

system in power house and tunnels, Institution for Feeble-Minded, Apple Creek, Ohio, and calls for an expenditure of forty-four thousand seven hundred and ten dollars (\$44,710.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted evidence that the consent of the Controlling Board to the release of funds has been obtained in accordance with Section 4 of House Bill 203 of the 88th General Assembly. In addition, you have submitted a contract bond upon which the Seaboard Surety Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the law relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
GILBERT BETTMAN,
Attorney General.

942.

SEWER DISTRICT—PLANS PREPARED, APPROVED AND RESOLUTION OF NECESSITY FOR IMPROVEMENT PASSED BY COUNTY COMMISSIONERS—EFFECT OF INCORPORATION OF MUNICIPALITY FROM PORTION OF SUCH DISTRICT.

SYLLABUS:

1. *When a sewer district is established by the county commissioners under the provisions of Sections 6602-1, et seq., of the General Code, and detailed plans have been prepared and approved and a resolution adopted declaring the necessity of such improvement by the board of county commissioners, and thereafter a part of the territory is included within the limits of a corporation organized after such approval of plans and resolution of necessity, the original district shall be under the jurisdiction of the county commissioners for sewerage purposes until all such improvements for said area have been completed or until the county commissioners shall have abandoned such projects, notwithstanding the original resolution of necessity was amended after the incorporation of the municipality.*

2. *Under such circumstances, the approval of plans and authority to be granted by the municipality under the provisions of Section 6602-1b of the General Code, have no application.*

3. *Under such circumstances, if the resolution of necessity and all prior steps have not been taken before the incorporation of the municipality, then the authority of the municipality must be given to the improvement and the plans therefor must be approved by it.*

4. *When the council of a municipality has passed an original measure with reference to such an improvement and a proper referendum petition has been filed thereon and certified to the board of elections, the question should be submitted to the voters irrespective of whether or not such measure, if it becomes a law, will have any effect.*

COLUMBUS, OHIO, September 30, 1929.

HON. GEORGE S. MIDDLETON, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Your recent communication reads:

“On the 21st day of July, 1924, the board of county commissioners of Logan County, Ohio, passed a resolution establishing what is known as The Indian Lake Park Sanitary District, which included the territory surrounding Indian Lake, and outside of the village of Lakeview. Part of the district included in this sanitary district, is what was at a later date incorporated as Russell Point, Ohio.

On August 19, 1925, the board of county commissioners defined definitely the limit of said territory, including Russell Point. On February 12th, 1928, the board of county commissioners passed an amended resolution changing the boundary of the district, but not affecting the territory which was later incorporated as Russell Point, which remained in the sanitary district as originally established.

On the 3rd day of March, 1928, a part of the sanitary district was incorporated as the village of Russell Point, and the first council which was elected on February 18th, 1929, passed a resolution authorizing the board of county commissioners, to include Russell Point in said sanitary district, and at a later date, June 17th, 1929, approved the plans and specifications for said improvement. On February 18th, 1929, a referendum petition was signed by the required number of electors of Russell Point, and filed with the board of election, to submit to the voters of Russell Point, a referendum on the resolution passed by council approving the district.

The questions which I desire to submit to you are:

First: Whether the territory which was incorporated as the village of Russell Point still remained in the sanitary district, without any further action by the council of Russell Point after incorporation, or whether it was necessary for the council, by resolution, to authorize the inclusion of the village in said district?

Second: Whether the fact that Section 6602-1b of the General Code of Ohio, requiring that before any plans are approved the council of any village included in the district must approve the plans, gave to the village of Russell Point, incorporated after the district was created, a right to refuse to approve the plans, and remain outside the district?

Third: Should the referendum be submitted to the voters at the November election?”

In your supplemental communication you enclose copy of a resolution, passed by the board of county commissioners on February 19, 1929, which relates to a former resolution “passed and advertised.” You also enclose copy of resolution adopted by the board of county commissioners on May 14, 1929, which eliminates from the boundaries of Indian Lake Sanitary Sewer District the village of Lakeview.

It is believed that Section 6602-1c of the General Code is pertinent to be considered in connection with your inquiry, which provides:

“Whenever any portion of a sewer district is incorporated as a municipality or annexed to a municipality, the area so incorporated or annexed shall remain under the jurisdiction of the county commissioners for sewerage purposes, until all sewerage improvements for said area for which detailed plans have been prepared and the resolution declaring the necessity thereof

has been adopted by the county commissioners, shall have been completed or until the county commissioners shall have abandoned such projects. Such incorporation or annexation of any part of a sewer district shall not interfere with or render illegal any issue of bonds or certificate of indebtedness made by the county commissioners to provide for the payment of the cost of construction and maintenance of any sewer improvement within such area, or with any assessments levied, or to be levied upon the property within such area to provide for the payment of the cost of operation and maintenance."

The section above quoted in definite and certain language defines the relative status of a sewer district when a part of the territory is incorporated within a municipality after it is established, when plans have been approved and the resolution of necessity has been adopted prior to the incorporation. Under such circumstances the territory so incorporated shall remain under the jurisdiction of the county commissioners for sewerage purposes until all sewerage improvements for said area for which such detailed plans have been prepared are complete, or until the county commissioners have abandoned such projects. The section then in express language provides that such incorporation shall not interfere with or render illegal any issue of bonds issued to provide for the payment of the cost of such construction.

From the foregoing, it will appear that there is no power vested in the municipality under Section 6602-1c, supra, to decide whether it will remain in or eliminate itself from such a sewer district. The statute fixes the status of such subdivision in the event of such a contingency as is therein mentioned and any action of the municipality with respect thereto can have no effect upon the situation where the district was established outside of municipalities and later a municipality is formed within the district. In this connection you have submitted copy of resolution of the board of county commissioners passed February 19, 1929, after the incorporation of the municipality. This action purports to be a resolution of necessity referred to in Section 6602-2 of the General Code. It is provided in said resolution that it is an amendment of an earlier resolution of necessity passed presumably before the incorporation of the village. In the event such earlier resolution of necessity was actually passed prior to the date of the incorporation of the village, Section 6602-1c, General Code, is clearly applicable. For the purpose of this opinion, it will be assumed that said resolution of necessity was passed prior to the incorporation of the village and under such circumstances, it is not believed that the amendment of the same would disturb the status of said district as governed by Section 6602-1c.

However, before passing the point, in order that there may be no misunderstanding, it is my opinion that before the improvement may, under Section 6602-1c, be considered as not subject to the approval of the village, the following steps must have been taken:

1. The district must have been laid out under Section 6602-1 of the General Code;
2. Sanitary engineers must have been requested to prepare plans;
3. Such plans must have been approved by the State Department of Health;
4. The county commissioners must have approved such plans;
5. The sanitary engineer must have been instructed to prepare detailed plans, specifications and estimates of cost of such parts of the improvement necessary to be then constructed, together with tentative assessment of cost based on such estimate;
6. Detailed plans, specifications and estimates of cost must have been approved by the county commissioners;
7. A declaratory resolution must have been passed which contained the stipulations and provisions set forth in Section 6602-2 of the General Code.

As hereinbefore indicated, if all of the steps above set forth were taken before

the incorporation of the municipality, there is no requirement that such municipality grant its authority to proceed with the improvement or to approve the plans thereof. On the other hand, if the steps above mentioned were not taken and the resolution of necessity was not passed before the incorporation of the village, it follows, of course, that Section 6602-1b, as enacted by the 87th General Assembly, then would be applicable, which provides :

“The authority of the board of county commissioners to provide sewer improvements and to maintain and operate the same within sewer districts which include a part or all of the territory within one or more incorporated municipalities shall be the same as provided by law within sewer districts wholly outside of municipalities, including the levying of assessments, provided, however, that such authority, except as hereinafter provided, shall be limited to main works only, and shall not include construction and maintenance of lateral sewers for local service within such municipality, and further provided that the plans, specifications and estimated cost for any improvement within the corporate limits of such municipality shall be approved by the council of such municipality prior to the letting of any contract for the construction thereof. All road surfaces, curbs, sidewalks, sewers, water pipes, or other public property disturbed or damaged by such construction shall be restored to their original condition within a reasonable time, by the board of county commissioners, and the cost thereof shall be a part of the cost of such improvement. After such main works are constructed, such municipality shall have the right to use the same as an outlet for branch and local sewers constructed by such municipality for the service and use only of that part of such municipality as lies within the area assessed or to be assessed for the cost of such main works, subject to such rules and regulations as may be established by the board of county commissioners and subject to all requirements of the state department of health.

At any time after a sewer district is established comprising or including a part or all of the territory within any municipality, the council of such municipality may by ordinance or resolution authorize the board of county commissioners to proceed with the construction or the maintenance, repair and operation of any sewer improvement for local service within such municipality. After such authority has been granted, the board of county commissioners may proceed with the construction, or the maintenance and operation of said improvement in the same manner as provided by law for improvements in sewer districts wholly outside of municipalities, under the same restrictions as hereinbefore provided for main works.”

The section last quoted seems to contemplate that the council of a municipality may, by ordinance or resolution, authorize the commissioners to proceed with sewer improvements for local service within such municipality, and when such authority is given, the commissioners shall proceed with the construction in the same manner as improvements in sewer districts wholly outside of municipalities. The section further provides that plans and specifications for improvements within the corporate limit of such municipality shall be approved by such municipality.

However, the section last mentioned contemplated a different situation than that wherein the district was established and proper steps taken, including the resolution of necessity, before the incorporation of the municipality. If the resolution of necessity and the necessary steps prior thereto had been taken before the incorporation of the municipality, then clearly the municipal authorities could take no legal action with reference thereto and any attempted action would be of no effect.

In any event, however, no rule of law has come to my attention which would justify the election officials in refusing to place a referendum upon the ballot, which is properly filed upon a measure subject to the same. A court could not enjoin a village council from passing an act, even though such act would be in violation of some provision of the state law or federal constitution. When a given act is passed, then, of course, the courts could prevent the carrying of the same into effect in the event it was in conflict with the Constitution or exceeded the powers of such municipality. Likewise the same rule is believed to apply to any measure which such council may pass, which is subject to the referendum.

In view of the provisions of Section 4227-3 of the General Code, it is clear that only the first ordinance or measure relating to a public improvement is subject to the referendum.

The conclusion hereinbefore reached is clearly supported in the case of *Cincinnati vs. Hillenbrand, et al.*, 103 O. S., 286. The second branch of the syllabus of said case reads:

“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 vs. Graves, Secretary of State*, 88 Ohio St., 473, approved and followed.)”

The cases above mentioned were reaffirmed by the Supreme Court in the case of *State, ex rel. vs. Smith, Secretary of State*, 105 O. S. 571.

In specific answer to your inquiries, it is my opinion that:

1. When a sewer district is established by the county commissioners under the provisions of Sections 6602-1, et seq., of the General Code, and detailed plans have been prepared and approved and a resolution adopted declaring the necessity of such improvement by the board of county commissioners, and thereafter a part of the territory is included within the limits of a corporation organized after such approval of plans and resolution of necessity, the original district shall be under the jurisdiction of the county commissioners for sewerage purposes until all such improvements for said area have been completed or until the county commissioners shall have abandoned such projects, notwithstanding the original resolution of necessity was amended after the incorporation of the municipality.

2. Under such circumstances, the approval of plans and authority to be granted by the municipality under the provisions of Section 6602-1b of the General Code, have no application.

3. Under such circumstances, if the resolution of necessity and all prior steps have not been taken before the incorporation of the municipality, then the authority of the municipality must be given to the improvement and the plans therefor must be approved by it.

4. When the council of a municipality has passed an original measure with reference to such an improvement and a proper referendum petition has been filed thereon and certified to the board of elections, the question should be submitted to the voters irrespective of whether or not such measure, if it becomes a law, will have any effect.

Respectfully,
GILBERT BETTMAN,
Attorney General.