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COUNTY COMMISSIONERS—DITCH ASSESSMENTS—FEES—ALLOWED BY FORMER SECTION 6502 G. C.—SERVICES—IMPROVEMENT MADE UNDER PROVISIONS CHAPTER I, TITLE III, PART SECOND, GENERAL CODE—COMMISSIONERS ENTITLED TO FEES ONLY WHEN PROVISION MADE IN SPECIAL ASSESSMENT FOR SUCH IMPROVEMENT OF AN AMOUNT SUFFICIENT TO INCLUDE AND COVER SUCH COMPENSATION.

SYLLABUS:

County commissioners are entitled to the fees allowed by former Section 6502 General Code, for services in connection with an improvement made under the provisions of Chapter I, Title III, Part Second of the General Code, only when provision has been made in the special assessment for such improvement of an amount sufficient to include and cover such compensation.

Columbus, Ohio, October 6, 1945

Hon. Richard E. Hole, Prosecuting Attorney
Greenville, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“Since the release of your Opinion No. 387, rendered August 4, 1945, a question has arisen in this County concerning payment of the fees earned by a commissioner under the provisions of Section 6502, which was repealed effective September 3, 1945.

As was the practice throughout the State, no fees were figured in ditch assessments from and after the last mentioned date, and consequently there is no money available for the payment of said fees provided in said Section 6502 unless the same can be paid from funds other than those arising from ditch assessments on the particular ditches in question.

As this question has arisen in all of the surrounding counties, I would appreciate your rendering a formal Opinion as to whether or not a commissioner can legally be paid fees earned under Section 6502 of the General Code, when such fees have not been figured in the costs of construction and have not been taken

into consideration when the assessments were levied and collected.”

Section 6502, General Code, prior to its repeal by the 95th General Assembly, read as follows:

“In addition to the salary otherwise provided by law for county commissioners, each commissioner shall receive, for performing all duties required of him in this chapter, five dollars per day for each day actually engaged in work on an improvement as defined in this chapter, but not to exceed one hundred days in any one year, and not to exceed four days on any one improvement, and said compensation shall be charged as costs in the location and construction of the improvement and paid in the first instance out of the general ditch improvement fund of the county.”

It will be noted that the compensation provided for a county commissioner for duties “required of him in this chapter” was to be paid in the first instance out of the general ditch improvement fund of the county, but that such compensation was to be charged as costs in the location and construction of the improvement. The chapter referred to is Chapter 1, Title III, Part Second of the General Code, and by the provisions of that chapter the costs of drainage ditches are to be assessed upon the benefited property. The supervision of the improvement and the levying of the assessment are part of the duties of the county commissioner.

The general ditch improvement fund referred to in Section 6502 supra, is defined by Section 6492, General Code, which reads as follows:

“The commissioners of each county shall provide and establish a fund, to be known as the general ditch improvement fund, which shall be used as a sinking fund for all bonds issued under the provisions of this chapter. Said fund shall consist of all funds in any ditch fund at the time this act takes effect, that are not then specifically appropriated, of any taxes then or thereafter levied and collected for ditch and drainage purposes under county levies, not by law otherwise disposed of, the proceeds of all bonds issued and sold under this chapter, the collections from all special assessments for benefits to property, as provided in this chapter, and such other funds as by law are or may be provided to be paid therein.”

The general ditch improvement fund referred to in the section last quoted has now been abolished and has become by virtue of Section

5625-1 et seq. General Code, known as the uniform tax levy law, one of the subdivisions of the general fund of the county. See 1928 Opinions Attorney General, page 2691. Section 5625-9, General Code, sets out the funds which are to be established by each subdivision, including among others the general fund, and Section 5625-10 General Code, provides in part as follows:

“All revenue derived from the general levy for current expense within the ten mill limitation; from any general levy for current expense authorized by vote outside of the ten mill limitation; and from sources other than the general property tax, unless the law prescribes its use for a particular purpose, shall be paid into the general fund. * * *.”

My opinion No. 387, rendered August 4, 1945, to which you refer, held in effect, that the repeal of said Section 6502, General Code, did not deprive a county commissioner who was in office prior to such repeal, of his fees earned during his existing term, pursuant to that statute.

If, therefore, in the case you present, the county commissioners in pursuance of their duty have included in the assessments the amount of the compensation to which they were entitled under Section 6502, General Code, the general fund of the county will have been enriched to the extent of such compensation and the county commissioners would therefore have a right to draw their compensation from the fund.

If, on the contrary such fees were not taken care of in estimating and fixing the assessment, then it appears to me that the county commissioners would be unable to allow and pay themselves such compensation out of that fund. The right to receive these fees seems to me to be coupled with the duty to provide funds for their payment in the manner prescribed by the law, and the mere fact that this compensation was to be paid in the first instance from the general ditch improvement fund created from a variety of sources, did not confer upon the county commissioners the right to draw their compensation from that fund and ignore the provisions of the law for replenishing it. The very use of the words “in the first instance” implies that that fund was to be merely the temporary source for payment of a cost which must ultimately be paid by assessments collected from the owners of the benefited property.

In Section 3909, General Code, relating to municipal assessments, there is a provision authorizing an additional pro rata assessment when the

original assessment is insufficient to cover all costs and expense of an improvement but I find no similar provision relating to assessments by the county commissioners in the matters here under consideration.

Accordingly, in specific answer to your inquiry it is my opinion that county commissioners are entitled to the fees allowed by former Section 6502, General Code, for services in connection with an improvement made under the provisions of Chapter 1, Title III, Part Second of the General Code, only when provision has been made in the special assessment for such improvement of an amount sufficient to include and cover such compensation.

Respectfully,

HUGH S. JENKINS

Attorney General.