

"The trustees of a church organization, religious or charitable society or association, or such organization, religious or charitable society or association itself, if incorporated, and all persons holding title to property in trust therefor, may upon a two-thirds vote of the members of the organization connected therewith present and voting at a meeting duly called and held for that purpose, lease, transfer, convey or incumber it to other trustees of the same denomination or to the trustees of such organization, society or association itself of the same denomination if incorporated under the law of this state. But the lease, transfer, conveyance or incumbrance shall be made only when the property so transferred, leased or incumbered, or the proceeds thereof, or the revenue arising from the use thereof, is still to be used for the religious, missionary or church purposes of said denominations, or, if a charitable organization, for the specified charitable purpose."

This section authorizes the encumbrance of the property of an incorporated church by a two-thirds vote of the members, without court order, where the encumbrance is made to an organized society or association of the same denomination and the proceeds of the encumbrance are to be used for the same character or purpose.

Specifically answering your inquiry I am of the opinion that a church or religious society or association incorporated under the provisions of Sections 8623-98 et seq., General Code (the new general corporation act) is required to obtain court authority in order to mortgage its property in the manner provided by Section 10051, General Code.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2157.

COUNTY COMMISSIONERS—WITHOUT AUTHORITY TO EXPEND  
PUBLIC MONEY TO DREDGE A RIVER IN AID OF NAVIGATION.

*SYLLABUS:*

*A board of county commissioners is without authority to expend public moneys to dredge a river in aid of navigation.*

COLUMBUS, OHIO, May 24, 1928.

HON. D. A. BAIRD, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—This will acknowledge your letter dated May 18, 1928, which reads:

"Black River is a navigable stream flowing through the City of Lorain and emptying into Lake Erie. Boats on the Great Lakes navigate this stream for a distance of about four or five miles, within the limits of the city. Each year silt deposits form in the channel of the river, making it impossible for the boats to navigate the stream unless it is dredged or cleaned out, and the City of Lorain has been doing this in the past and it is more or less expensive.

The City of Lorain has asked the County Commissioners to contribute to the expense of dredging the river. The Commissioners are willing to cooperate with the city and pay part of the expense, if it can be legally done and we would like to inquire whether or not they have any authority to appropriate money for this purpose."

Section 3812, General Code, in so far as pertinent, provides:

"Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation \* \* \* any part of the cost and expense connected with or made for \* \* \* narrowing, widening, dredging, deepening or improving any stream or watercourse \* \* \* or making any other improvement of any river front or lake front (whether such river front or lake front be privately or publicly owned), which the council may declare conducive to the public health, convenience or welfare, by any of the following methods. \* \* \*"

With reference to the above section, in the case of *Kasch vs. City of Akron*, 100 O. S. 229, Judge Donahue speaking for the Court said as follows (page 235):

"Section 3812, General Code, as amended 107 Ohio Laws, 629, vests in municipal corporations power to levy and collect special assessments for any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or watercourse, which the council may declare to be conducive to the public health, convenience or welfare.

A like condition to the exercise of this power is found in Section 6443, General Code, authorizing the board of county commissioners to locate, construct, straighten, widen, alter, deepen, box, or tile, a ditch, drain, or watercourse, and the subject is deemed of such importance that it is further provided in Section 6469, General Code, that an appeal may be taken from the final order or judgment of the county commissioners finding that such improvement will be conducive to the public health, convenience, or welfare."

Section 6443, General Code, referred to in the quotation above was part of an act passed April 3, 1923 (110 v. 161), entitled:

"An Act—To codify the drainage laws of Ohio \* \* \*,"

and reads as follows:

"The board of county commissioners, at a regular or called session, upon the filing of a petition as provided in this chapter (G. C. Sections 6442 to 6508) by any owner of any land, when the commissioners find that the granting of the petition and the construction of the improvement is necessary to drain any land, or to prevent the overflow of any land in the county, and further find that the construction of the improvement will be conducive to the public welfare, and further find that the cost of the proposed improvement will be less than the benefits conferred by the construction of the proposed improvement, may cause to be located, constructed, reconstructed, straightened, deepened, widened, boxed, tiled, filled, walled, 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, by proceedings as provided in chapters 1 and 2 of title III of the General Code of Ohio."

You will note that the authority granted by the terms of Section 6443, *supra*, extends to those improvements *only* wherein the board of county commissioners find that the granting of the petition and the construction of the improvement is necessary

to drain any land or to prevent the overflow of any land in the county and further find that the construction of the improvement will be conducive to the public welfare and that the cost of the proposed improvement will be less than the benefits conferred by the construction of the proposed improvement.

Your attention is further directed to Section 6729, General Code, which originally was part of an act passed March 21, 1874 (71 v. 36) entitled:

“An Act—To authorize commissioners, for the protection of bridges and highways, to remove timber and drift from rivers and watercourses.”

and which reads:

“the board of county commissioners may cause to be removed, from a river, watercourse or creek, within the county, drift, timber, piling or other obstruction placed or allowed to remain therein by a person, company or corporation, which obstructs to any extent, the free flow of the water, or endangers a county or township road, or free turnpike, after giving thirty days' notice to such person, company or corporation, or an agent thereof, to remove the obstruction within said time.”

Your attention is further directed to Section 2428, General Code, which originally was part of an act passed March 20, 1875 (72 v. 64), entitled:

“An Act—To authorize Commissioners, for Protection of Highways, to straighten and clean out Creeks and Watercourses.”

and which reads as follows:

“The commissioners may cause a river, creek or watercourse to be straightened or cleaned out for the protection of any bridge or road within their control.”

Obviously neither of these sections is applicable to the question which you present.

As stated in the case of *Elder vs. Smith*, 103 O. S. 369, at page 370,

“It has long been settled in this state that the board of county commissioners has such powers and jurisdiction, and only such, as are conferred by statute.”

The rule that statutory boards, being creatures of statute, can exercise only such powers as are expressly granted by statute and such as are necessarily implied to carry the powers expressly granted into effect, is especially applicable with reference to the county's financial affairs. Such boards represent the county in respect to its financial affairs only so far as authority is given to them by statute. Public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, which can only be disbursed by clear authority of law. To this effect see *State, ex rel. Smith vs. Maharry*, 97 O. S. 272. As stated in the third paragraph of the syllabus in the case of *State ex rel. vs. Pierce*, 96 O. S. 44:

“In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power.”

A board of county commissioners is without authority to appropriate public funds in order to contribute to the expense of dredging a river as an aid to navigation in such river. Your question must, therefore, be answered in the negative.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2158.

CUSTODIANS PENSION FUND—DUTY OF BOARD OF EDUCATION TO APPROPRIATE THEREFOR.

SYLLABUS:

*Where a board of education has established a Custodians' Pension Fund, it is required to appropriate for the uses of such fund a sum equal to not less than one-tenth, nor more than one-fifth of one per cent of the amount levied and collected by said board for all purposes. This does not include levies made under authority of a vote of the people, but does include levies for interest and retirement charges of funds issued by such board without a vote of the people.*

COLUMBUS, OHIO, May 24, 1928.

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

GENTLEMEN:—This is to acknowledge your recent communication which reads as follows:

“You are respectfully requested to render this department your written opinion upon the following, certain additional questions having arisen, growing out of the opinion rendered by you to this department under date of March 9, 1928, and being Opinion No. 1829, relative to the assessment of custodians' pension funds. The additional questions appear to be as follows:

Question 1: When a board of education has issued bonds without a vote of the people are the funds levied for the payment of the interest and the retirement of such bonds, subject to the assessment for custodians' pension funds, as provided in Section 7882 of the General Code?

Question 2: When an additional levy of three mills has been voted by the people of the district, are the proceeds of such levy subject to an assessment for the custodians' pension funds?

Question 3: When an additional levy is made for recreational purposes by vote of the people, are the proceeds of such levy subject to assessment for the custodians' pension fund?

We are enclosing herewith a copy of a letter, addressed to the Director of Law, by the clerk of the Board of Education of the Lakewood City School District, in connection with the questions submitted.”

The letter which you enclosed contains the following:

“On page 8 of the opinion appears the following:

‘It seems to me that the language, levied and collected by said School Board for all purposes, refers only to the levies authorized by law to be made