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DITCH—DUTY OF COUNTY COMMISSIONERS TO LEVY ASSESSMENTS DIRECTLY ON EACH TRACT OF LAND AFFECTED BY DEEPENING OF COUNTY DITCH—LEVY—ACCORDING TO BENEFITS—ALL LAND AFFECTED BY DEEPENING OF DITCH SHALL BE ASSESSED IN PROPORTION AS SPECIALLY BENEFITED, NOT OTHERWISE—SECTIONS 6455, 6463 G. C.

SYLLABUS:

Section 6455 and Section 6463 of the General Code place the duty on the county commissioners to levy assessments directly on each tract of land affected by the deepening of a county ditch according to benefits and all land affected by the deepening of such county ditch shall be assessed in proportion as it is specially benefited thereby, and not otherwise.

Columbus, Ohio, September 18, 1950

Hon. G. L. Fenton, Prosecuting Attorney
Williams County, Bryan, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“I would appreciate your giving me your opinion as to whether the County Commissioners are able to make assessments in regard to a single ditch which runs near an incorporated village and in which the land of some of the citizens of the village drain. That is, do the County Commissioners make assessments on the village and does the village in turn collect the assessments from the citizens who are benefited or can the County Commissioners make the assessments directly on the citizens that are benefited within the municipal corporation?”

In response to my request for additional information, the following letter was received:

“In answer to your letter dated June 15, 1950, the petition is for the cleaning and deepening of a county ditch and for extending said county ditch upstream to the starting point. These are the exact words as used in the petition.

“The Commissioners have viewed the ditch and have had the first hearing. They have also had the second hearing and have

made assessments and set the costs. It is my understanding that no citizens of the Village of Alvordton or its mayor have taken any action concerning the ditch.”

At the outset, it must be kept in mind that the Legislature has seen fit to make a distinction between “maintenance” and “construction” of county ditches. For maintenance purposes, your attention is directed to Section 6546, et seq. of the General Code. It is apparent that your county commissioners have proceeded under statutes relating to the deepening and constructing of a county ditch and, for that reason, my opinion will be limited to those laws.

Section 6443 of the General Code reads as follows:

“The board of county commissioners, at a regular or called session, upon the filing of a petition as provided in this chapter by any owner of any land, when the commissioners find that the granting of the petition and the construction of the improvement is necessary for controlled drainage of any land, for irrigation, or to prevent the overflow of any land in the county, and further find that the construction of the improvement will be conducive to the public welfare, and further find that the cost of the proposed improvement will be less than the benefits conferred by the construction of the proposed improvement, *may cause to be located, constructed, reconstructed, straightened, deepened, widened, boxed, tiled, filled, walled, dammed, or arched, any ditch, drain, or watercourse, or construct any levee, or straighten, deepen, or widen any river, creek, or run, or vacate any ditch, by proceedings as provided in chapters 1 and 2 of title III of the General Code of Ohio.* (G. C. §§ 6442 to 6563-48.) (Emphasis added.)

To invoke the jurisdiction of county commissioners, a petition must be filed pursuant to Section 6444 of the General Code. Said section reads as follows:

“Any owner of land may file a petition with the auditor of the county in which is located a part of the land that is averred to be benefited by the construction of the proposed improvement. The petition shall state that the construction of the improvement is necessary, and will be conducive to the public welfare; and shall state the nature of the work petitioned for; *and may ask to locate, construct, reconstruct, straighten, deepen, widen, box, or tile a ditch, drain, or watercourse, or to change the course or location thereof; or may ask to construct a levee; or may ask to straighten, deepen, or widen a river, creek, or run, or to change the course or location thereof.* The petition shall state the course and termini of the proposed improvement, and the branches,

spurs, or laterals, if any are petitioned for. The petition shall contain a list of the names and addresses, where known, of all the owners of the land which the petitioner claims will be benefited or damaged by the construction of the proposed improvement. The petition shall be signed by one or more owners of land as petitioners.” (Emphasis added.)

Section 6455 of the General Code provides that :

“The surveyor, in making his estimate of the amount to be assessed each tract of land, and the commissioners, in amending, correcting, confirming, and approving the assessments, shall levy the assessments according to benefits; and all land affected by said improvement shall be assessed in proportion as it is specially benefited by the improvement, and not otherwise.”

Section 6463 of the General Code provides that :

“At the final hearing on said improvement, if the petition is not dismissed, the commissioners shall hear any evidence offered for or against the assessment proposed to be levied against any owner, or on any land, as shown by the schedule of assessments filed by the surveyor, and shall hear any competent evidence on the question of benefits. The commissioners shall, from the evidence offered and from an actual view of the premises, amend and correct the assessments, and the assessments so amended or corrected shall be approved by the commissioners. That part of the assessment that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare shall be paid by the public, and shall be assessed against the county, and such part of the assessment as may be found to benefit state or county roads or highways, shall be assessed against the county, and such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision, and shall be paid out of the general funds of such corporation or political subdivision of the state, except as otherwise provided by law. The commissioners shall approve and confirm the assessments, and shall order the surveyor to let the contracts for the construction of the proposed improvement, and shall fix the time for the letting of the contracts, which shall be not less than twenty-five days after the date of said order, and shall determine when the assessments shall be paid, and shall determine whether bonds shall be issued in anticipation of and payable out of the installments of assessments. Their orders, approving the assessments, and ordering the surveyor to let the contract, and other orders made at this hearing, shall be entered on their journal.

“Any owner opposed to the granting of the petition, or any owner opposed to further proceedings in the improvement; and any owner who claims that the assessment levied against him or it is excessive, or is not in proportion to benefits, may appeal from any order made pursuant to this section, as provided in this chapter (G. C. §§6442 to 6508).” (Emphasis added.)

The above statutes provide for two types of assessments based upon benefits:

1. Against the county, any public corporation or political subdivision benefited.
2. Against each tract of land affected by the improvement and benefited thereby.

The above statutes also clearly place on the county commissioners the duty of levying assessments against any land benefited. See: *Kent v. Perkins*, 36 O. S. 639. Whether such land within a village is benefited by deepening of a county ditch lying outside of said village is a question to be determined by the county commissioners in the exercise of their discretion based on the evidence presented.

Section 6484 of the General Code provides that:

“Upon the approval of the contracts, the commissioner shall order the auditor to reduce pro rata the assessments confirmed by them, by the difference between the estimated cost of the construction and the contract price, and the assessments so reduced, but with the cost of location included therein, shall be levied upon each parcel of land stated in the schedules as of the date of the order of the commissioners approving the contracts and ordering the levying of the assessments; the auditor shall forthwith proceed to place said assessments so levied upon the duplicates of the county, and said assessments shall be a lien upon the several parcels of land respectively from and after the date of the order of the commissioners approving the contracts and ordering the levying of the assessments. The auditor shall be liable on his bond for any damages sustained by any person by reason of his failure to place promptly said assessments upon the proper duplicates of the county.”

The method of collecting assessments placed on benefited lands by the deepening of a county ditch is provided for in Section 2667 of the General Code. Said section reads as follows:

“When taxes and assessments or either, charged against lands or lots or parcels thereof upon the tax duplicate, authorized

by law, or any part thereof, are not paid within the time prescribed by law, and four years thereafter, the county treasurer in addition to other remedies provided by law may enforce the lien of such taxes and assessments, and any penalty or penalties thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county in the same way mortgage liens are enforced.”

In view of the foregoing, it is my opinion that Section 6455 and Section 6463 of the General Code place the duty on the county commissioners to levy assessments directly on each tract of land affected by the deepening of a county ditch according to benefits and all land affected by the deepening of such county ditch shall be assessed in proportion as it is specially benefited thereby, and not otherwise.

Respectfully,

HERBERT S. DUFFY,
Attorney General.