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1. DITCH, COUNTY — IN CONSTRUCTION, COUNTY GENERAL FUND CHARGED ONLY FOR BENEFITS ACCRUING TO PUBLIC OR TO ROADS OR OTHER COUNTY PROPERTY.
2. LEVELING OFF OF BANKS — IF NEW AND SEPARATE PROJECT FROM ORIGINAL WORK, WHERE STATUTORY PROCEDURE FOLLOWED, SAME PROCEDURE ANEW.

SYLLABUS:

1. *In the construction of a county ditch the county general fund may be charged only for benefits accruing to the public generally or for benefit to roads or other county property.*

2. *If the leveling off of the banks of such ditch constitutes a new and separate project from the original work done on the ditch in which the statutory procedure has previously been followed, then the statutory procedure governing such work on county ditches must be followed anew.*

Columbus, Ohio, June 30, 1941.

Hon. William L. Coleman, Prosecuting Attorney.

Marysville, Ohio.

Dear Sir:

I am in receipt of your recent communication which is as follows:

“During the summer of 1940 we had under construction and completion the dredging of a certain water course in this county. Last fall in December 1940 the project was determined by the county engineer to have been completed. Accordingly the costs were certified to the county auditor and were later drawn on the office of the county treasurer. Simultaneously with this act the county commissioners entered upon the record a statement to the effect that they would have the county engineer level off the banks along this dredging project at no added cost to the parties benefited. Since that time we have a new county engineer who now refuses to use his road machinery and equipment or any road funds for the leveling off of this embankment, unless I as prosecutor will authorize him in writing to do this.

I would appreciate knowing if there is any way this additional work can be completed and paid from the general fund without any reassessment to the parties benefited, or if it must be assessed against the properties benefited, then can this be done without a public rehearing.”

Some discussion of the statutes authorizing the building of county ditches is necessary before the precise questions you ask may be answered.

After definitions of terms in Section 6442, General Code, the county commissioners are authorized by Section 6443, General Code, upon application by a land owner, 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, * * * .”

A detailed course of procedure is outlined by succeeding sections of the General Code, which must be followed when any of the things above quoted are undertaken and which require, among other things, a petition to be filed by a land owner seeking the improvement (Section 6444), together with a bond to secure costs if the petition be denied (Section 6446), a notice to the board of county commissioners who are required

to fix a date for a preliminary hearing of the question and a view of the lands affected, and a notice to all land owners interested (Section 6447). In addition, Section 6448 allows land owners interested to join with the petitioner in seeking the improvement or to remonstrate against the improvement.

Before the petition for a county ditch may be granted it is necessary that the board of county commissioners find that the proposed improvement will be conducive to the public welfare and that the benefits to be derived from the improvement will exceed the cost thereof (Sections 6451 and 6452, General Code).

The duties of the county engineer in connection with the plans for and the construction of a county ditch are set out in detail in Section 6454, General Code, which, among other things, charges the county engineer with the duty of surveying and locating the course of the ditch, making estimates of costs and working specifications. That section also provides as follows:

“ * * * He shall also prepare a schedule containing the name of each owner of land, with a description of the land believed by him to be benefited by the proposed improvement, which names of land owners and descriptions of land believed to be benefited shall be taken from the tax duplicates of the county; and the surveyor shall enter in said schedule the proximate number of acres benefited by the proposed improvement, and the amount that said land, in his opinion, ought to be assessed, * * * .”

Section 6455, General Code, further governs the making of assessments on benefited lands and is as follows:

“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.”

A final hearing by the board of county commissioners is provided by Sections 6462 and 6463, General Code, where it is restated that the commissioners must find the cost of the improvement to be less than the benefits to be derived from the improvement. Those sections also require

the commissioners, after hearing, to pass upon the assessments made by the county engineer and confirm or amend them. The latter section in addition contains the following language:

“ * * * 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. * * * ”

From the foregoing review of the provisions of law touching the building of a county ditch, the following things become obvious: (1) the cost of the improvement must be less than the benefit to be derived; (2) such cost must be borne by the benefited lands in proportion to the benefits derived; (3) the cost to the county, like others affected, is only for the benefit to the county through the enhancement of the public welfare or direct benefit to roads or other property.

Your first question then becomes one of fact and it may, therefore, be answered thusly. If the leveling off of the banks of a newly constructed county ditch is of value to the county because it either benefits the public generally or county property, the cost of such work may be assessed against the county and paid from the general fund of the county. It, of course, follows that if the facts indicate to the contrary, then the cost of leveling the banks of the ditch must be borne by the owners of the land which is benefited.

The above conclusion is the only result possible under the rule that expenditures of public funds must be directly authorized by law and the corollary to that rule that in case of doubt as to the propriety of the expenditure of public funds, the doubt must be resolved against such expenditure. The rule is stated in 32 O. Jur., page 734, as follows:

“Public funds can be disbursed only by clear authority of law and upon compliance with statutory provisions relating thereto. And in case of doubt as to the right of any administrative board to expend public monies under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power.”

You next ask if the cost of the work contemplated can be assessed against the benefited property without a public rehearing.

As previously noted herein, the law governing the construction of county ditches provides a detailed course of procedure for the construction of such ditches, with opportunities for hearing of those affected thereby at each step and with opportunities for those affected to make objection to the improvement. If the work of leveling the banks of the ditch is in fact a part of the original project undertaken and was considered by the county engineer to be a part of the construction, and if the estimates of cost of such work and assessments arrived at included such work, and if the hearings had in conformity with the statute included a consideration of such work, I see no need or any provision in the law for a new hearing on the matter before the costs are actually assessed against the benefited property. If such be true, it is possible to say that hearing has already been had and all parties heard and all rights fixed. If, however, the work contemplated is a new undertaking amounting to an improvement of a ditch, the contrary would be true and the statutory steps would, of necessity, have to be followed so that all affected persons might be heard and their rights considered and protected.

In accordance with the above, you are advised and it is my opinion that: (1) In the construction of a county ditch the county general fund may be charged only for benefits accruing to the public generally or for benefit to roads or other county property. (2) If the leveling off of the banks of such ditch constitutes a new and separate project from the original work done on the ditch in which the statutory procedure has previously been followed, then the statutory procedure governing such work on county ditches must be followed anew.

Respectfully,

THOMAS J. HERBERT,

Attorney General.