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M E M O R A N D U M

TO: Ohio Library Council
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I've taken a more detailed look at the question of what the phrase "without first obtaining the approval of a majority of electors in that political subdivision" means as used in subdivision (E)(1) of the proposed Section 14 of Article XII of the Ohio Constitution, the Tax and Expenditure Limitation Amendment (the "TEL Amendment").

First, a review of Ohio cases – based on several hours of research – does not show any Ohio decisions which have looked at precisely the same question. And most of the Ohio cases I've found are fairly old and only interpret statutory enactments, not Constitutional provisions. So, for example, in *Enyart v. The Trustees of Hanover Township*, 25 Ohio St. 618 (1874), the Ohio Supreme Court was called on to interpret a statute that read that a levy was not passed until "a majority of all the electors of said township, at some regular election, shall vote in favor of said levy." In this instance, the court held that this phrase required that a majority of all of the votes cast at the regular election, not simply a majority of those voting for or against the levy, were required to pass the levy. The case of *City of Wellsville v. Connor*, 91 Ohio St. 28 (1914), clarifies that if the relevant provision requires a majority of votes cast "at an election," then both spoiled ballots and valid ballots get counted in determining the total number, and that if the requirement is simply a "majority of votes", then spoiled ballots do not get counted.

The *Enyart* case is the closest Ohio case I could find to our language – but the language interpreted includes the phrase "at some regular election" – which is not included in the TEL Amendment provision. There is the decision in *State ex rel. Thrailkill v. Amlin*, 13 Ohio Dec. 334 (Franklin County Common Pleas 1902), which interpreted the phrase "a majority shall be found in favor" to mean a majority voting on the question, not a majority voting at the election. Yet this phrase doesn't have a reference to a geographic area – so I think the *Amlin* case is likely not terribly instructive.

I also found and reviewed an American Law Reports annotation which looked at the question of how courts determine the basis of computing a majority of votes under varying phraseology of constitutional and statutory provisions relative to the adoption by the public of special propositions, constitutional amendments and the like. 131 A.L.R. 1392 The A.L.R. annotation collected dozens of cases, from across the United States. In general, the cases reviewed by the A.L.R. stand for the propositions that (1) if the applicable language is silent on the question, a majority of those voting is sufficient for a measure to pass and (2) a majority, but not all, of the courts that have looked at the question have tended to disfavor interpretations that would imply the necessity of a majority of all of the electors or registered voters of a geographic area.

That said, courts have honored explicit provisions. So, for example, the phrase "a vote of the majority of the qualified electors of such city" was held in *Clayton v. Hill City*, 111 Kan. 595, 207 P. 770 (1922) to be too explicit to allow for any other construction than that the issue needed a majority of all persons entitled to vote. Similar results were obtained in *People ex rel. Hetfield v. Ft. Edwards*, 70 NY 28 (1877) ("a majority of said taxable inhabitants") and *State ex rel. Davis v. White*, 162 Mo. 533, 63 SW 104 (1901) ("two-thirds of the legal voters of the county"). But other courts, such as the Supreme Court of Arkansas in *Vance v. Austell*, 45 Ark. 400 (1885) ("the consent of the majority of the qualified voters of the county"), have interpreted almost the same language as meaning only a majority of those voting on the question at an election.

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So, for the purposes of the case law generally, I believe it is fair to conclude that support could be found for both propositions – and thus a fair reading of the TEL Amendment in light of the cases annotated in the A.L.R. is that the question could go either way.

Although almost all of the provisions in current Ohio Constitutional and statutory provisions include phrases such as “voting thereon” or “voting on the question”, I did find a few uses of similar phraseology. Article IV, Section 23 of the Ohio Constitution uses the phrase “***If a majority of the electors of such county vote in favor of such proposition....***” However, there are no cases interpreting this provision.

Article V, Section 7, of the Ohio Constitution employs the phrase “but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for ***by a majority of the electors of such township or municipality.***” In this context, I would think that this phrase clearly counts electors, since petitions do not have anything to do with persons voting in an election.

A very few select statutes use wording along these lines. For example. Revised Code Section 709.45 seems to refer to a majority of electors in a municipal corporation and doesn't tie that use to the familiar “voting on the question”. However, there are no cases interpreting Section 709.45, and, since Section 709.45 is a statute, the provisions of Revised Code Section 3519.21 would come into play:

. . . Except as otherwise provided by law, all propositions, issues, or questions submitted to the electors and receiving an affirmative vote of a majority of the votes cast thereon are approved.

I do not believe that Section 3519.21 – a mere statutory enactment – would control the question of interpretation of a Constitutional provision, however.

Finally, there is the issue of the words of the TEL Amendment itself. In subdivision (A) of proposed Section 14 of Article XII, the authors use the phrase “a majority of electors voting at such election...” The authors clearly know how to refer to the voters at an election. So, since this phrase is used in subdivision (A), there would be at least an implication that a different result is intended in subdivision (E)(1), where the provision refers to “a majority of the electors in that political subdivision” without reference to a particular election or vote.

Based on this research, I believe that my bottom line stays more or less the same. I think the Amendment is drafted in such a fashion that one cannot rule out that the language means any of (i) a majority of the electors of the political subdivision, regardless of who votes, (ii) a majority of those voting at an election, regardless of how many vote on the question at issue or (iii) a majority of those voting on the question. If I had to guess, I think the current trend in the caselaw would imply that it most likely means either (ii) or (iii). But since the answer is unclear, I think it is fair to point out this risk in any discussion of the TEL Amendment.