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DITCH ASSESSMENTS—§6131.22 RC—SUBSEQUENT AWARD OF DAMAGES; SUCH AWARD IS AN OBLIGATION “LEGALLY INCURRED” WITHIN MEANING OF §6131.51 RC—GENERAL REVENUE FUND; MAY BE APPROPRIATED FOR SUCH PURPOSE.

SYLLABUS:

1. Where the assessment for the cost of a joint county ditch has been made and certified to the county auditor as provided in Section 6131.22, Revised Code, Section 6463, General Code, and where the cost of such improvement has been increased by reason of an award by the Common Pleas Court, made some years later, for damages to a landowner attributable to such construction, such award represents an obligation “legally incurred” within the meaning of Section 6131.51, Revised Code, but the amount of such cost may not be met by a supplemental or amended assessment against the benefited land.

2. When obligations legally incurred exceed the amount in the drainage improvement fund, an amount of the general revenue fund in the county treasury, unless otherwise appropriated, equal to the deficiency, may by resolution of the board of county commissioners be transferred to the general drainage improvement fund as provided in Section 6131.51, Revised Code.

Columbus, Ohio, December 4, 1957

Hon. John F. DeMuth, Prosecuting Attorney
Paulding County, Paulding, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“In 1947 in the Prairie-Hoaglin Ditch improvement proceedings the County Commissioners of Paulding County refused to allow a landowner’s claim for damages and this landowner, one George M. Wyatt, instituted an appeal. However, the County Commissioners proceeded with the improvement, made the assessments and let the contract. No injunction to stop proceeding with the improvement was ever granted or sought. The work was fully completed and paid for in 1949, while this appeal on the damage claim was still pending.

“A trial by jury was had on this claim for damages in 1954 and the jury returned a verdict allowing no damages. Thereupon, the landowner filed a motion for a new trial which was granted. Recently the case was again tried to a three judge

court and the court found the landowner was damaged in the sum of \$600.00. A judgment for \$600.00 and costs was rendered against Paulding County. A transcript of the proceedings was filed with the County Auditor by the clerk according to Section 6131.36 of the Revised Code. I am enclosing a copy of the transcript of the proceedings for your information.

"I should like to have your opinion on the following :

"1. After a county ditch has been improved, the work thereon having been completed and the assessments thereon made and paid, can a county auditor make an additional assessment upon the lands benefited by the improvement to pay the damages and court costs awarded in a judgment against the county in a statutory ditch appeal case arising out of such ditch improvement proceedings?

"2. When the general ditch improvement fund is exhausted can a county auditor pay out of the General Fund a judgment rendered against the county in a statutory ditch appeal case?"

From the copies of documents and papers appended to your letter, it is apparent that we are here concerned with a joint county ditch as provided for in Sections 6133.01 to 6133.16, Revised Code.

Section 6133.03, Revised Code, provides that the procedure, rights, remedies, and rights of appeal made applicable to single county ditches by Sections 6131.01 to 6131.64, Revised Code, are also applicable to joint county ditches.

When the joint boards of county commissioners of Paulding and Van Wert counties denied George M. Wyatt's claim for damages, by the finding made pursuant to Section 6131.19, Revised Code, he appealed to the common pleas court under authority of Section 6131.25, Revised Code, which reads in applicable part :

"Any interested owner may appeal to the court of common pleas from a final order made by the board of county commissioners, as provided in sections 6131.01 to 6131.64, inclusive, of the Revised Code, and may appeal any one or more of the following questions :

"(F) Is the award for compensation or damages just?"

Section 6131.31, Revised Code, so far as is here pertinent now provides :

“(C) * * * The court shall fix the time for the trial of claims for compensation or damages, and such claims shall be tried by a jury unless trial by jury is waived. The compensation or damages awarded shall be paid as provided in sections 6131.01 to 6131.64, inclusive, of the Revised Code. The court shall order the clerk to certify a transcript of the findings and judgments, together with all the original papers filed in the court, to the clerk of the board of county commissioners, who shall enter the court’s orders in the board’s journal and transmit the schedules to the county auditor. The engineer, the auditor, and the board shall proceed with the letting of the contract, the construction of the improvement, and the collecting of the assessments in the same manner as if the board had approved and confirmed the assessments and ordered the letting of the contract. All costs before the board, the costs of the engineer in making his survey, reports, and schedules, and all costs on appeal shall be a part of the costs of constructing the improvement.”

A supplemental assessment to include additional costs of the improvement subsequent to the initial assessment, was considered, quite briefly, in *Gilmore v. Board of County Commissioners of Hocking County*, 17 Ohio App. 177. In that case the court found that the initial contract price was predicated upon a mutual mistake of fact. The court awarded the contractor an additional sum of money and said at page 184:

“* * * We will, therefore, decree a reformation of the contract, fixing the whole consideration at the sum of \$66,400. This increased cost must be met by a reassessment of the lands benefited, as indicated by the instructions of the Attorney General under date of March 1, 1921.”

A reading of the opinion in that case fails to disclose any authority for the conclusion thus reached. It is to be noted, however, that this case was decided in 1922, and that the following year there was enacted in Section 6466, General Code, the following provision:

“If an appeal has been taken to the court of common pleas, as provided in this chapter (G. C. Section 6442 to 6508), the bids may be received and tabulated, but the deposits with the bids shall forthwith returned to the bidders, and no further steps shall be taken on the bids. If no appeal has been taken, the surveyor shall proceed to receive the bids, as provided in this chapter.”

This provision is now found in substance in Section 6131.24, Revised Code, and I do not find any similar provision in the prior analogous stat-

utes, Sections 6456 and 6457, General Code, in effect at the date of the Gilmore decision.

It thus quite clearly appears that under the statutes applicable to the case at hand, it is contemplated that all appeals, including those for compensation for damages, are to be determined *before* construction of the improvement proceeds, and I cannot regard the Gilmore decision as applicable here. This provision appears to have been ignored in the case you describe, and the legal effect of such action is not readily apparent. It seems clear, however, that the statute does not contemplate the amendment of a schedule of assessments after the final hearing and action thereon as provided in Section 6131.22, Revised Code.

In this situation one is almost compelled to conclude that the commissioners decided to proceed on the basis that any compensation awarded the claimant here would constitute a cost of that portion of the improvement that would be "conducive to the public welfare" and hence would be paid from the county general fund as provided in Section 6131.22, *supra*. In any event, I perceive no authority now to amend such assessment so made.

In answer to your second question you are advised that if the general drainage improvement fund is depleted the board of county commissioners may, by resolution, authorize a transfer of funds not otherwise appropriated from the general revenue fund to the general drainage improvement fund. House Bill 220, 102nd General Assembly changed the title of the fund from general ditch improvement fund to general drainage improvement fund. Authority for this conclusion is found in Section 6131.51, Revised Code, and I invite your attention to that part of the statute which reads:

"* * * If at any time obligations legally incurred exceed the amount of said drainage improvement fund, an amount of the general revenue funds in the county treasury, unless otherwise appropriated, equal to the deficiency, may by resolution of the board of county commissioners be transferred to the general drainage improvement fund."

In specific answer to your questions, in the order presented, you are advised:

1. Where the assessment for the cost of a joint county ditch has been made and certified to the county auditor as provided in Section 6131.22, Revised Code, Section 6463, General Code, and where the cost

of such improvement has been increased by reason of an award by the Common Pleas Court, made some years later, for damages to a landowner attributable to such construction, such award represents an obligation "legally incurred" within the meaning of Section 6131.51, Revised Code, but the amount of such cost may not be met by a supplemental or amended assessment against the benefited land.

2. When obligations legally incurred exceed the amount in the drainage improvement fund, an amount of the general revenue fund in the county treasury, unless otherwise appropriated, equal to the deficiency, may by resolution of the board of county commissioners be transferred to the general drainage improvement fund as provided in Section 6131.51, Revised Code.

Respectfully,
WILLIAM SAXBE
Attorney General