

1812.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT — ORGANIZED UNDER AUTHORITY CONSERVANCY ACT OF OHIO—SECTIONS 6828-1 TO 6828-79 G. C.—NO AUTHORITY TO CONVEY ABSOLUTELY ITS LANDS TO FEDERAL GOVERNMENT—IN RE AGREEMENT TO CONSTRUCT AND MAINTAIN FLOOD CONTROL PROJECT.

SYLLABUS:

1. *The Muskingum Watershed Conservancy District was organized under authority of the "Conservancy Act of Ohio" (Sections 6828-1 to*

6828-79, *General Code*) for the purposes of water conservation, flood control and other purposes.

2. *There is no provision in such Act authorizing such district, organized for such purposes, to convey absolutely its lands to the Federal Government, under an agreement that such government will construct and maintain thereon a flood control project and thus place it beyond the power of such district to perform and accomplish the other purposes for which it was created.*

Columbus, Ohio, February 6, 1940.

Hon. John W. Bricker, Governor of Ohio,  
Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion reading:

"I am in receipt of a letter from Wilkin, Fisher & Limbach, attorneys for the Muskingum Watershed Conservancy District in which they submit the following:

1. A certified copy of a resolution of the Board of Directors adopted at said meeting and recorded in Volume 4 at Page 877 of their minutes.
2. A certified copy of the order of the Court of Common Pleas of Tuscarawas County, Ohio, creating and incorporating the District on June 3, 1933, in cause Number 21669 under the Conservancy Act of the State of Ohio.
3. A copy of the Official Plan of the District (Volumes 1 and 2).
4. A certified copy of the boundaries of lands, easements and rights of way to be acquired by the United States as provided by the 1938 Flood Control Act (Public—No. 761—75th Congress) as amended by the 1939 Act (Public No. 396—76th Congress).

For your complete information, I am enclosing a copy of the letter from Wilkin, Fisher & Limbach together with the enclosures referred to therein. The officers of the District have requested that I secure from you an opinion as to the authority of the District to divest itself of these lands, and whether or not the Governor of the state under the statutes has any authority or power in the matter."

The Muskingum Watershed Conservancy District was organized under the authority of "Conservancy Act of Ohio" (Sections 6828-1 to 6828-79,

General Code). Section 6828-2, General Code, provides that such a district may be formed "for any or all of the following purposes:

- (a) of preventing floods;
- (b) of regulating stream channels by changing, widening and deepening the same;
- (c) of reclaiming or of filling wet and overflowed lands;
- (d) of providing for irrigation where it may be needed;
- (e) of regulating the flow of streams and conserving the waters thereof;
- (f) of diverting, or in whole or in part eliminating water courses;
- (g) of providing a water supply for domestic, industrial, and public use;
- (h) of providing for the collection and disposal of sewage and other liquid wastes produced within the district."

Section 6828-3, General Code, provides for the creation of the district by filing a petition with the clerk of the common pleas court of a county containing a portion of the territory sought to be included within the proposed district, setting forth:

"Second: The necessity for the proposed work and that it will be conducive to the public health, safety, convenience or welfare."

"Fourth: Said petition shall pray for the organization of the district by the name proposed."

Section 6828-6, General Code, provides for a hearing and a determination:

"Upon the said hearing, if it shall appear that the purposes of this chapter would be subserved by the creation of a conservancy district, the court shall, after disposing of all objections as justice and equity require, by its findings, duly entered of record, adjudicate all questions of jurisdiction, declare the district organized and give it a corporate name, by which in all proceedings it shall thereafter be known, and thereupon the district shall be a political subdivision of the state of Ohio, a body corporate with all the powers of a corporation, shall have perpetual existence, with power to sue and be sued, to incur debts, liabilities and obligations; to exercise the right of eminent domain and of taxation and assessment as herein provided; to issue bonds and to do and perform all acts herein expressly authorized and all acts necessary and proper

for the carrying out of the purposes for which the district was created, and for executing the powers with which it is invested.”

Section 6828-15, General Code, provides in part as follows:

“In order to accomplish the purposes of the district, the board of directors is authorized and empowered:

\* \* \*

\* \* \*

\* \* \*

(c) To construct, acquire, operate, and maintain main and lateral ditches, sewers, canals, levees, dikes, dams, sluices, revetments, reservoirs, holding basins, floodways, wells, intakes, pipe lines, purification works, treatment and disposal works, pumping stations and siphons, and any other works and improvements deemed necessary to accomplish the purposes of the district or to construct, preserve, operate or maintain such works in or out of said district.

\* \* \*

(k) To hold, encumber, control, acquire by donation, purchase or condemnation, construct, own, lease, use and sell real and personal property, and any easement, riparian right, railroad right of way, canal, cemetery, sluice, reservoir, holding basin, mill dam, water power, wharf, or franchise in or out of said district for right of way, holding basin, location or protection of works and improvements, relocation of communities and of buildings, structures and improvements situated on lands required by the district, or for any other necessary purpose, or for obtaining or storing material to be used in constructing and maintaining said works and improvements.”

I am informed that after the district authority was, under authority of Section 6828-7, General Code, decreed by the court to be an organized conservancy district, a copy of the decree of the court was filed with the Secretary of State, defining the purposes of the Muskingum Watershed Conservancy District to be as follows:

“That the purposes for which said District is established are as follows:

Preventing floods, and conserving flood waters for beneficial uses;

Regulating stream channels by changing, widening, and deepening the same;

Reclaiming and filling wet and overflowed lands;

Providing for irrigation where it may be needed;

Regulating the flow of streams;

Diverting, or in whole or in part eliminating, water courses; and incident to such purposes and to enable their accomplishment, to straighten, widen, deepen, change, divert, or change the course

or terminus of, any natural or artificial water course; to build reservoirs, canals, levees, walls, embankments, bridges or dams; to maintain, operate and repair any of the construction herein named; and to do all other things necessary for the fulfillment of the purposes of the proposed district, such as forestation, the building of check dams and other control works to prevent soil erosion and the consequent clogging of stream channels.”

The records further show that such quasi-corporation thereafter acquired property, enabling it to carry out its corporate purposes. I am advised further that the State of Ohio has appropriated approximately \$2,000,000 to such corporation to aid it in accomplishing its purposes and has expended approximately \$4,000,000 in relocation of highways; that special assessments have been levied against the property within the district to provide funds for such purpose and bonds have been issued in anticipation of the collection of such special assessments, \$1,500,000 of which are now outstanding.

You enclose with your request a certified copy of the description of lands which the United States government seeks to acquire under authority of Public Act No. 396 of the 76th Congress, which supplements and amends Public Act No. 761 of the 75th Congress for purposes of flood control, which act contains the following language:

“That the reimbursements in connection with the Muskingum project shall include, in addition to payments to landowners, the reasonable expenses of acquiring lands, easements, or rights-of-way heretofore transferred to the United States, as well as those hereafter transferred and the reasonable expenditures made in acquiring lands or rights-of-way transferred to railroads or other utilities in connection with the relocation of such facilities other than highways. Such reimbursements shall be made from funds heretofore or hereafter appropriated and shall not exceed actual expenditures made by the Muskingum Watershed Conservancy District that are deemed reasonable by the Secretary of War and the Chief of Engineers nor include any expenditures for the relocation of highways nor any funds provided by the State of Ohio nor by any State or Federal agency other than the Muskingum Watershed Conservancy District: Provided further, That the Secretary of War is authorized to pay to said district forthwith on the passage of this Act, the sum of \$1,500,000, on verification of the fact that reimbursable expenditures in such amount have been made by the district, and on the agreement of the district, duly certified to the Secretary of War, that it will proceed immediately to convey and transfer any assets acquired through such expenditures not already conveyed, but such payment may be made prior to the actual transfer of title to lands, easements, rights-of-way, and

other property: And provided further, That the Muskingum Watershed Conservancy District is hereby relieved of any obligation to maintain and operate the dams."

In such Act 761 provision is made authorizing the Secretary of War to acquire lands for flood control projects. A portion of such provision reads:

"Notwithstanding any restrictions, limitations, or requirement of prior consent provided by any other Act, the Secretary of War is hereby authorized and directed to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project or channel improvement or channel rectification project for flood control, with funds heretofore or hereafter appropriated or made available for such projects, and States, political subdivisions thereof, or other responsible local agencies, shall be granted and reimbursed, from such funds, sums equivalent to actual expenditures deemed reasonable by the Secretary of War and the Chief of Engineers and made by them in acquiring lands, easements, and rights-of-way for any dam and reservoir project, or any channel improvement or channel rectification project for flood control heretofore or herein authorized: Provided, That no reimbursement shall be made for any indirect or speculative damages: Provided further, That lands, easements and rights-of-way shall include lands on which dams, reservoirs, channel improvements, and channel rectifications are located; lands or flowage rights in reservoirs and highway, railway, and utility relocation."

You have undoubtedly noted that such Acts do not purport to appropriate moneys for the purpose of purchasing the lands for flood control projects. They merely authorize the expenditure of the moneys for such purpose when, as and if appropriated by Congress. I have been informed that Congress has not yet appropriated sufficient moneys to pay the proposed purchase price of the lands, and improvements thereon, now owned by the Muskingum Watershed Conservancy District.

The first question which arises in the consideration of your request is whether the "Conservancy Act of Ohio" authorizes a district to convey the fee simple title to the lands acquired by such district for the purposes for which it was created to the Federal Government to be used by it for flood control purposes. It is elemental that a conservancy district, the same as any other corporation or quasi-corporation, can have and does have only those powers which have been granted to it by its charter. The charter of an Ohio corporation consists of its articles of incorporation, as a limitation upon the general statute under which it is created. The charter of the Muskingum Watershed Conservancy District consists in the Ohio Conservancy

Act, as limited by the journal entry of the Conservancy Court filed with the Secretary of State under authority of Section 6828-7, General Code, as well as with the county recorder of each county of the district.

In Section 6828-15, General Code, we find that the district is granted the power to sell real or personal property owned by it; however, such power is granted only "In order to accomplish the purposes of the district." Is the conveyance of the fee title to all of the lands by the district to the United States Government for flood control purposes the accomplishment of the *purposes* of the district? When we examine the journal entry which created the district we see that the *purposes* for which the district was created are, in addition to the prevention of floods, the conserving flood waters for beneficial uses, regulating stream channels, reclaiming wet and overflowed lands; providing irrigation, regulating the flow of streams, the diversion or elimination of streams, forestation, and prevention of soil erosion.

The court, in authorizing the district, found that it was a public necessity for the district to be created for the purposes and with the powers above described; that public safety, health, convenience and welfare would be promoted by the creation of such district.

In the "Official Plan," adopted by the district under authority of Section 6828-12, General Code, a copy of which you have enclosed, considerable language has been expended in setting forth that the adopted plan contemplates not only the prevention of floods but also the conservation of water for the prevention of droughts and other purposes (see pages 32 and 34 of Volume I), and on the advantage of combining the ideas of flood control and water conservation (pages 25, et seq., Volume 1).

In the certified copy of the journal entry creating the district, the court at least infers, if not clearly states, that, by reason of the plan so considered by the court, the answers, objections and protests which were filed in the proceedings for the creation of the district were withdrawn by the defendants. While it may have been that such court, under authority of Section 6828-6, General Code, would have decreed the creation of a district solely for the purpose of flood control, had such petition been before it; nevertheless, such court did not consider such proposition and did not so decree. The court ordered and decreed that the district should be cre-

ated for several purposes, only one of which was flood control. The effect of such finding and decree is as stated in Section 6828-6, General Code, that:

“After an order is entered establishing the district, such order shall be deemed final and binding upon the real property and public corporations within the district and shall finally and conclusively establish the regular organization of the said district against all persons except the state of Ohio upon suit commenced by the attorney general. \* \* \* The organization of said district shall not be directly or collaterally questioned in any suit, action or proceeding except as herein expressly authorized.”

If the district were to convey its entire interest in the lands which it has acquired, to the United States to be used for flood control purposes, and the Federal Government would thereupon perform, carry out and maintain thereon the plans for flood control purposes which the district has contemplated performing and maintaining thereon, then it might be urged with some degree of credence that by virtue of the agreement under which the district made the conveyance the purpose of the district with reference to flood control was being accomplished by it; however, it, by such conveyance, would render itself impotent to accomplish the other purposes for which it was created.

In Section 6828-23, General Code, authority has been granted to the district to enter into certain types of contracts and arrangements with the Federal Government. The language of such section in so far as pertinent reads:

“The board of directors shall also have the right and authority to enter into contracts or other arrangements with the United States government or any department thereof, \* \* \* for cooperation or assistance (not in violation of Article VIII of the constitution) in constructing, maintaining, using and operating the works of the district, the waters thereof, or the parks, parkways, forests, and recreational facilities thereof, or in minimizing or preventing damage to the properties, works and improvements of the district from soil erosion; or for making surveys and investigations or reports thereon; \* \* \*”

While in this section it is specifically provided that contracts may be made with the Federal Government, nevertheless such section also limits the extent and purpose of such agreements. The term “cooperation” connotes “joint operation” or “concurrent effort or labor” (see Webster’s Interna-



tional Dictionary). If such definition is correct, it could scarcely be said that a contract was one of cooperation, when the district was to agree to convey absolutely the property owned by the district to the federal government for its special use and to be exclusively managed by the Federal Government. The district would then be without purpose; it would not have the facilities with which to carry out its other purposes of water conservation, soil erosion prevention, forestation, the development of recreational facilities thereon as contemplated by its adopted plan. Its possible functions would necessarily cease except for the collection of funds through assessment and otherwise for the payment of its bonds.

As stated in 1 McQuillin, *Municipal Corporations*, 2d ed., §393, "the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others" (see also *Cincinnati v. Cook*, 107 O. S., 223; *Ampt v. Cincinnati*, 17 O. C. C., 516; *Molacek v. White*, 31 Okla., 693). It has been repeatedly held that the powers of flood control and water conservation are public powers. *Stanley v. Jeffries*, 86 Mont., 114, 70 A. L. R., 168; *Woodward v. Fruitvale Sanitary District*, 99 Cal., 554; *Strabbona Special Drainage District v. Cornwall*, 281 Ill., 551; *Tarpey v. McClure*, 190 Cal., 593; *Re Forked Deer Drainage District*, 133 Tenn., 684. From the provisions of the "Conservancy Act of Ohio," it would seem that, when the court shall have determined that public necessity and convenience require the creation of a conservancy district for accomplishment of specified purposes, the legislature has bestowed certain powers upon the board of directors to accomplish such determined public purposes. Such powers so conferred are public trusts to be performed by such officials for the benefit of the community composing the conservancy district (see 1 McQuillin, *Municipal Corporations*, 2d ed., §393; *Glover, Municipal Corporations*, pages 1, 3; *Cooley's Constitutional Limitations*, 204, 205). Such powers and duties can neither be delegated nor abandoned by them, except to the extent authorized by the General Assembly. (See cases above cited.) It is likewise a well established rule of law that when the legislature grants a power to perform an act in a specified manner, such grant of power is likewise a limitation upon the use of the power and the act may be performed in no other manner. *Bottany Worsted Mills v. United States*, 278 U. S., 282; *Anderson v. Investment Company*, 72 Fed. (2d), 768; *Frisbee Company v. Cleveland*, 98 O. S., 266. Since the legislature has specified

the manner in which a conservancy district may operate, it would appear that it could be operated in no other manner.

As I have above pointed out, by the enactment of Section 6828-23, General Code, the legislature has authorized the district to enter into an agreement with the Federal Government *for its cooperation and assistance* in the construction and operation of the district; to sell and convey property or easements therein *in order to accomplish the purposes of the district*; nevertheless, I find no language in such act which would authorize the district to convey its property to the Federal Government or to any other body or agency even though such grantee agrees to carry out one of the many purposes for which the district was created.

I do not herein rule that the conservancy district may not, under authority of Section 6828, General Code, enter into an agreement with the Federal Government pursuant to which that government might construct and maintain thereon such flood control projects as it may deem expedient for its purposes, in so long as such would not cause additional damage to property owners within the district in excess of that appraised and compensated for at the time of the creation of the district, and further in so long as such agreement did not interfere with the completion of the plan of the district as approved by the conservancy court but was in furtherance thereof. Nor do I herein rule that the district may not convey an interest in the property owned by it to the Federal Government for such purpose, providing also that the interest so conveyed does not divest the district of the property rights necessary for it to exercise and complete its purposes other than that performed by the Federal Government.

An examination of the statute, under authority of which the district acquired the lands for the purposes of the proposed improvement (Sections 6828-26 to 6828-41, both inclusive, General Code) discloses that at the time of the creation of the district an appraisalment of the benefits, which would accrue to the property owners in the district by reason of the construction of the proposed improvement *according to the plan as adopted*, was made and confirmed by the court; and that assessments were made against benefited property, on the basis of such appraisalment, for the payment of the preliminary expenses of the district, as well as for the payment of the bonds which were issued by the district. By reason of the facts as presented, I am unable to form an opinion as to whether the benefits which

would accrue to property from a flood control project would accrue to such property upon the same pro rata basis as would benefits from a water conservation project; however, it would appear that no such appraisalment has been made, nor has it been approved by the court.

The General Assembly of Ohio has appropriated and the State of Ohio has paid to such district the sum of \$2,000,000 for the purpose of enabling the district to accomplish all its purposes, not merely for the purpose of flood control alone (115 O. L., Part 2, 221). In addition, I am informed that the State Highway Department has under authority of Section 1178-2, General Code, expended approximately \$4,000,000 for the relocation of highways to enable such district to carry out its *purposes* as set forth in its official plan.

The legislature has authorized the district to issue and sell its bonds in order to enable it to acquire funds for the furtherance of its *purposes*. The district has issued its bonds for such purposes, I am informed, in the amount of \$1,500,000, which have been sold to holders for value. Under authority of law, I am informed, assessments have been made against benefited property for the payment of such bonds. Preliminary taxes have been levied, and I presume paid, under authority of Section 6828-43, General Code, for the reimbursement of preliminary expenses incurred in the creation of the district and paid from the general funds of the counties composing the district.

An examination of the statutes authorizing the creation of the district discloses that at the time of the creation of the district an appraisalment was made and approved by the court of the benefits that would accrue to the property owners of the district from the completion of the adopted plan and the damages that would be resultant therefrom. On the basis of these appraisements, the court made its decision that the district should be permitted to undertake the improvement. Section 6828-33, General Code, provides:

“If it appears to the satisfaction of the court after having heard and determined all said exceptions that the estimated cost of constructing the improvement contemplated in the official plan is less than the benefits appraised, then the court shall approve and confirm said appraisers’ report as so modified and amended, and such findings and appraisals shall be final and incontestable. In considering the appraisals made by the board of appraisers, the court shall take cognizance of the official plan and of the degree to which it is effective for the purposes of the district. In case the court shall

find that the estimated benefits appraised are less than the total costs of the execution of the official plan, exclusive of interest on deferred payments, or that the official plan is not suited to the requirements of the district, it may at its discretion return said official plan to the directors of the district with the order for them to prepare new or amended plans, or it may disorganize the district after having provided for the payment of all expenditures."

In the case of *Muskingum Watershed Conservancy District v. Clow*, 57 O. App., 132, the court held as stated in the first paragraph of the syllabus:

"When a conservancy district has been organized under the provisions of Section 6828-1 et seq., General Code, and the project has been put into effect, it is essential under the provisions of Section 6828-33, General Code, that it be determined as a matter of fact that the estimated cost of the improvement is less than the benefits appraised. If this be not found to be the fact, it would become the duty of a court either to disorganize the district, or to order a revision of the official plan. However, the term 'cost', as used in this section, means the cost to the district and does not include contributions by the federal Government, or by the state of Ohio."

In Section 6828-37, General Code, the legislature has made provision for change in the official plan of a district after it has been adopted. Such section, in so far as material to the matter under consideration, reads:

"The board of directors may at any time after the appraisal record is filed, *when necessary to fulfill the objects for which the district was created*, alter or add to the official plan, and when such alterations or additions are formally approved by the board and by the court, and are filed with the secretary, they shall become parts of the official plan for all purposes of this chapter where such alterations or additions in the judgment of the court neither materially modify the general character of the work, nor materially increase resulting damages for which the board is not able to make amicable settlement, nor increase the cost more than ten per cent., no action other than a resolution of the board of directors shall be necessary for the approval of such alterations or additions. \* \* \* After bonds have been sold, in order that their security may not be impaired, no reduction shall be made in the amount of benefits appraised against property in the district, but in lieu of such reductions in benefits, if any are made, the amount shall be paid to the party in cash."

(Emphasis mine.)

Such section also makes provision for judicial determination of injury to rights of property owners within the district and for compensation therefor. It is to be noted that such section only authorizes a change in the

official plan *when necessary to fulfill the objects for which the district was created*. I find no provision of statute which purports to authorize a district to abandon the purposes for which it was created, or to abandon any part thereof.

I am not unmindful of those provisions of Sections 6828-61 and 6828-64, General Code, which authorize the consolidation or amalgamation of conservancy districts, however, I am unable to find any provisions of statute which purports to authorize a conservancy district to liquidate by a sale of its properties and the surrender or abandonment of its rights even though it may have no bonds outstanding. It would seem that in the absence of such provision the legislature has contemplated the continued existence of the district not only for the purpose of the construction of the necessary improvements but also their maintenance.

Since the court has determined that the creation of the Muskingum Watershed Conservancy District, with the purposes expressed in its charter, was not only for the best interest of the district but that there was a public necessity that such district be created and improved; that the state has expended approximately \$6,000,000 for the accomplishment of such purposes; appraisements of benefits and damages from the completion of such plan have been judicially determined; damages have been paid to property owners based upon such appraised estimates of damage and benefit; assessments have been levied and bonds issued in contemplation of the acquisition of property and the improvement thereof according to a previously adopted plan; and there is no statute granting to such district the right to discontinue the plan and convey the property to some other entity to improve so as to partially carry out such plan, I am of the opinion that the statutes of the State of Ohio do not authorize the Muskingum Watershed Conservancy District to convey the lands acquired by it for flood control, water conservancy and other purposes to the Federal Government with an agreement that such government will complete and maintain a flood control project thereon similar to that described in the plan of the district, and thus place it beyond the power of the district to perform the purposes for which it was created.

Specifically answering your inquiries, it is my opinion that:

1. The Muskingum Watershed Conservancy District was organized under authority of the "Conservancy Act of Ohio" (Sections 6828-1 to

6828-79, General Code) for the purposes of water conservation, flood control and other purposes.

2. There is no provision in such Act authorizing such district, organized for such purposes, to convey absolutely its lands to the Federal Government, under an agreement that such government will construct and maintain thereon a flood control project and thus place it beyond the power of such district to perform and accomplish the other purposes for which it was created.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.

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