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## Municipal Corporations - Bonds - Issuance Subject to Electoral Consent

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the primary employer. If the primary employer has a permanent place of business at which the dispute may be adequately publicized, picketing at the premises of a secondary employer will be deemed illegal unless the secondary premises have become involved in the dispute due to an alliance between the two employers. It is clear, also, that the Board will, in the future, hold "hot cargo" clauses illegal, contrary to its ruling in the *Conway* case. However, since the *Conway* case was approved on appeal, it is quite possible that the Board's new policy will fail if put to the test before the Circuit Courts of Appeal.

*James P. Garland*

#### MUNICIPAL CORPORATIONS—BONDS—ISSUANCE SUBJECT TO ELECTORAL CONSENT.

Today, municipalities are spending more money than ever before and undoubtedly this trend will continue. In the face of peak labor and material costs municipalities are forced to expand schools, street and sanitation systems, police and fire departments, and other facilities to meet the needs of the increased population. Although cities have constantly been looking for new sources of revenue they have not been very successful and must borrow. Such municipal borrowing is often effected through the issuance of bonds.<sup>1</sup>

The authority to issue bonds is not inherent in a municipality.<sup>2</sup> However, the authority may be conferred on a municipality by the legislature. It may be conferred expressly, or by necessary implication from other express authority.<sup>3</sup> In any event, bonds may be validly issued only in the manner prescribed by law. The law usually provides for certain steps to precede the issue. One such step may be the approval by the electorate of the issuance of the bonds.<sup>4</sup>

Such approval is the subject of this Comment. The scope of the law of municipal bonds is vast. The object of this Comment is to acquaint the reader with the various types of positive law requiring the approval of bond issues by the electorate, the reasoning behind these laws, the general exceptions to them, some of the more important requirements of these laws in more detail, and the effect of irregularities in connection with an election.

In almost every election, bond issues are presented for the approval of voters throughout the country. The usual electoral approval was typi-

1. *Business Week*, Sept. 4, 1954, p. 70.

2. There are some cases holding that the power to issue bonds is inherent in a municipality; but on examination most of them actually only sustain an implied power to issue bonds. *COOLEY, MUNICIPAL CORPORATIONS* § 129 (1914).

3. *COOLEY, MUNICIPAL CORPORATIONS* § 129 (1914).

4. 6 *MCQUILLIN, MUNICIPAL CORPORATIONS* § 2458 (2d rev. ed. 1936).

fied by the voters of Philadelphia, who recently authorized a total bond issue of 54.6 million dollars for various municipal projects.<sup>5</sup> Therefore, although the law dealt with in this Comment will be the general law of the United States, the law of Pennsylvania will be included for comparison.

The submission of the question of the issuance of bonds to the voters may be done to get an indication of their opinion even when such submission is not necessary to the issuance.<sup>6</sup> However, submission to the electorate is often necessary.<sup>7</sup> A constitution, statute, or charter may demand the consent of the electorate as a condition precedent to the valid issuance of bonds.<sup>8</sup> There are various types of provisions. Some provisions require consent to all bond issues.<sup>9</sup> Others require consent only to those issues which are in excess of a specific monetary amount. This amount may be the debt limitation, a certain percentage of the taxable real property value in the municipality,<sup>10</sup> or the revenue and income of a municipality for one year.<sup>11</sup> In other provisions, consent of the voters is only necessary to accomplish certain purposes, such as the acquisition of a public utility<sup>12</sup> or the construction of water or sewage systems.<sup>13</sup> Provisions which require all bond issues, or those in excess of a certain amount, to have popular approval are usually found in constitutions and charters. While those pro-

5. Business Week, Nov. 13, 1954, p. 50.

6. *Muscatine Lighting Co. v. City of Muscatine*, 205 Iowa 82, 217 N.W. 468, 472 (1928) (dictum).

7. *Coleman v. Town of Eutaw*, 157 Ala. 327, 47 So. 703 (1908) (Constitution); *Morgan v. Board of Sup'rs.*, 67 Ariz. 133, 192 P.2d 236 (1948) (Constitution); *Downen v. McLaughlin*, 189 Ark. 827, 75 S.W.2d 227 (1934) (Statute); *Pasadena v. McAllister*, 204 Cal. 267, 267 Pac. 873 (1928) (Constitution); *Kingsley v. Denver*, 26 Colo. 194, 247 P.2d 805 (1952) (Charter); *Eastern Shore Public Service Co. v. Seaford*, 21 Del. Ch. 214, 187 Atl. 115 (1936) (Charter); *Spearman Brewing Co. v. Pensacola*, 136 Fla. 869, 187 So. 365 (1939) (Constitution); *Fowler v. Board of Trustees of Ottowonwa*, 214 Iowa 395, 238 N.W. 618 (1931) (Statute); *Gentzler v. Smith*, 320 Mich. 394, 31 N.W.2d 668 (1948) (Constitution); *Natchez v. City of Engle*, 221 Miss. 380, 51 So.2d 564 (1951) (Statute); *State ex rel. Blue Springs v. McWilliams*, 335 Mo. 816, 74 S.W.2d 363 (1934) (Statute); *Weber v. Helena*, 89 Mont. 109, 297 Pac. 455 (1931) (Statute); *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945) (Statute); *Hard v. Depaoli*, 56 Neb. 19, 41 P.2d 1054 (1935) (Statute); *Varney v. Albuquerque*, 40 N.M. 90, 55 P.2d 40 (1936) (Constitution); *Lang v. City of Cavalier*, 59 N.D. 75, 228 N.W. 819 (1930) (Constitution); *Gill v. Charlotte*, 213 N.C. 160, 195 S.E. 368 (1938) (Statute); *Middletown v. City Commission*, 138 Ohio St. 596, 37 N.E.2d 609 (1941) (Constitution); *Hyams v. Carroll*, 146 S.C. 470, 144 S.E. 153 (1928) (Statute); *State ex rel. Hurd v. Blomstrom*, 72 S.D. 526, 37 N.W.2d 247 (1949) (Statute); *Radford v. Cross Plains*, 126 Tex. 153, 86 S.W.2d 204 (1935) (Statute); *Town of Galax v. Appalachian Electric Power Co.*, 177 Va. 29, 12 S.E.2d 778 (1941) (Constitution); *Robb v. Town of Tacoma*, 175 Wash. 580, 28 P.2d 327 (1933) (Statute); *Whipps v. Town of Greybull*, 56 Wyo. 355, 109 P.2d 805 (1941) (Statute).

8. *Ibid.*

9. *Coleman v. City of Eutaw*, 157 Ala. 327, 47 So. 703 (1908); *Spearman Brewing Co. v. Pensacola*, 136 Fla. 869, 187 So. 365 (1939).

10. *Town of Galax v. Appalachian Electric Power Co.*, 177 Va. 29, 12 S.E.2d 778 (1941).

11. *Pasadena v. McAllister*, 204 Cal. 267, 267 Pac. 873 (1928).

12. *Middletown v. City Commission*, 138 Ohio St. 596, 37 N.E.2d 609 (1941).

13. *Downen v. McLaughlin*, 189 Ark. 827, 75 S.W.2d 227 (1934); *State ex rel. Blue Springs v. McWilliams*, 335 Mo. 816, 74 S.W.2d 363 (1934).

visions which turn their attention to particular things or projects in requiring a vote are usually found in statutes.

The Pennsylvania constitution<sup>14</sup> forbids any municipality, other than Philadelphia, from incurring debts in excess of seven percent of the assessed value of the taxable property in that municipality. In Philadelphia it is 13½ percent. Moreover, it provides that no municipality or district shall increase its indebtedness more than two percent of the assessed valuation of its property without the consent of the electors. In Philadelphia the amount is three percent.

The purpose of a law which requires the consent of the people is to afford protection to them against undue extravagance by their governing body,<sup>15</sup> and to obviate unrestrained expansion at the expense of the taxpayers.<sup>16</sup> In addition to providing for the determination of whether the electors desire money to be borrowed for a particular purpose, the vote may also enable the electors to control some of the particulars of the project. An example of the latter is to allow the voters to decide whether an existing electric plant should be purchased or a new one built.<sup>17</sup>

Even where the law requires an election there are instances, although not generally expressed in the law, in which an election is not necessary to the issuance of bonds by a municipality. By the weight of authority, if property which is to be purchased is to be paid for out of the income returned by the property itself, it is not indebtedness within a constitutional debt limitation,<sup>18</sup> and bonds issued therefor do not have to be approved by the voters.<sup>19</sup> Improvement bonds do not have to be authorized by the voters where the debt is to be paid for by the abutting owners and there is no liability on the city.<sup>20</sup> Also, voter approval is unnecessary where refunding bonds are issued.<sup>21</sup>

The reasoning behind these decisions seems to be that no approval of the electors is necessary where there is no municipal debt created. However, in Florida it was held that an election was required even though the obligation was not that of the city and the creditor was to look only to private property.<sup>22</sup> An election was also required even though the prop-

14. PA. CONST. art. IX, § 8 (1874) (1920). The 1941 Municipal Borrowing Law would increase the limit in some situations to 10 percent. PA. STAT. ANN. tit. 53, § 2011.201 (1954).

15. *Town of South Hill v. Allen*, 177 Va. 154, 12 S.E.2d 770 (1941).

16. *Clover Leaf Inc. v. Jacksonville*, 145 Fla. 341, 199 So. 923 (1940).

17. *Kansas Utilities Co. v. City of Paola*, 148 Kan. 267, 80 P.2d 1084 (1938).

18. *City of Cascade Locks v. Carlson*, 161 Ore. 557, 90 P.2d 787 (1938); *People v. Chicago Transit Authority*, 392 Ill. 77, 64 N.E.2d 4 (1945).

19. *Fuller v. City of Cullman*, 240 Ala. 309, 199 So. 2 (1940); *City of Springfield v. Monday*, 353 Mo. 981, 185 S.W.2d 788 (1945).

20. *Sanborn v. City of Boulder*, 74 Colo. 358, 221 Pac. 1077 (1924); *City of Nokomis v. Zepp*, 246 Ill. 159, 92 N.E. 809 (1910). *Contra*, *City of Natchez v. Engle*, 211 Miss. 380, 51 So.2d 564 (1952).

21. *State v. Miami*, 155 Fla. 95, 19 So.2d 410 (1944); *Smith v. City of Mayfield*, 270 Ky. 784, 110 S.W.2d 1081 (1938).

22. *Clover Leaf, Inc. v. Jacksonville*, 145 Fla. 341, 199 So. 923 (1940).

erty purchased was payable solely from the income of such property.<sup>23</sup> However, it is doubtful that this is the law in Florida any longer.<sup>24</sup>

In Pennsylvania a refunding bond need not be approved by the voters.<sup>25</sup> However, a Pennsylvania decision held that a self-liquidating improvement is generally not an exception to the constitutional provision that if an increase in the debt is more than two percent of the value of the property it must be approved by the voters.<sup>26</sup> The constitution, on the other hand, provides that obligations issued by a municipality (excluding a school district)<sup>27</sup> or county, other than Philadelphia, for the construction or acquisition of waterworks, subways, underground or street railways or appurtenances thereto shall not be a debt within article nine, section eight of the constitution, if for five years the income therefrom will pay its interest and sinking fund charges or if the obligation shall be secured by liens on the respective properties and impose no municipal liability.<sup>28</sup> The Pennsylvania Municipal Borrowing Law appears to abrogate this decision by extending this group of bonds which are free from public approval to bonds issued in order to construct, acquire or extend any public works undertakings or facilities, which it has been authorized by law to do, by calling them "non-debt" revenue bonds.<sup>29</sup> A non-debt bond would be outside the constitutional restriction. It is to be noted that the Municipal Borrowing Law excludes first class cities, counties and institutional districts; thus, with respect to these units of government the prior law applies.<sup>30</sup>

Generally a bond issue for a "necessary expense" of a municipality will also be excused from submission to the popular vote. While this is primarily case law, North Carolina and Idaho have constitutional provisions excusing such issues from submission to a vote. The problem lies in determining what is a "necessary expense." Under the North Carolina statute the following were held to be "necessary expenses": a contract to improve and expand the water plant and sewage system, the construction of a water and a light plant, the cost of maintaining, repairing, and paving streets, a market house, and a municipal building. An airport and a public hospital were held not to be "necessary."<sup>31</sup>

23. *Charles v. Miami*, 125 Fla. 110, 112, 169 So. 589, 590 (1936) (dictum).

24. *City of Orlando v. State*, 67 So.2d 674 (Fla. 1953) held that since bonds were not payable from ad valorem taxes, but from the proceeds of a special assessment, the certificates were not the bonds of the municipality and the vote of the freeholders was not required. This case strongly questioned *Clover Leaf, Inc. v. Jacksonville*, and in effect overruled it.

25. *Hirt v. Erie*, 200 Pa. 233, 49 Atl. 796 (1901). PA. STAT. ANN. tit. 53, §2011.501 (1954).

26. *Atkins v. Philadelphia*, 339 Pa. 345, 14 A.2d 423 (1940).

27. *Long v. School Dist. of Cheltenham Tp.*, 269 Pa. 472, 112 Atl. 545 (1921).

28. PA. CONST. art. IX §15 (1874) (1913).

29. PA. STAT. ANN. tit. 53, §2011.620 (1954).

30. *Id.* §2011.102.

31. 15 McQUILLIN, MUNICIPAL CORPORATIONS §40.03 (3d ed. 1950).

Although there are no Pennsylvania cases on this point, a "necessary expense" would probably not be found to be an exception to the general need for a vote. For example, the Supreme Court of Pennsylvania in speaking of creating a debt greater than the debt limitation has said that it is the increase in indebtedness that is forbidden, regardless of the object to be accomplished.<sup>32</sup>

In determining whether proposed municipal bonds come within a provision requiring a vote, the result attempted to be brought about by that particular law is the first consideration. The controlling test should be to look at the practical effect of the bond issue in the light of the statutory restriction.<sup>33</sup> If there is a reasonable doubt as to the need for a vote it should be resolved in favor of a vote.<sup>34</sup>

In general, in order to have the required consent of the voters there must be a substantial compliance with the law,<sup>35</sup> and if there is any omission of a substantial requirement the court will enjoin the issue in a direct proceeding or render it void.<sup>36</sup> Mere irregularities which do not prevent a full and free expression of the will of the electors and do not affect or change the result of the election will not invalidate the election. This rule has been applied to irregularities in notice, in calling the election, in registration of voters, in the ballots, in the appointment of election officials, in the time and place of the election, and in the exclusion of qualified voters from the polls.<sup>37</sup>

Judge Eugene McQuillin points out that any defect or irregularity in connection with the election cannot be urged by the municipality where, on the face of the bonds, there are general or specific recitals of compliance with the statute and the bonds are in the hands of a bona fide holder.<sup>38</sup> However, Dean Fordham suggests that the universality of the rule had its basis in federal decisions, and that after *Erie R. R. v. Tompkins*,<sup>39</sup> when state law controlled, the estoppel clause lost its universality.<sup>40</sup> But this does not mean that it is dead, in fact, a number of states have embraced the estoppel doctrine by statute.<sup>41</sup>

In Pennsylvania, if an indebtedness is incurred in violation of the provision requiring approval by the voters, the securities issued therefor are absolutely void.<sup>42</sup> Those contracting with a municipality in Pennsylvania must, at their peril, inquire into its power to incur the debt.<sup>43</sup>

32. *Jackson v. Conneautville Borough School Dist.*, 280 Pa. 601, 607, 125 Atl. 310, 312 (1924).

33. *Fuller v. City of Cullman*, 240 Ala. 309, 199 So. 2 (1940).

34. *Fort Lauderdale v. Kraft*, 155 Fla. 738, 21 So.2d 461 (1945).

35. *Eastern Shore Public Service Co. v. Seaford*, 21 Del. Ch. 214, 187 Atl. 115 (1936).

36. *Allison v. Phoenix*, 44 Ariz. 66, 33 P.2d 927 (1934).

37. 15 McQUILLIN, MUNICIPAL CORPORATIONS §40.14 (3d ed. 1950).

38. *Id.* §40.01.

39. 304 U.S. 64 (1938).

40. FORDHAM, LOCAL GOVERNMENT LAW 598 (1949).

41. *Id.* at 612.

42. *Millerstown Borough v. Fredrick*, 114 Pa. 435, 7 Atl. 156 (1886).

43. *Pittsburgh Paving Co. v. Birmingham*, 332 Pa. 563, 3 A.2d 905 (1939).

When giving notice of the election, as said above, only a substantial compliance with the law is required,<sup>44</sup> but if there is not substantial compliance the bond issue is void.<sup>45</sup> If something is added which is not required by the statute, it must be clearly stated; if it actually misleads the voters the issue will be declared void.<sup>46</sup> Stated simply, the required notice is that notice which is definite enough so that the voters will have knowledge of just what they are voting upon. Generally the notice must state: the purpose of the issue, the rate of interest which the bonds will bear, the maturity date of the bonds, and the time and place of the election.<sup>47</sup> If the statute contains any of these particulars it has been held that they need not be specified in the notice; the statute is said to be incorporated into the notice by reference.<sup>48</sup>

In Pennsylvania, notice is required to be given in three newspapers that an election will be held on a certain date. The notice must contain the last assessed valuation, the amount of the existing gross debt, allowable deductions, the amount of the net debt, and the purpose for the increase.<sup>49</sup>

Since the voters do not merely assent to the issuance of the bonds, but delegate the power to do it, the amount of the debt on the ballot must be accurate. But as to other things on the ballot, substantial compliance with the law is sufficient.<sup>50</sup> The problem which most often arises as to the form of the ballot is whether several issues or objects may be combined so that one answer will be an answer to them all, or whether they must be presented separately. While it is permissible that more than one object be presented, generally the objects must be presented so that the voters can vote on them individually.<sup>51</sup> However, a number of cases hold that it is permissible to submit the question of the issuance of a water works and a lighting system together.<sup>52</sup> Another case held that it was permissible to combine the question of a sewer system and water works.<sup>53</sup>

Pennsylvania agrees with the majority that where there are several objects for which the increase in indebtedness is proposed, an election for an increase in a lump sum is invalid; the question for each purpose must be submitted separately.<sup>54</sup>

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44. Phillip v. Rock Hill, 188 S.C. 140, 198 S.E. 604 (1938).

45. Peterman v. City of Milford, 104 A.2d 382 (Del. Ch. 1954).

46. Anselmi v. Rock Springs, 53 Wyo. 223, 80 P.2d 419, 423 (1937) (dictum).

47. 15 McQUILLIN, MUNICIPAL CORPORATIONS § 40.07 (3d ed. 1950).

48. State v. Topeka, 68 Kan. 177, 74 Pac. 647 (1903).

49. PA. STAT. ANN. tit. 53, § 2011.205 (1954). The notice required by a first class city is a little more elaborate but basically the same. PA. STAT. ANN. tit. 53, § 3303 (1954).

50. 15 McQUILLIN, MUNICIPAL CORPORATIONS § 40.10 (3d ed. 1950).

51. *Id.* at § 40.09.

52. Coleman v. City of Eutaw, 157 Ala. 327, 47 So. 703 (1908); Swam v. Murray, 146 Ky. 148, 142 S.W. 244 (1912); Kemp v. Haglement, 80 Miss. 443, 31 So. 908 (1902).

53. Ennis v. Town of Henderson, 168 Va. 539, 191 S.E. 685 (1937).

54. Bloomsburg Town Election, 4 Pa. Dist. 671 (C.P. Col. 1895).

The qualifications of a voter are largely a matter of local legislation, but generally only a registered voter and one qualified to vote in the general elections of the city can vote at a bond election.<sup>55</sup> Some laws require that the voter have paid a property tax the preceding year.<sup>56</sup> A Texas statute permits a city to require the payment of a poll tax as a requisite to voting at the municipal bond election.<sup>57</sup> The voters are often required to be freeholders.<sup>58</sup> Although Pennsylvania does not deal specifically with this problem it intimates that one must be qualified to vote in the general elections.

Statutes and constitutions usually stipulate what constitutes an affirmative vote. Generally it is a majority. It may be more. The legislature can make the amount of required favorable votes more burdensome than the constitution,<sup>59</sup> but not less.<sup>60</sup> In Pennsylvania the requirement is usually a simple majority, but in some instances it is two-thirds.<sup>61</sup>

Rescission of the authority to issue bonds which was granted by an election may be withdrawn by a later election where no rights have resulted from the first vote.<sup>62</sup>

After the bonds are authorized by the electors, the question remains, how soon must the bonds be issued? It is a settled rule that a county or municipality is not required to issue all the bonds authorized by an election at one time. They may be issued as needed, and a delay in issuing a part or all of the bonds, at least for a reasonable time, does not bar the right to issue.<sup>63</sup> The question remains, what is a reasonable time? Eleven years was held not to be unreasonable.<sup>64</sup> While the answer to whether a certain time is reasonable depends on all the circumstances, time itself plays a part. In saying that twenty-five years was not reasonable, the Kentucky court in *Sparks v. Sparks*<sup>65</sup> pointed out that the bonds were voted on conditions as they existed then, and that the intention was not to benefit and burden future generations.

The requirement of the consent of the electors to issue bonds is generally beneficial. It gives the voters an important check on city officials without destroying the benefits of representative government. However, it is submitted that in order to insure a municipality against the effect of an ill-advised vote in time of need, there should be a statutory exemption

55. 15 McQUILLIN, MUNICIPAL CORPORATIONS §40.11 (3d ed. 1950).

56. *Varney v. Albuquerque*, 40 N.M. 90, 55 P.2d 40 (1936).

57. *Powell v. City of Baird*, 127 S.W.2d 206 (Tex. App. 1939).

58. *State v. Miami*, 62 So.2d 407 (Fla. 1950).

59. *Varney v. Albuquerque*, 40 N.M. 90, 55 P.2d 40 (1936).

60. *Robb v. Tacoma*, 175 Wash. 580, 28 P.2d 327 (1933).

61. PA. STAT. ANN. tit. 53, §2011.203 (1954).

62. *Independent School Dist. v. Rosenow*, 185 Minn. 261, 240 N.W. 649 (1932); *Denicore v. Burlington*, 116 Vt. 72, 70 A.2d 582 (1950).

63. *Sparks v. Sparks*, 300 Ky. 392, 189 S.W.2d 354 (1945).

64. *Stokes v. City of Montgomery*, 203 Ala. 307, 82 So. 663 (1919); *Jonson v. Fiscall*, 272 Ky. 9, 113 S.W.2d 453 (1938).

65. 300 Ky. 392, 189 S.W.2d 354 (1945).