

of the gift, as fixed by the donor or determined by the trustees deny its use for the general purposes of the fund, such conditions will govern.

It would appear to be absurd to require a municipality to make a levy when there are ample funds to cover all existing needs available for the purpose. Inasmuch as the entire fund is available for the purposes of relief or pensions, save for the exceptions hereinbefore noted, it would seem illogical to require an additional burden upon the taxpayer by making a levy under Section 4621, General Code, where there is an ample fund available for the same purpose for which the levy is made. The language is that a levy shall be made sufficient in amount within the three-tenths of a mill to provide for payment of all pensions. As heretofore indicated, this office has held that such levy must be made to care for relief when no pensions have actually been granted. It follows, as a matter of logic, that when there is no amount needed there is no requirement to make any levy.

In view of the foregoing, and in specific answer to your inquiry, it is my opinion that the council of a municipality in making the levy provided for under Section 4621, General Code, may take into account any sums in the pension fund arising by virtue of the provisions of Section 4623, General Code, in determining the amount needed. It may also consider balances arising under Section 4624, except when gifts or donations have been made with conditions attached by the donor or fixed by the trustees which preclude their use for the purpose of pensions and relief generally in which event such funds may not be considered in making such levy.

Respectfully,

GILBERT BETTMAN,

Attorney General.

2919.

STRAIGHTENING RIVER—PROJECT WHOLLY WITHIN CORPORATE
LIMITS OF MUNICIPALITY—COUNTY MAY COOPERATE—HOW
COST TO BE ALLOCATED—MUST PROCEED UNDER SINGLE
COUNTY DITCH LAW.

SYLLABUS:

Under the provisions of Sections 6442, et seq., of the General Code, commonly known as the single county ditch law, the county commissioners of a county may straighten or otherwise improve that part of a river within the limits of a municipal corporation in such county where the petition for such improvement is filed by the mayor or council of such municipal corporation; and such municipal corporation may participate in the improvement by paying to the county the amount assessed to it by the county commissioners for the benefits received by the municipal corporation on account of such improvement.

COLUMBUS, OHIO, February 6, 1931.

HON. MARCUS C. DOWNING, *Prosecuting Attorney, Findlay, Ohio.*

DEAR SIR:—This is to acknowledge the receipt from you of a communication which reads as follows:

"The Council of the city of Findlay, Ohio, and the County Commissioners of our County have entered into a tentative agreement to straighten that part of the channel of the Blanchard River which lies within the corporate limits of the City of Findlay, west of our Main Street bridge. The river forms almost a loop and it is their intention to dredge a channel from the point where the loop commences to a point where the loop ends, which will make the channel almost in a straight line. There is a bridge at the west termini of the proposed cut and a road along the west bank of the present river bed. I am attaching a brief sketch of this proposed improvement for your benefit so that you may have before you a drawing of this project. The Blanchard River is a navigable and inter-county stream.

It is the intention of the Council and the County Commissioners to commence this project as soon as possible after the first of the year for the purpose of furnishing employment to a great number of our residents who are now idle. By so doing we have taken care of the employment situation of our County and also completed a public work of benefit to our community.

Please advise if the County Commissioners have authority to cooperate with the Council of our city in this public improvement. I am unable to find any section of law in our code which specifically gives them the authority to straighten a river channel unless it is Section No. 2427-1 of our General Code.

In view of the fact that this will necessitate the expenditure of a large sum of money and it will be necessary to sell bonds, it is very imperative that the Commissioners have authority to legally cooperate with the City Council in this project."

In response to my request for further information with respect to the projected improvement referred to by you, you forwarded to me a further communication which reads as follows:

"In reply to your communication of January 14th, please be advised that the County Commissioners and the City Council have agreed to share the costs equally in the proposed straightening of a portion of the Blanchard River, within the city limits of Findlay, Ohio. The Commissioners will sell the project and the city will furnish the necessary ground. The county will pay all the costs and the city will reimburse the county for their 50% assessment.

The reason or purpose of the County Commissioners and City Council in desiring to straighten this water course is:

1. To increase the flow of water through our Main Street bridge in order that the Main street in our city will not be flooded during high water periods.
2. To help flood conditions on the Cemetery Road which lies west of the present channel.
3. To increase the capacity of the Cemetery River bridge, which is the extreme western termini of the proposed cut.
4. To prevent scour behind bridge abutments by sending the current straight into the throat of the bridge.

The Main Street bridge is on State Routes No. 12, No. 15 and No. 25 and is in the center of the city of Findlay and all traffic from north to south and from south to north passes over this bridge."

Section 2427-1, General Code, which is referred to in your communication, provides that when, in their opinion, it is necessary or advisable, in order to provide a proper location for a proposed bridge or road, or to provide proper protection for same, the county commissioners may divert, alter, straighten or clean out a river, creek or other water course; and that for such purpose the county commissioners may acquire the necessary property and settle all claims for damages of any persons interested, and that the expenses so incurred shall be payable out of the funds provided for the protection or construction of said bridge or road.

The procedure outlined for the improvement of a river, creek or other water course under the authority of the section of the General Code above noted, is provided by Sections 2427-2 to 2427-8, General Code, which sections, together with Section 2427-1, were enacted by an act passed by the legislature under date of March 20, 1917. 107 O. L. 412. In this connection it is noted that Section 2428, General Code, provides "The commissioners may cause a river, creek or water-course to be straightened or cleaned out for the protection of any bridge or road within their control." Proceedings for the improvement of a river, creek or water course under the authority of this section, and in the manner therein designated, are required to be initiated by a petition signed by one or more taxpayers of the county in the manner provided by Section 2429, General Code, which section, together with Sections 2430 to 2432, inclusive, furnish the procedure for such improvement.

Assuming, as seems to be the fact, that the Main Street bridge, referred to in your communications, is a county bridge which the commissioners are authorized and required to maintain under the provisions of Sections 2421 and 7557 of the General Code, it seems clear, that whatever question may be made with respect to the application of Sections 2427-1, et seq., to the projected improvement of the Blanchard River by straightening the same in the manner stated in your communication, there can be no question of the authority of the county commissioners of Hancock County to make this improvement under the provisions of Sections 2428, et seq., of the General Code, above noted.

From your communication it appears that it is contemplated that the county commissioners of Hancock County shall make this improvement, and that the city of Findlay is to pay one-half of the cost and expense of the same by way of reimbursement to the county for the city's share of the cost and expense of said improvement. It is to be observed, however, that in neither of the statutory plans for straightening or otherwise improving a river, creek or water course, above noted, is there any provision for the participation in the improvement of a municipal corporation in which the river, creek or other water course to be improved is located, by such municipality paying a part of the cost and expense of the improvement or otherwise.

On the other hand, speaking with respect to the projected improvement referred to by you, ample authority is conferred upon the city of Findlay to straighten and otherwise improve the Blanchard River by the provisions of Sections 3625 and 3939, General Code. As to an improvement of this kind conducted by the city under the authority of the sections of the General Code just noted, it is likewise observed that no authority is conferred upon the county commissioners by which the county may cooperate in the improvement, by the payment of a part of the cost and expense of such improvement or in any other manner.

After a diligent examination of the statutory provisions of this state pertaining to the question presented by your communications, I am forced to the conclusion that the only way in which the city of Findlay can cooperate with

the county in the construction of this improvement is under the statutory provisions relating generally to single county ditches so-called, which statutory provisions have been carried into the General Code as Sections 6442 to 6535-1, General Code; and the only way in which the city of Findlay can participate in the improvement of the river, under these sections, is by paying to the county the amount assessed against said city by the county commissioners for the benefits received by said city on account of the improvement.

Section 6443, General Code, provides, among other things, that upon the filing of a petition therefore (which petition, under Sections 6442 and 6444, General Code, may be filed by the mayor or council of a city or village), the board of county commissioners of a county may straighten, deepen or widen any river or creek in the county. And where an improvement of this kind is petitioned for by the mayor or council of a municipal corporation in the county, the county commissioners of such county clearly have authority to construct such improvement, although the part of the river or creek to be improved lies wholly within such municipal corporation. See *Village of Pleasant Hill vs. Commissioners*, 71 O. S. 133; Opinions of Attorney General, 1927, Vol. I, p. 595; Opinions of Attorney General, 1928, Vol. II, p. 869.

It is not necessary, in the consideration of the question presented in your communications to me, to note all of the statutory provisions outlining the procedure for an improvement of the kind here referred to, or for other improvements under the single county ditch law.

It is necessary, however, to note the provisions of said law relating to the levy of assessments to pay the cost and expense of an improvement of this kind, or other improvement under said law. In this connection, Section 6454, General Code, provides that when there has been certified to the county surveyor a copy of the findings and orders of the county commissioners in favor of an improvement, he shall make a schedule of assessments in the manner provided by said section and by Section 6455, General Code. Said Section 6455, General Code, provides as follows:

"The surveyor, in making his estimate of the amount to be assessed each tract of land, and the commissioners, in amending, correcting, confirming, and approving the assessments, shall levy the assessments according to benefits; and all land affected by said improvement shall be assessed in proportion as it is specially benefited by the improvement, and not otherwise."

Section 6463, General Code, provides that at the final hearing on the improvement, if the petition is not dismissed, the county commissioners shall hear any evidence offered for or against the assessment proposed to be levied against any owner, or on any land, as shown by the schedule of assessments filed by the surveyor, and shall hear any competent evidence on the question of benefits; and that the commissioners shall, from the evidence offered and from an actual view of the premises, amend and correct the assessments, and the assessments so amended or corrected shall be approved by the commissioners. This section further provides as follows:

"That part of the assessment that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare shall be paid by the public, and shall be assessed against the county, and such part of the assessment as may be found to benefit state

or county roads or highways, shall be assessed against the county, and such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision, and shall be paid out of the general funds of such corporation or political subdivision of the state, except as otherwise provided by law."

In an opinion directed to the prosecuting attorney of Seneca County under date of April 10, 1928, Opinions of Attorney General, 1928, Vol. II, p. 869, wherein the sections of the General Code last above noted, were considered in their application to a question similar to that here presented, it was held:

"Under the provisions of Sections 6454 to 6463, inclusive, and related section of the General Code, all land affected by the improvement of a water course, by deepening and widening the same and building retaining walls along the banks thereof, shall be assessed in proportion as it is specially benefited by the improvement, and not otherwise. That part of the assessment that is assessed for benefits to the general public by reason of the improvement being conducive to the public welfare and such part of the assessment as may be found to benefit state or county roads or highways shall be assessed against the county, and such part of the assessment as may be found to benefit any public corporation or political subdivision of the state shall be assessed against such corporation or political subdivision. The entire cost of such an improvement may not be assessed against a city, except where the county surveyor and the board of county commissioners, in a sound exercise of their discretion, find that no land is benefited by the improvement."

From the facts stated in your communications, it appears that practically all of the benefits to be derived from the projected improvement of the Blanchard River by straightening the same in the manner therein indicated, will be such benefits as accrue to the public generally or to state and county roads and to city streets and property. In this situation it would not be an abuse of discretion upon the part of the county commissioners of Hancock County to assess substantially all of the cost and expense of this improvement to said county and to the city of Findlay, in such shares as will correspond substantially with the benefits received by each, as such benefits are measured in the light of the provisions of Sections 6455 and 6463, General Code, above noted. In this view, the action of the county commissioners in assessing one-half of the cost and expense of the improvement upon the county and the other half of the cost and expense of said improvement upon the city of Findlay would not be interfered with by the courts unless on all the facts such a division of the cost and expense of the improvement would constitute an abuse of discretion upon the part of the county commissioners.

In one of your communications you speak of the necessity of issuing bonds to meet the cost and expense of said improvement. These bonds will, of course, be issued by the county commissioners in the manner provided by Section 6464, General Code.

The city of Findlay will have to meet the assessment levied upon it for said improvement by tax levies upon all the taxable property of said municipality, which tax levies will be subject to the limitations provided by law. See Opinions of Attorney General, 1928, Vol. II, p. 869.

Respectfully,
GILBERT BETTMAN,
Attorney General.