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SEWER DISTRICT—WHERE NO DUTY FOR COUNTY OFFICERS TO PLACE SPECIAL ASSESSMENTS AGAINST INTERESTS OF LESSEES IN STATE LANDS, SUCH DUTY CAN NOT BE IMPOSED UPON OFFICERS BY A PROVISION IN THE LEASE

SYLLABUS:

Where there is no duty for county officers to place special assessments against interests of lessees in state lands, such duty cannot be imposed upon such officers by a provision in the lease.

Columbus, Ohio, April 12, 1950

Hon. James R. Goslee, Prosecuting Attorney
Logan County, Bellefontaine, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"In compliance with and pursuant to the provisions of Ohio General Code Section 6602-2 et seq. proceedings have been instituted by the Logan County Commissioners to establish a sanitary sewer district embracing the village of Lakeview and some surrounding territory lying outside of that corporation. Some portions of the property to be included in the sewer district, which will be directly and specially benefited thereby to the same extent as privately owned property, is state owned land adjacent to or near Indian Lake. Most of this state owned land is leased to private individuals who have erected improvements thereon.

These leases which are for periods of 15 years and expire at various times depending upon the time of their original grant contain the following provision or similar provision to the same effect:

> 'This lease is granted with the understanding that whenever a sanitary sewer is constructed along the border of.....or within any sanitary sewer district of which.....may be a part, under County or State supervision, the lessee herein, heirs, executors, administrators, successors or assigns, shall pay a proportionate share of the cost of the location, construction and maintenance of said sanitary sewer, such assessment shall be made by the proper officials having charge of the location, construction and maintenance of said sewer system according to benefits derived therefrom.'

I should add that these leases may be referred to as 'standard leases', having been prepared for the Division of Parks and Department of Natural Resources, State of Ohio. Their form has been approved by the Governor and the Attorney General's office.

The last clause of General Code Section 6602-8 states:

> 'and state land so benefited shall bear its proportion of assessed cost, according to special benefit.'

The county commissioners are desirous of knowing whether or not lessees of state owned lands may be assessed as provided in the lease to which reference has already been made and, if so, how may such assessment be enforced against the said lessee. The county commissioners would appreciate an opinion on this subject in order that they may proceed with their plans in a proper manner and with the assurance that the project can go ahead upon a sound basis."

It appears that the proposed sewer is to be constructed under the provisions of Sections 6602-1 to 6602-9 inclusive of the General Code.

So much of Section 6602-8 as is pertinent to your inquiry reads as follows:

> "* * * In the construction of a local sewer the entire cost and expense of construction and maintenance may be assessed, upon the benefited property abutting thereon, according to special benefits conferred, and state land so benefited shall bear its proportion of assessed cost, according to special benefit."

It will be noted that the assessments shall be upon the "benefitted property abutting thereon."

In order to answer your question it is obvious that the definition of the word "property" as it is used and referred to in the provisions of law above mentioned must be arrived at. In Chapter 4a of Title III on drainage which contains the sections of law above mentioned, I find no definition for the word "property." It is defined, however, in several other chapters in Title III. Each of such definitions restrict the meaning of the word to real estate. Although it might be argued that because it is defined elsewhere in the same title as meaning real estate, it is reasonable to construe its meaning here as real estate. However, I do not believe that alone would be conclusive.

In Volume 34 Words and Phrases, Permanent Edition, at page 398, the following statement is made:

> " 'Property' has different meaning according to the context and may have different meanings in different parts of the identical statute; it may have a restrictive import so that it will not embrace real estate, and may have a meaning so as to exclude choses in action."

In the same volume some 134 pages are devoted to defining property with its many meanings, all of which give me no assistance here.

From Section 6602-8 it is very evident that state land is intended to be included within the meaning of property and is to be assessed according to its benefits. The State and lessees under the terms of the leases in question clearly stand in the relation of landlord and tenants. I think that statement will go without question. The interest of these tenants under their leases is certainly property. I think that statement is elementary and will also stand without question. The question then arises: Does such property come within the meaning of the word "property" as that word is used by the legislature. Another word used in the statute is "abutting." When we use the word "abut" or "abutting" we mean, matter or solid meeting or coming together. Webster defines "abut" as follows:

> "To border upon; to be contiguous to; to meet; strictly, to adjoin to at the end; used with on or upon; sometimes against; as, his land abuts upon mine; the building abuts on the highway; the bridge abuts against the solid rock."

A lessee for years of real estate is often referred to as being in the nature of a lien, a right to possession, but it is not a fee or ownership. It is incorporeal and not corporeal property. It is not capable of abutting on

the sewer district and therefore it cannot be interpreted that the lessee's interest is such property as is within the meaning of that word in the statute. There is an additional reason which forces me to conclude that the lessee's interest is not intended to come within the meaning of property and is not to be assessed in accordance with its benefits, and that is: There is no provision for appeal from assessments on such matters. Section 6602-3b prescribes the method and procedure of appeal in regard to any of the following matters:

> "1. The necessity of the improvement including the question whether the cost of the improvement will exceed the benefits resulting therefrom.
>
> 2. Boundaries of the assessment district.
>
> 3. The tentative apportionment of the assessment."

Yet in such section the persons referred to as making such appeal seem to be restricted to "owners of land."

Although it is not material in answering your question, it may be helpful to keep in mind a distinction between taxes on real estate for general revenue purposes and special assessments for improvements. The former does not take into consideration any benefits to or enhancement of value to such real estate while the theory in connection with the latter is that the improvement for which special assessments are made do enhance the value of such real estate.

In Volume 36, Ohio Jurisprudence, under the title of Special Assessments, the first paragraph of §24 reads as follows:

> "With respect to the liability of property to assessment for the cost of local improvements as affected by the character, ownership, or use thereof, it may be observed, first, that a special assessment is levied only upon real estate. Also, in Ohio assessments are levied only upon the corpus of real property, and not upon the titles by which the same may be held, unless otherwise provided by statute."

In this connection see Scovill v. Cleveland, 1 O. S., 126; Miller v. Hixson, 64 O. S., 39, and St. Bernard v. Kember, 60 O. S., 244.

It is well established that a leasehold for a term of years such as we are considering here, is personal property. See Ralston v. Ralston Steel Car Co., 2 O. L. A. 746; affirmed 112 O. S. 306.

Therefore, since there is no authority under the sections of law first above referred to, to assess other than lands for the construction and maintenance of a sewer district, the imposition of the duty of ascertaining such special assessment or apportionment thereof against the lessees of state land cannot be imposed upon county officials by the terms of the lease. The assessment must be against the state land and the state must adjust its apportionment with the lessee. It appears to me that the logical procedure for the county to collect such assessments would be to invoice the state agency having supervision over such real estate, and if there is not a proper fund appropriated for such purpose, the legislature would be required to make such appropriation.

Respectfully,

HERBERT S. DUFFY,
Attorney General.