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1. LIGHTING SYSTEM — WHEN BOARD OF TOWNSHIP TRUSTEES DETERMINES PUBLIC SAFETY AND WELFARE REQUIRE HIGHWAY WITHIN TOWNSHIP TO BE LIGHTED BY ARTIFICIAL LIGHTING, COST TO CONSTRUCT AND OPERATE SUCH SYSTEM MUST BE PAID FROM TOWNSHIP GENERAL FUND — MAY NOT BE ASSESSED AGAINST ABUTTING PROPERTY OWNERS.
2. WHEN COST AND OPERATION OF SUCH SYSTEM PAID FROM TOWNSHIP GENERAL FUND, TRUSTEES NOT AUTHORIZED TO LEVY SPECIAL ASSESSMENTS AGAINST ABUTTING PROPERTY OWNERS TO REPLENISH GENERAL FUND TO EXTENT SO DEPLETED— SECTION 3440-1 G. C.

SYLLABUS:

1. *When a board of township trustees under authority of Section 3440-1, General Code, has determined that public safety and welfare require a highway within the township to be lighted by artificial lighting, and construct a lighting system, the cost of constructing such system and its operation must be paid from the general fund of the township and may not be assessed against abutting property owners.*

2. *When such artificial lighting system has been constructed under authority of Section 3440-1, General Code, and the cost thereof and its operation paid thereof from the general fund, the township trustees are not authorized to levy special assessments against abutting property owners to replenish the general fund to the extent so depleted.*

Columbus, Ohio, December 24, 1940.

Hon. Ross Michener, Prosecuting Attorney,
St. Clairsville, Ohio.

Dear Sir:

I am in receipt of your request for my opinion reading:

“We have been requested to obtain an opinion from you by the Pease Township Board of Trustees, Belmont County, in the following matter:

The Trustees of Pease Township, Belmont County, desire to provide artificial lights by contract, for certain roads, highways, public places and territory under their supervision and control, and outside the boundaries of any municipal corporation, and to pay for the same out of the general fund by authority of Section 3440-1 of the General Code. They further desire, if it can be legally done, to reimburse the general fund by levying special assessments against the real estate directly benefited, to cover the cost of said lighting.

Do the trustees have the power to levy said special assessments against the real estate directly benefited by said lights to reimburse the general fund for the cost of said lights?

Mr. Thomas Jones, Attorney at Law, Bridgeport, Ohio, is taking this letter to you, and will be in position to give you any further information that you may desire to know on this question."

The board of township trustees being a public office has such powers and such only as have been granted it by statute. It is, therefore, necessary that we consult the statutes in order to determine the powers, if any, of such board to furnish artificial lighting facilities outside of the municipalities within such township, and if power is therein granted, the limitations, if any, on the use of such powers.

Sections 3428 to 3440, both inclusive, of the General Code, provide that when the owners of more than one half of the feet front of lands in an unincorporated district in such township file a petition, with the township clerk, for artificial lighting of the streets and public ways in such district, during the night season, (Section 3428, General Code) the board of township trustees shall determine the necessity therefor and the extent thereof and create a lighting district. (Section 3433, General Code.) Section 3435, General Code, then directs that the contract for such improvement shall be let by competitive bidding. Section 3436, General Code, provides the methods of paying the cost of such improvement. Such section reads:

"On accepting such bid and bond, the trustees shall enter into a contract with the successful bidder for the furnishing of such lights according to specifications. The contract shall not be for a longer term than ten years. The cost and expenses of furnishing and maintaining such lights and of the proceedings in relation thereto, shall be paid from a fund raised by special assessments against the lots and lands in the district which are benefited by such lighting, and such assessments against any lot or parcel of land shall not be in excess of the special benefits resulting thereto from such lighting and such assessments shall be paid and collected in equal semi-annual installments equal in number to twice the number of years for which the contract is made, and shall be paid and collected in the same manner and times as taxes are paid and collected; provided,

however, that any such assessment in the amount of five dollars or less, or whenever the unpaid balance of any such assessment is five dollars or less, the same shall be paid in full, and not in installments, at the time when the first or next installment would otherwise become due and payable; and such assessments may be made and levied by any one of the following methods:

First: By a percentage of the tax value of the property assessed.

Second: In proportion to the benefits which may result from the lighting.

Third: By the foot frontage of the property bounding and abutting upon the street or streets, or public way or ways so lighted."

It is to be noted that under authority of such section the cost of the improvement is to be paid by special assessment against benefited property within the district so created. Such assessment according to benefits may be made in any one of the three methods therein enumerated and then is payable either in a lump sum or installments. We find no language in such section which would authorize the board of township trustees to pay the cost of such improvement from the general fund of the township. Such section authorizes the improvement but not at public expense.

In 1921 the legislature supplemented the method of providing such artificial lighting facilities by the enactment of Section 3440-1, General Code (109 O. L. 69), by providing that the board of township trustees might provide such facilities, when necessary for public convenience and welfare, without having received the petition mentioned in Section 3428, General Code, but specifically provided the cost of the improvement shall be paid from the general fund of the township. Such section was amended in other respects in 113 O. L. 53, and now reads:

"The township trustees of any township shall also have power to provide artificial lights for any road, highway, public place or building under their supervision or control, or territory within such township and outside the boundaries of any municipal corporation, when such township trustees determine that the public safety or welfare requires that such road, highway, public place or building or territory be lighted. Such lighting may be procured either by installing a lighting system or by contracting with any person or corporation to furnish lights.

In case such lights be furnished under contract such contract may provide that the equipment employed in supplying same may be owned either by the township or by the person or corporation supplying same.

If the township trustees determine to procure said lighting by contract, they shall prepare plans and specifications therefore and shall advertise for bids for furnishing the same, for a period of two weeks, either by posting said advertisement in three conspicuous places in said township, or by publication thereof once a week for two consecutive weeks in a newspaper of general circulation in the township.

The contract for such lighting shall be made with the lowest and best bidder and no such contract shall be made to cover a period of more than ten years. The cost of installing and operating any such lighting system, or of any such light furnished under contract, shall be paid from the general fund of the township treasury."

In the Opinions of the Attorney General for the year 1921, Vol. II, page 1075, the then attorney general ruled as stated in the syllabus:

"Except as provided by section 3428 et seq. and 3440-1 of the General Code, township trustees are unauthorized to provide for the lighting of unincorporated areas of the township, and the expenditure of township funds for such purposes, otherwise than provided by such sections is illegal."

See also Opinions of the Attorney General for the year 1928, Vol. III, page 1909.

In Opinions of the Attorney General for the year 1931, Vol. I, page 181, the then attorney general again ruled that if the improvement is constructed under authority of Section 3440-1, General Code, the cost must be paid from the general fund of the township.

You will note that Section 3440-1, General Code, does not authorize the board of township trustees to construct such lighting system until it has determined "that the *public safety and welfare* requires that such road, highway, public place or building or territory be lighted"; while the preceding sections, which authorize the construction of the improvement upon filing of a petition of benefited property owners, does not require any such determination. From an examination of such statutes it would appear that if the improvement is constructed under authority of Sections 3428 to 3439, et seq., General Code, it is for the benefit of the abutting property owners and at their instigation; while that authorized to be constructed under authority of Section 3440-1, General Code, is for the public welfare and safety.

I assume from the statements contained in your letter that no petition of property owners of abutting property has been filed with the board of township trustees and that the proposed improvement is instigated by the

board itself. Your inquiry is whether when the improvement is so made and the cost paid from the general fund, the general fund can be reimbursed by means of the levy and collection of special assessments.

As was held in *Curry v. Lybarger*, 133 O. S. 55, the authority of the board of township trustees to levy special assessments for local improvements, if it exists must have been conferred by statute and the legal validity of the assessments when made is conditioned upon the requirements of such statutes having been complied with. If no statute exists granting the power to the board of township trustees, then the purported assessments are void. If the statute grants the power to make the assessments and prescribes certain steps to be taken in the levy of the assessments, and these steps have not been followed, the assessments are void and of no effect. (See also *Johnson v. New Concord*, 39 O. App. 9). If any doubt is present as to the existence of the power to make the assessment it must be resolved in favor of the taxpayer and as against the existence of the power. *Mallo v. Dover*, 36 O. App. 84; *Bising v. Cincinnati*, 126 O. S. 218.

When we apply such reasoning to the facts contained in your letter, we necessarily come to the conclusion the only authority possessed by a board of township trustees to levy special assessments for such purpose is that contained in Section 3436, General Code, which by its terms is limited to making the improvement after the filing of a petition therefor by the property owners sought to be benefited by the improvement. Section 3439, General Code, then provides that:

“Said assessments when collected shall go into the township treasury and shall be used by the trustees only for the purpose for which they were levied and collected.”

It would thus appear that there is: First, no authority in the board of township trustees to levy any special assessments unless a petition has been filed by the owners of more than fifty percent of the feet frontage of property sought to be benefited by the lighting, and then only after proceedings have been had as specified in Sections 3430 to 3436, both inclusive, of the General Code; second, no authority of statute to use such special assessments for any purpose other than for the payment of the cost of the lighting and lighting facilities; and, third, if the improvement is constructed under authority of Section 3440-1, General Code, “the cost of installing and operating any such lighting system, or of light furnished under contract, *shall be paid from the general fund of the township treasury*”.

To state the proposition in a different manner, the General Assembly has authorized the township trustees to construct highway lighting facilities, in certain instances, *for the benefit of property owners* as provided in Sections 3428 to 3438, General Code, both inclusive, and to pay the cost thereof by means of special assessment; but, if the improvement is made for the benefit of public safety and welfare the cost is to be paid from the general fund of the township. Such is the plain and unambiguous meaning of the language.

However, if we were to assume that such were not the plain and unambiguous meaning of the statute we would be faced with more serious considerations. Thus, Section 5625-1, General Code, defines the taxing unit for which the township trustees may levy taxes as the township and not a part thereof. Section 2 of Article XII requires all property of the state to be taxed by uniform rule. Section 5625-10, General Code, defines the general fund of a taxing subdivision or unit and the moneys that must be placed therein. It is highly probable that a court would hold that by reason of such provision, constitutional and statutory, the township trustees could not levy a tax or assessment for the benefit of the general fund of the township upon any quantum of property or taxpayers within the township unless it included all within the geographical limits of the township. However, inasmuch as the statutes in question do not purport to authorize special assessments to replenish the general fund of the township to the extent depleted by expenditures made by authority of Section 3440-1, General Code, it is unnecessary to consider such propositions.

Specifically answering your inquiry, it is my opinion that:

1. When a board of township trustees under authority of Section 3440-1, General Code, has determined that public safety and welfare require a highway within the township to be lighted by artificial lighting, and construct a lighting system, the cost of constructing such system and its operation must be paid from the general fund of the township and may not be assessed against abutting property owners.

2. When such artificial lighting system has been constructed under authority of Section 3440-1, General Code, and the cost thereof and its operation paid thereof from the general fund, the township trustees are not authorized to levy special assessments against abutting property owners to replenish the general fund to the extent so depleted.

Respectfully,

THOMAS J. HERBERT,
Attorney General.