed with the issue of such bonds, shall, more than forty days prior to such 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 who shall prepare the ballots and make other necessary arrangements for the submission of the question to the voters of the subdivision."

Sec. 2293-21. "The election shall be held at the regular places for voting in such subdivision and shall be conducted, canvassed and certified in the same manner as regular elections in such subdivision for the election of county officers. Notice of the election shall be published in one or more newspapers of general circulation in the subdivision once a week for four consecutive weeks prior thereto, stating the amount of the proposed bond issue, the purpose for which such bonds are to be issued, the maximum number of years during which such bonds shall run and the estimated average additional tax rate, outside of the fifteen mill limitation, as certified by the county auditor."

It will be observed from the terms of Section 2293-21, supra, that the notice of election shall be published for four consecutive weeks prior to such election and shall state the amount of the proposed bond issue, the purpose for which such bonds are to be issued, the maximum number of years during which such bonds shall run and the estimated average additional tax levy outside the fifteen mill limitation as certified by the county auditor. This notice had undoubtedly been published once and possibly oftener before October 15th, the date when there was certified to the board of elections the amendment to the original resolution changing the portion which the city was to pay. Obviously, if the city is to pay as its portion, one-half instead of three-fourths of the cost of the improvement, as was determined by the original resolution, the amount of the proposed bond issue and the estimated average original tax would be different, and it would be impossible to publish a notice of the amount of the proposed bond issue and the average additional rate of taxes in conformity with the amended resolution after October 15th for four consecutive weeks before the election which will be held on November 5th.

In my opinion the requirement of the publication of the notice required by Section 2293-21, General Code, is mandatory and for that reason, the board of elections should pay no attention to a certification made to it too late to comply with the statute as to notice.

A question practically the same as is involved here was considered by the Court of Appeals for Summit County in the case of *City of Barberton ex rel Platt vs. Dutt, Auditor, et al.*, 22 O. A., 200. The question there arose under Sections 5649-9a and 5649-9b, General Code (111 O. L. 335, Sections 2 and 3), later repealed in 1927 upon the enactment of the Uniform Bond Act.

In that case, it appeared that a proposition had been submitted to the voters of the city of Barberton to issue bonds for some purpose or other. The ballot which

was voted at this election showed the amount of the proposed bond issue, the purpose for which it was to be issued, the maximum number of years during which the bonds should run and the estimated average additional rate outside of the limitation made necessary for the purpose of retiring the bonds, but the notice of election did not show these facts. The statute, Section 5649-9b, General Code, provided that the notice of election should show the facts enumerated above. The proposition carried at the election and suit was thereafter brought to enjoin the authorities of the city of Barberton, from issuing and selling the bonds and also to enjoin the levying and collecting of a tax to retire the bonds. The court held:

“The requirement of Section 5649-9b, General Code, that the notice of an election to authorize the issuance and sale of bonds shall contain the estimate of the average additional rate of taxes outside the limitation which will be made necessary by the proposed bond issue is mandatory, and a failure to comply with that requirement of the section invalidates the election.”

The court said:

“The failure to comply with the law as to notice, renders the election invalid and the prayer of the petition is granted.”

A somewhat similar question was recently submitted for my consideration by the Prosecuting Attorney of Williams County, in response to which there was rendered Opinion No. 1043, under date of October 17, 1929.

The question there arose over the submission of a proposition to levy additional taxes by authority of Sections 5625-15 et seq., of the General Code.

These sections provide that the taxing authority of any subdivision may at any time prior to September 15th, declare by resolution the necessity for the levying of additional taxes outside the fifteen mill limitation for certain purposes enumerated in Section 5625-15, General Code. Thereafter, a copy of the resolution must be certified by the taxing authorities to the Board of Deputy State Supervisors and Inspectors of Elections for the proper county or counties prior to September 15th in any year. Such board shall make necessary arrangements for the submission of the questions to the electors of the subdivision, and notice of the election shall be published once a week for four consecutive weeks prior to the election, setting out the purpose, the proposed increase in rate and the number of years during which such increase shall be in effect and the time and place of holding the election.

In the case submitted, the resolution of necessity was not certified to the board of elections until after September 15th, but was certified in sufficient time to permit the publication of notice as provided by the statute. It was held in said opinion, that the requirement of filing the resolution of necessity with the board of elections prior to September 15th in any year, was directory but that the requirement of notice was mandatory.

In specific answer to your question, therefore, I am of the opinion that the board of elections is not authorized to prepare the ballot for the vote on the proposed bond issue in question in accordance with the amended resolution certified to it on the 15th day of October, 1929.

Respectfully,

GILBERT BETTMAN,
Attorney General.