

**VOLUME NO. 34**

**Opinion No. 16**

**ELECTIONS - Electors; qualifications for general obligation bond elections. Article IX, section 2, Montana Constitution; sections 23-2702 and 23-2703, R.C.M. 1947.**

- HELD:** 1. Section 23-2703, R.C.M. 1947, dealing generally with taxpayer qualifications for electors for the creation of a debt or liability has been repealed by Chapter 120, Montana Session Laws of 1971.
2. A registered elector, whether or not a taxpayer, may vote at any election called to approve the issuance of general obligation bonds.

September 30, 1971

Mr. Lawrence G. Stimatz  
 Silver Bow County Attorney  
 155 West Granite Street  
 Butte, Montana 59701

Dear Mr. Stimatz:

You have requested my opinion as to whether registered electors must be taxpayers in order to be eligible to vote at a general obligation bond election.

Consideration should be given to Chapter 158, Montana Session Laws of 1971, which attempted to amend sections 23-2702 and 23-2703, Revised Codes of Montana, 1947, and Chapter 120, Montana Session Laws of 1971, which repealed sections 23-2702 and 23-2703, R.C.M. 1947. Both bills were effective upon passage and approval, and were signed into law by the governor on the same day: March 1, 1971. Section 43-515, R.C.M. 1947, provides: "An act amending a section of an act repealed is void." Since the two bills referred to above became effective on the same day, it is impossible to say that one preceded the other. Therefore, the action of the legislature was such that sections 23-2702 and 23-2703, R.C.M. 1947, were repealed. Thus, the only qualifications dealing generally with taxpayers for voting purposes are found in Article IX, section 2, Montana Constitution, which will be discussed below.

The apparent reason for the amendment of these sections is found in section 1 of Chapter 158, Session Laws of 1971. Section 1 describes the legislative policy and purpose of the law, and indicates that the laws were amended in anticipation of the possible unconstitutionality of part of Article IX, section 2, Montana Constitution, in light of recent decisions by the United States Supreme Court. The decisions referred to are **City of Phoenix v. Kolodziejski**, 399 U.S. 204, 26 L.Ed.2d 523, decided in June, 1970, and **Cipriano v. City of Houma**, 395 U.S. 701, decided in June of 1969.

In **Cipriano** the court dealt with a Louisiana law which provided that only "property taxpayers" had the right to vote in elections called

to approve the issuance of revenue bonds by a municipal utility system. The court held that the “property taxpayer” limitation on the franchise violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court said at page 706:

“The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are to vote. When, as in this case, the State’s sole justification for the statute is that the classification provides a ‘rational basis’ for limiting the franchise to those voters with a ‘special interest’, the statute clearly does not meet the ‘exacting standard of precision we require of statutes which selectively distribute the franchise.’” (citing **Kramer v. Union Free School District**, 395 U.S. 632)

In **Kolodziejcki** the court dealt with the same type of challenge as that presented in **Cipriano**, however dealing in that case with general obligation bonds. The general obligation bonds were to be issued to finance various municipal improvements. Pursuant to Arizona constitutional and statutory provisions, only otherwise qualified voters who were also real-property taxpayers were permitted to vote on these bond issues. The court, again noting their decision in **Kramer** in which they held that a state could not restrict the vote in school district elections to owners and lessees of real property and parents of school children, held the restriction was not based upon a valid state interest and was unconstitutional. At page 209 the court said:

“Presumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise. Arizona nevertheless excludes nonproperty owners from participating in bond elections and vests in the majority of individual property owners voting in the election the power to approve or disapprove facilities that the municipal government has determined should be financed by issuing general obligation bonds. Placing such power in property owners alone can be justified only by some overriding interest of those owners that the State is entitled to recognize.”

The crux of the argument in the **Kolodziejcki** case is summed up in the following at page 209:

“Secondly, although Arizona law ostensibly calls for the levy of real property taxes to service general obligation bonds, other revenues are legally available to this purpose. According to the parties’ stipulation in this case, it is anticipated with

respect to the instant bonds, as has been true in the past, that more than half of the debt service requirements will be satisfied not from real property taxes but from revenues from other local taxes paid by non-property owners as well as those who own real property. Not only do those persons excluded from the franchise have a great interest in approving or disapproving municipal improvements, but they will also contribute, as directly as property owners, to the servicing of the bonds by the payment of taxes to be used for this purpose.”

The court also went on to point out that nonproperty owners will have the extra tax passed on to them in the form of higher rent. Sections 23-2702 and 23-2703, R.C.M. 1947, were repealed by Chapter 158, Montana Session Laws of 1971, in recognition of the rulings in **Kolodziejski** and **Cipriano**.

Article IX, section 2, Montana Constitution, reads in part:

“Every person of the age of nineteen years or over, possessing the following qualifications, shall be entitled to vote at all general elections. . . . If the question submitted concerns the creation of any levy, debt or liability the person, in addition to possessing the qualifications above mentioned, must also be a taxpayer whose name appears upon the last preceding completed assessment roll, in order to entitle him to vote upon such question.”

The provisions of the Arizona Constitution questioned in **Kolodziejski**, and the provisions of Article IX, section 2 of the Montana Constitution, *supra*, are sufficiently similar to lead to the conclusion that if the Montana constitutional provisions were presented to the United States Supreme Court for review the provision relating to the taxpayer qualifications for elections on the issuance of general obligation bonds would be struck down as a violation of the Constitution of the United States and therefore void.

THEREFORE, IT IS MY OPINION that:

1. Section 23-2703, R.C.M. 1947, dealing generally with taxpayer qualifications for the creation of a debt or liability has been repealed by Chapter 120, Montana Session Laws of 1971.
2. A registered elector, whether or not a taxpayer, may vote at any election called to approve the issuance of general obligation bonds.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General