

abutting property to pay a part of the cost of a State highway and has issued bonds in anticipation of the collection of such assessments, such board of county commissioners has no authority to cancel and set aside such assessments."

This last cited opinion was discussed in Opinion No. 2118 rendered July 21, 1930, wherein it is said, after quoting the foregoing syllabus:

"Although in that particular case bonds had been issued in anticipation of the collection of assessments sought to be cancelled, the following language is used in the opinion:

'An answer to your inquiry must, in my view, be primarily predicated upon the fact that there are no provisions in the General Code whereby a board of county commissioners are authorized to cancel and set aside special assessments which have been previously levied.'

I am of the view that since the law contains no authority for the cancellation by the commissioners of assessments previously levied and for the return to the parties assessed of a part of such assessments already collected, such authority does not exist."

There is, in the case of municipalities, a similar lack of authority for the cancellation of assessments.

The question which you present amounts to one of whether or not a municipality may do indirectly what it may not do directly, thus invoking the maximi *quando aliquid prohibetur ex directo, prohibetur et per obliquum*. Although the fund from which the bonds are paid may not be impaired or tampered with and although assessments may not be waived or refunded, you inquire as to whether or not the same ends may be accomplished by presenting the parties to be assessed with money with which to pay their assessments, if not in whole, at least in part. In addition to the equitable principle raised by such a proposal, there is clearly no statutory authority for such distribution of public funds, not to mention the constitutional question involved of applying money received by taxation for a purpose other than that for which it was levied, and therefore your inquiry must necessarily be answered in the negative.

Specifically answering your question, it is my opinion that the legislative authority of a municipality may not, out of any funds available for street improvement, make payments of money to property owners who have paid assessments for street improvements, regardless of whether or not such payments are made out of the particular assessment fund to which such property owners have made payments or out of some other street improvement fund.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

2894.

SPECIAL ASSESSMENTS—COLLECTION THEREOF—MUNICIPALITY MAY NOT EXTEND COLLECTION TO A PERIOD GREATER THAN SET FORTH IN ORIGINAL LEGISLATION.

## SYLLABUS:

*When a municipality has issued notes in anticipation of the collection of special assessments for street improvements levied to be paid in ten annual installments, such assessments may not be rescinded and re-levied to be paid in fifteen annual installments.*

COLUMBUS, OHIO, January 31, 1931.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This is to acknowledge the request for my opinion on several questions presented to one of your examiners by the clerk of the Village of S. The clerk's inquiry reads in part as follows:

"On June 1st, 1929, this Village sold one year improvement notes in anticipation of a bond issue and the collection of special assessments, for the following improvements in Solon Allotment Company's Subdivision Nos. 1 and 2:

(7 street improvements, paving, sewer, sidewalks and water—estimated cost \$350,000.)

These notes were renewed on June 1st, 1930, for six months for the same amounts. The improvements were completed in October of this year at an actual cost as follows:

(Actual cost, including interest on the notes, \$377,795.58.)

On December 1st, 1930, the notes were again renewed for six months more for the following amount; after deducting assessments collected first half 1929 and depository interest: \$344,530.46.

Special assessments based on ten year maturities were certified to the County Auditor for collection with taxes in 1929 and 1930. A large part of the first half of 1929 have been collected and applied against the notes issued December 1st, 1930, as previously stated. A small part of the last half of 1929 have been paid and are now in the Village Treasury. 1930 assessments will not be payable until December, 1930 and June, 1931. The taxpayers contend that they cannot pay these assessments due to business conditions in general and small demand at the present time for real estate.

In order to relieve the situation, it is proposed:

- 1st. To rescind assessment legislation and abate unpaid assessments.
- 2nd. Pass legislation to levy assessments on a cost basis over a period of 15 years, 1931 to 1945.
- 3rd. Solon Allotment Co. to sell preferred stock to the amount of \$100,000.00, \$45,000.00 of which is to be deposited in a special fund under control of the Village which amount it is estimated is sufficient to pay 1931 and 1932 installment of assessments and interest; surety bonds for \$35,000 which the Village holds for the payment of 1929 assessments to be released when the fund has been established. The balance of \$55,000.00 realized from stock sales to be used for a building program.

4th. To pass bond legislation to retire the present notes on a fifteen year basis capitalizing interest due June 1st, 1931 and interest payable prior to collection of assessments; first bond to mature on December 1st, 1932.

1. Is this plan, in your opinion, legal, considering the note and assessment legislation, based on ten year maturity, already passed?

It will be noted that unless there is some way by which assessments already collected and applied against the note issue, may be credited against

the re-assessments proposed to be made beginning with 1931, discrimination will result, as some of the lots owned by individuals are still delinquent.

2. If the proposed plan is illegal, what litigation could possibly result in case the Council sees fit to adopt it in order to relieve the financial difficulties of the Allotment Co.

3. Which, if any, of the Village officials could be held liable, and for what, and by whom?

4. The part the undersigned will be called upon to play in carrying out the proposed plan will be in abating the unpaid assessments, refunding those paid and now held in the Treasury, and in executing the bond issue. Would the Clerk be within his rights in refusing to carry out that part of the program from the standpoint that the proposed plan is illegal?

5. In view of the statutes providing the manner in which special assessments are to be collected, is the establishment of a trust fund as referred to in the third proposition mentioned above to be considered a lawful purpose within the meaning of Sec. 5625-9, G. C. and does it have the approval of the Bureau as per Sec. 5625-11, G. C.?"

I shall consider first the proposed plan set forth in your letter.

1. Assessments collected may not be refunded and unpaid assessments previously levied may not be cancelled or abated. Opinion No. 2893, rendered to your Bureau January 31, 1931.

2. Since the assessments in question have already been levied and since they may not be cancelled, there is no occasion to relevy such assessments, nor is there authority to reassess for these improvements, there being no showing that the special assessments heretofore levied are invalid and no adjudication of illegality by a court of competent jurisdiction. Section 3902, General Code, authorizes council to order a reassessment only in the case of invalidity of assessments previously levied.

3. I do not deem it necessary to take up in detail the proceedings suggested in the third proposal contained in the clerk's letter. These involve a proposed method of financing of the owners of the lots assessed. It is a matter of no concern to the municipal authorities what method a property owner may wish to pursue to raise funds to pay his assessments. It must be remembered that a taxing authority in the collection of assessments must look primarily to the property assessed rather than to the person owning that property. Section 3892, General Code, provides how special assessments shall be collected. This section is as follows:

"When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner and at the same time as other taxes are collected, and when collected, pay such assessment, together with interest and penalty, if any, to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes. Each installment of such assessments, remaining unpaid after becoming due and collectable, shall be delinquent and bear the same penalty as delinquent taxes. The city solicitor or the regular and authorized legal representative of any such municipality is hereby authorized and directed

to act as attorney for the county treasurer in actions brought under authority of section twenty-six hundred and sixty-seven of the General Code for the enforcement of the lien of such delinquent assessments."

In the event the owners of the lots in question are unable to pay the assessments the remedy is obviously in foreclosure.

4. I am advised that the assessments in question have been levied to be paid in ten annual installments. There is obviously no authority, therefore, to issue bonds in anticipation of the collection of these assessments extending over a greater period of time. Denison in his Manual on Ohio Bonds, in speaking of the maturities of special assessment bonds issued by municipalities, says at p. 145:

"It should be noted that the first maturity of the bonds is governed by the date of the passage of such ordinance and not by the fiscal year in which the assessments will be available and the last maturity is controlled by the fiscal year in which the last assessments will be available and the certificate of the fiscal officer."

Coming now to the five specific questions asked, the first of these has already been answered. The proposed plan in my opinion is illegal.

Under the circumstances, I do not consider it proper for me to render an official opinion upon the question of possible litigation which could result in the event council were to take the illegal steps suggested nor as to what personal liability may result from such procedure. I may say, however, that the clerk should, of course, refuse to take any steps in furtherance of illegal legislation.

The fifth question which the clerk submits must also be answered in the negative. It is sufficient to say that the Budget Law does not authorize the establishment of a trust fund for the payment of obligations incurred in anticipation of the collection of special assessments.

Attention is directed to the provisions of Section 2293-5, General Code, which section provides that, with the approval of the Tax Commission, council of a municipality may refund serial bonds issued in anticipation of the collection of special assessments which are about to mature when for any reason, and to the extent such collection cannot be made. Such refunding bonds may mature over a period of fifteen years after their date of issuance, providing they are not issued subsequent to January 1, 1935. This section may afford some relief providing bonds are issued to retire the notes which are now outstanding. The question of whether or not mandamus will lie to compel council to issue bonds under such circumstances as are here under consideration, is now before the Supreme Court of Ohio and, accordingly, no opinion is expressed thereon.

It is believed that more specific answers to your numerous questions may not be given.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*