

OPINION NO. 85-084**Syllabus:**

R.C. 727.33 requires the county auditor to place on the general tax list any unpaid certified municipal assessment levied under R.C. 727.25, regardless of whether the county auditor believes the assessment to be invalid or legally insufficient.

To: Richard G. Ward, Ross County Prosecuting Attorney, Chillicothe, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 26, 1985

I have before me your request for my opinion concerning the duties of the county auditor with respect to the placement of certified municipal special assessments upon the general tax list of real property in the county. I understand that the municipality in question is not chartered and that the special assessments were enacted pursuant to the provisions of R.C. Chapter 727.

Prefatory to addressing the duties of the county auditor, I must set forth the scheme for the levy and collection of assessments pursuant to R.C. Chapter 727. Medeiros v. Guardian Title & Guaranty Agency, Inc., 57 Ohio App. 2d 257, 260, 387 N.E.2d 644, 646-47 (Cuyahoga County 1978) contains a succinct discussion of R.C. Chapter 727. The court in Medeiros stated as follows:

When the municipality determines it is necessary to make a public improvement to be paid for by special assessment, plans, specifications, and profiles of the proposed improvement and an estimate of its cost must be filed with the clerk of the legislative authority of the municipal corporation. R.C. 727.12. The municipality may then pass a resolution declaring the necessity for the improvement.... Notice of the passage of the resolution of necessity must be sent to owners of the lots to be assessed. R.C. 727.13. Such owners are given an opportunity to file objections (R.C. 727.15-17) and damage claims (R.C. 727.18-22).

The next step for the municipality, set forth in R.C. 727.23, is to pass an ordinance stating its intention to proceed with the improvement in accordance with the provisions of the resolution of necessity. The ordinance shall also adopt the estimated assessment prepared in accordance with the resolution of necessity, or if objections have been filed, adopt the estimated assessment approved by the legislative authority.

After the actual costs of the improvement have been determined, R.C. 727.25 provides that:

[T]he legislative authority of the municipal corporation shall by ordinance assess, in the manner provided in the resolution of necessity adopted under [R.C. 727.12], upon the lots and lands enumerated in the estimated assessment adopted under [R.C. 727.23], that portion of the total cost of the improvement to be paid for by special assessments....Such assessments shall be payable as

provided in the resolution of necessity adopted under [R.C. 727.12], and shall be final upon the adoption of the ordinance provided for in this section....

Thus, an assessment becomes final upon the passage of the ordinance of assessment and, at that same time, becomes a lien upon the assessed land. R.C. 727.27. The lien of an assessment continues for two years, unless, before the expiration of that time, the assessment is certified to the county auditor for entry upon the tax lists for collection or an action to enforce the lien is properly commenced in court. R.C. 727.34. A special assessment may be certified to the county auditor, as described in R.C. 727.34, pursuant to R.C. 727.30 or R.C. 727.33.

In the situation you pose, the city of Chillicothe has certified to the county auditor an assessment ordinance for unpaid assessments from eight separate projects dating from 1966 through 1975. The auditor has not placed the unpaid assessments on the tax lists because he doubts the validity of the assessments. Your question then, is whether the county auditor may exercise discretion and refuse to place municipal special assessments on the tax lists when the assessments have been certified to the county auditor pursuant to R.C. 727.33.

The county auditor is a creature of statute and may exercise only such powers as are expressly granted by statute or necessarily implied therefrom. State ex rel. Kuntz v. Zangerle, 130 Ohio St. 84, 197 N.E. 112 (1935). Thus, the placement of certified assessments on the tax lists will be a matter of discretion for the county auditor only if such discretion may be found in an express or implied grant of statutory authority.

R.C. 319.28 provides that, "[o]n or before the first Monday of August, annually, the county auditor shall compile and make up a general tax list of real and public utility property in the county...." R.C. 319.28 also provides that the general tax list must be prepared in duplicate. Concerning the auditor's duty under R.C. 319.28, one of my predecessors concluded in 1969 Op. Att'y Gen. No. 69-139 at 2-299, "[t]he responsibility of the auditor with respect to real property is to compile and make up a general tax list and general duplicate of real and public utility property. Section 319.28, Revised Code. For this he need only be able to identify the tract involved and its owner." The county auditor has no discretion with respect to the method of compiling the county-wide tax list. See 1966 Op. Att'y Gen. No. 66-052 (syllabus, paragraph three).

The auditor's placement of municipal assessments upon the tax lists of the county is governed by either R.C. 727.30 or R.C. 727.33. When bonds or notes are issued by a municipal corporation in anticipation of the collection of special assessments, R.C. 727.30 provides that "the clerk of the legislative authority, on or before the second Monday in September of each year, shall certify the assessment to the county auditor, stating the amounts and time of payment. The auditor shall place the assessment upon the tax list in accordance therewith." In this instance, however, you have indicated that the municipal special assessments were certified to the county auditor pursuant to R.C. 727.33, which provides in part:

The legislative authority of a municipal corporation may order the clerk of the legislative authority or any other proper officer of the municipal corporation to certify any unpaid assessment levied under section 727.25 of the Revised Code to the county auditor, and the amount so certified shall be placed upon the tax list by the auditor, and shall, with a ten percent penalty to cover interest and cost of collection, be collected with and in the same manner as state and county taxes and credited to the municipal corporation. (Emphasis added.)

The word "shall" is generally construed to make a provision in which it is contained mandatory, unless there is unequivocal evidence of legislative intent that it is to be construed as permissive or discretionary. Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971). There is no indication in R.C. 727.33 that the term "shall" is to be interpreted as discretionary. Thus, R.C. 727.33 imposes a mandatory duty upon the county auditor to place upon the tax list the amount of any unpaid assessment levied under R.C. 727.25 when certified to the county auditor. Additionally, the failure of a county auditor to place certified assessments on the tax list may result in the auditor being compelled to perform his duty by means of a writ of mandamus. State ex rel. City of South Euclid v. Zangerle, 145 Ohio St. 433, 62 N.E.2d 160 (1945).

You state that, in the situation you pose, the auditor has failed to place the assessments certified to him under R.C. 727.33 on the tax list due to his doubts as to the validity of such assessments. In 1948 Op. Att'y Gen. No. 3718, p. 432, 437, one of my predecessors concluded that the assertion that an assessment was "properly made and levied" was not of "particular significance" to the determination of the duties of the county auditor with respect to the placement of that assessment on the tax list, where the assessment had been certified to the auditor for placement on the tax list. This conclusion arises from the fact that an assessment will be held valid until the contrary is demonstrated in an appropriate judicial action.¹ Bolton v. City of Cleveland, 35 Ohio St. 319 (1880). Because the validity of these assessments is not significant for purposes of the duty of the auditor to place the unpaid certified assessments on the tax list, the duty of the auditor in this situation, is ministerial, as well as mandatory in nature. See generally 1985 Op. Att'y Gen. No. 85-008 at 2-32 (a ministerial duty is one that "requires a mere physical act, or which does not require judgment and discretion in its performance").

Therefore, I am of the opinion that R.C. 727.33 requires the county auditor to place the assessments on the general tax

¹ R.C. Chapter 2723 governs actions to enjoin the illegal levy or collection of taxes and assessments. Jurisdiction is vested in courts of common pleas, R.C. 2723.01, and the action to enjoin collection of the taxes and assessments must be brought against the officer whose duty it is to collect the taxes and assessments, R.C. 2723.03. In such an action, the burden of proving that the assessment is invalid will be placed on the party seeking the injunction. Bolton v. City of Cleveland, 35 Ohio St. 319 (1880).

list for collection in the same manner as other taxes. R.C. 727.33 makes the performance of this ministerial duty mandatory irrespective of any doubts which the auditor might entertain as to the legal sufficiency or validity of the certified assessments.² Cf. 1980 Op. Att'y Gen. No. 80-029 at 2-119 (concluding that R.C. 319.20 which states that "the county auditor shall transfer any land...from the name in which it stands into the name of the owner," imposes upon the county auditor a mandatory duty and that "the auditor has no authority to pass upon the validity or legal sufficiency of instruments purporting to transfer an interest in real estate, provided that there is no question about the location of the real estate to be conveyed"); 1966 Op. Att'y Gen. No. 66-090 (R.C. 6117.02, providing that unpaid sewer charges shall be certified to the county auditor "who shall place them upon the real property tax list and duplicate," imposes upon the auditor merely a ministerial duty to place unpaid sewer charges on the tax list); 1956 Op. Att'y Gen. No. 6400, p. 275 (concluding that, with regard to an instrument which purports to convey an interest in real property, the county recorder is a ministerial officer without authority to determine the legal sufficiency of such a document).

It is, therefore, my opinion, and you are hereby advised, that R.C. 727.33 requires the county auditor to place on the general tax list any unpaid certified municipal assessment levied under R.C. 727.25, regardless of whether the county auditor believes the assessment to be invalid or legally insufficient.

² I note that R.C. 319.35 permits the county auditor to correct clerical errors by providing as follows:

From time to time the county auditor shall correct all clerical errors which he discovers in the tax lists and duplicates in the name of the person charged with taxes or assessments, the description of lands or other property, the valuation or assessment of property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment, and shall correct the valuations or assessments on the tax lists and duplicates agreeably to amended, supplementary, or final assessment certificates.

As was stated in 1983 Op. Att'y Gen. No. 83-045 at 2-176 "[t]he term 'clerical error' is not susceptible of precise definition, but has been characterized generally as a bookkeeping matter, rather than an error in the auditor's judgment or discretion involving a question of law. 1966 Op. Att'y Gen. No. 66-090; 1960 Op. Att'y Gen. No. 1876, p. 718." Thus, should the municipal special assessments as certified to the county auditor contain clerical errors of the type specified in R.C. 319.35, the auditor has the authority to correct such errors after placement on the tax list.