1185

1. ORDINANCE—INITIATIVE PETITION—IF APPROVED BY MAJORITY OF ELECTORS WILL BECOME VALID ENACTMENT—STATUS, PREVIOUS TEMPORARY ENACTMENT OF COUNCIL—EXPIRATION, TIME INITIATED ORDINANCE EFFECTIVE.

2. COUNTY BOARD OF ELECTIONS—NO AUTHORITY TO DETERMINE VALIDITY OF ORDINANCE APPROVED BY ELECTORS—DUTY TO PLACE PROPOSED ORDINANCE ON BALLOT—EMERGENCY MEASURE—PARKING METERS.

SYLLABUS:

1. An ordinance proposed by an initiative petition which is duly signed and filed as provided by law, will if approved by a majority of the electors voting thereon, become a valid enactment, even though it establishes a policy contrary to a previous temporary enactment of the council of such municipality the operation of which by its terms expires at the time such initiated ordinance is to become effective. Such initiated ordinance does not constitute either a repeal of or a referendum on the prior enactment.

2. A county board of elections is without authority to determine whether an ordinance duly submitted by initiative petition would or would not be valid if approved by the electors, and it is the duty of such board to place such proposed ordinance on the ballot.

Columbus, Ohio, September 3, 1946

Honorable Ernest E. Erb, Prosecuting Attorney
Marietta, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

"On February 7, 1946 the Council of the City of Marietta, Ohio, passed ordinance No. 6 (46-47) as emergency legislation. A copy of such ordinance is herewith enclosed.

Pursuant to the authority granted in such ordinance a contract for the installation of parking meters was entered into with the Rhodes Parking Meter company, parking meters were installed and are now in operation.

After the installation of parking meters, objection was made by a large number of persons to the number of meters installed and the location thereof. The Council of the City of Marietta, Ohio, refused to amend legislation to comply with their requests.

Thereafter, on July 19, 1946 such persons circulated and filed with the Board of Deputy State Supervisors of Elections of Washington county a 'Petition for Initiative,' a copy of which is also herewith enclosed.

No objections have been filed as to the form thereof and no question has been raised as to the number or validity of signatures on such petitions.

From a reading of such ordinance and ordinance proposed by the petition it will be found that action of the Council of the City of Marietta, Ohio would be repealed.

The Washington County Board of Deputy State Supervisors of Elections have received a communication from attorneys for the Rhodes Parking Meter Company in which attention is called to the fact that there can be no referendum on emergency legislation and cite the case of State of Ohio ex rel. Smith v. City of Fremont, 116 O. S. 469 in support thereof and request that such question be not submitted to the electors at the next general election.

The Board of Deputy State Supervisors of Election have referred such question to me for a reply. I have read the statutes and pertinent cases on this question but feel that your valued assistance is needed and am therefore requesting an opinion upon the two following questions, to-wit:

1. Assuming that all mandatory provisions of the constitution and statutes prescribing the necessary preliminary steps to authorize submission of the 'petition for initiative' have been complied with, has the Board of Deputy State Supervisors of Elections the right to determine if such proposed ordinance would be invalid if favorably voted upon, therefore the right to refuse to submit such question as requested in the 'petition for initiative'?

The case of Pfeifer v. Graves, Secretary of State, 88 O. S. 473 and the case of Cincinnati v. Hillenbrand, 103 O. S. 286 discuss this question and upon the statments contained therein it would appear that the Board of Deputy State Supervisors of Elections have no discretion in such matters.

2. If the answer to question No. 1 be in the affirmative, will you please let me have your opinion upon the question of the right to invoke initiative legislation as a substitute for and in lieu of a referendum, as is proposed by the enclosed copy of 'Petition for Initiative,' consideration being given to the enclosed copy of ordinance No. 6 (46-47) of the City of Marietta, Ohio."

Ordinance No. 6 (46-47) copy of which you enclose, appears to have been passed by the city council on February 7, 1946. Its provisions are substantially as follows:

It authorizes the safety service director to establish parking zones to be known as parking meter zones in certain named streets and avenues; specifies the hours during which parking meters are to operate; authorizes the director to enter into a contract, after advertising for bids, for the leasing of approximately 750 parking meters for a nine months' trial period with the stipulation that the city may discontinue the operation of the parking meters at the end of the trial period.

The ordinance further provides for marking parking spaces on certain specified streets and placing the meters opposite the parking spaces. It further makes it unlawful to allow any vehicle to remain in any parking space adjacent to a meter "while said meter is displaying a signal indicating that the vehicle has already parked beyond the period of time prescribed for such parking space." It is also made a misdemeanor to place slugs in the meters in place of coins or to tamper with or injure or destroy a meter. Other than these there are no penal provisions in the ordinance.

The ordinance was declared to be an emergency measure and was duly passed as such. Your letter indicates that the trial meters were in-

stalled as contemplated by the ordinance. The ordinance proposed by the initiative petition reads as follows:

> "An ordinance relating to traffic and regulating the use of Public Streets and Highways in the City of Marietta, Ohio; prohibiting the installation, operation, and use of Parking Meters after the date of February 2, 1947.
>
> WHEREAS: The installation of Parking Meters, results in the imposition of a new tax upon each person who parks a vehicle upon the City Streets of the City of Marietta, Ohio, and
>
> WHEREAS: Said Parking Meters, fail to alleviate congestion, fail to facilitate the movement of traffic, and fail to solve Marietta's parking problem.
>
> Now, therefore, be it ordained by the Electors of the City of Marietta, State of Ohio:
>
> SECTION I. From and after date February 2, 1947, the installation and the use of Parking Meters shall be prohibited upon any Public Street, Avenue, Road, Boulevard, Highway or other Public Place located in the City of Marietta, and established for the use of vehicles.
>
> SECTION II. Any Parking Meter or Parking Meter Standard located on any Public Street, Avenue, Road, Highway or Boulevard, in the City of Marietta, and remaining in said location after February 2, 1947, shall be removed immediately."

It will be noted that this proposed ordinance does not purport to repeal the ordinance passed by the council; also that by its terms it forbids the installation and use of parking meters only after February 2, 1947.

The letter from the city solicitor attached to your correspondence states that the contract for the installation of the meters was made on May 2, 1946, and that the nine months period of trial covered by that contract will end on February 2, 1947. It is evident therefore that the framers of the initiated ordinance did not intend nor does the proposed ordinance undertake to disturb either the ordinance passed by the council or the contract that was made pursuant thereto or to have any effect on the action of the council except to establish a new policy for the city after the expiration of the trial period. I am therefore unable to understand how it can be claimed that this initiated ordinance is an attempt to repeal an ordinance which has been passed by the council; or how it can be said that it was an attempt to have a referendum on the original ordinance.

That ordinance, in so far as it provides for the placing and maintaining of meters was merely a temporary measure, and its life expires on the day the new enactment is to become effective. There was nothing in the original ordinance which undertook to fix or establish a policy for the city except for the trial period. The new ordinance deals only with the continued maintenance of the meters after the trial period, and if passed, decrees that they shall be discontinued.

The case of State, ex rel., v. Fremont, 116 O. S. 469, is cited as controlling. In that case it appeared that an ordinance of the council was introduced on June 15, 1926, and was passed as an emergency measure on June 29, 1926, providing for the issuance of bonds to pay for installing a filtration plant for the water supply of the city. By the addition of the emergency provision, the council prevented the electors from attempting a referendum. (Section 4227-2, General Code.) It further appeared that while the ordinance was pending in council, to-wit, on June 28, 1926, a petition for an initiated ordinance was filed providing for another method of providing water; that on August 31, 1926, the city council passed another ordinance also *as an emergency measure* authorizing the director of service to advertise for bids and that on September 8, 1926, he did make a contract for the construction of the filtration plant; that thereafter on the 2nd of November of the same year the initiated ordinance was submitted to the electors, providing for an entirely different solution of the water problem, and was approved by a majority. The court held that this ordinance introduced by initiative and passed by the electors was in effect an attempt to nullify the action of the city council.

The decision, which was per curiam, was by a divided court. In the majority opinion it was said:

> "The only method by which the legislation of the city council could be annulled, under our present Constitution, would be by the employment of the referendum, not the initiative. However, since the city council declared the measure to be an emergency and in the interest of public health and safety, and that is conceded, there could be no referendum."

It was further said in the majority opinion:

> "The effect of the initiative petition and its subsequent adoption by the people would be nothing less than a referendum upon the measure adopted by the city council. It is the invoking of

initiative legislation as a substitute for and in lieu of a referendum; it is an attempt to repeal legislative action by invoking initiative action."

The minority in a dissenting opinion by Judge Allen pointed out with very great force that the constitution of Ohio gives municipalities the right *not only to the referendum* but also to the initiative. Commenting on the majority opinion, it was said:

"In other words, the majority of the court limit the subjects upon which the electors of a city can take initiative legislative action to subjects which have not already been handled in an opposite way by council."

The decision in the above case, whether it be sound or otherwise, does not appear to me to have any controlling bearing on the situation we are here considering. As I have already pointed out, the ordinance proposed to be enacted by vote of the people does not repeal or conflict in the slightest degree with the ordinance which was passed by the council, since it was a temporary measure and will have expired by its own terms when the new ordinance becomes effective. It is quite evident that it does conflict with the sentiments that are in the minds of the members of council, but I am unable to see how we can give effect to the constitutional provision found in Article II, Section 1, without conceding to the electors of a municipality the right to have and express an opinion contrary to the opinion which they have reason to believe lurks in the minds of their councilmen. That section reads as follows:

"The initiative and referendum powers *are hereby reserved to the people* of each municipality *on all questions* which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law." (Emphasis supplied.)

Your letter states that no objections have been filed to the form of the petition for initiative and no questions have been raised as to the number or validity of the signatures on such petition. Therefore assuming that all mandatory provisions of the constitution and statutes prescribing the necessary preliminary steps to authorize submission of such petition to the electors have been complied with, it is my opinion that such initiated ordinance would not have the effect of repealing the ordinance of the council theretofore enacted and referred to in your communication

and does not amount to a referendum thereon, and would therefore become a valid enactment of the municipality if approved by a majority of the electors voting thereon.

It is further my opinion that the county board of elections is without authority to determine whether a proposed ordinance duly submitted by initiative petition would or would not be valid if enacted, and that it is the board's duty to place it upon the ballot. This proposition is supported by the case of Cincinnati v. Hillenbrand, 103 O. S., 286, where it was held:

> "This court has no authority to pronounce a judgment or decree upon the question whether a proposed law or ordinance will be valid and constitutional if enacted by a legislative body or adopted by the electors. And where the mandatory provisions of the constitution or statute prescribing the necessary preliminary steps to authorize the submission to the electors of an initiative statute or ordinance have been complied with the submission will not be enjoined. (Pfeifer v. Graves, Secretary of State, 88 Ohio St., 473, approved and followed.)"

Respectfully,

HUGH S. JENNINS,
Attorney General.