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DITCHES — SINGLE COUNTY — ASSESSMENTS ; EXCESS FUNDS—§6131. R.C.—MAINTENANCE AND REPAIR—§6131.50 R.C.—EXCESS FUNDS TO PAY FUNDED DEBT OF SUBDIVISION, §5719.16 R.C.

SYLLABUS:

1. Excess funds accumulated from assessments levied under the provisions of Chapter 6131., Revised Code, may not be used for the repairs and maintenance of a single county ditch but must be placed in the general ditch improvement fund as provided in Section 6131.50, Revised Code.
2. Such excess funds should be utilized to pay any funded debt of the subdivision, or transferred to the general funds, as provided in Section 5719.16, Revised Code, if the subdivision has no such funded debt.

Columbus, Ohio, July 18, 1958

Hon. Wilford R. Miller, Prosecuting Attorney
Tuscarawas County, New Philadelphia, Ohio

Dear Sir:

I am in receipt of your letter in which you ask the question whether or not excess funds accumulated from assessments levied under the provisions of Chapter 6131., Revised Code, may be used by the county commissioners for subsequent maintenance of the ditch for which the original levy was made.

I note from your letter that several years ago the county commissioners undertook to improve the single county ditch here in question. They did so, as you indicate, under the provisions of Section 6131.02, Revised Code, which reads as follows:

“The board of county commissioners, at a regular or called session, upon the filing of a petition as provided in sections 6131.01 to 6131.64, inclusive, of the Revised Code, by any owner of any land, when the board finds that the granting of the petition and the construction of an improvement is necessary for controlled drainage of any land, for irrigation, or to prevent the overflow of any land in the county, and further finds 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, may locate, construct, reconstruct, straighten, deepen, widen, box, tile, fill, wall, dam, or arch 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 sections 6131.01 to 6131.64, inclusive, and 6133.02 to 6133.11, inclusive, of the Revised Code.”

This section was changed effective August 23, 1957, but retains the essential provisions of the former section.

The funds for the ditch were provided by assessments levied under Sections 6131.15 and 6131.22, Revised Code. When such assessments were collected they were, I assume, placed in the “general ditch improvement fund” as provided for in Section 6131.50, Revised Code, which reads in pertinent part:

“The board of county commissioners of each county shall provide and establish the ‘general ditch improvement fund,’ which fund shall be used as a sinking fund for all bonds issued under sections 6131.01 to 6131.64, inclusive, of the Revised Code. Said fund shall consist of:

“(C) The collections from all special assessments for benefits to property, as provided in such sections; * * *”

This is now called the “general drainage improvement fund” pursuant to Section 6131.50, Revised Code, effective August 23, 1957. Each county is *required* to establish this fund. *Van Wert National Bank v. Roos*, 134 Ohio St., 359.

There now exists a surplus from the above mentioned assessments which the county commissioners seek to use for the repair and maintenance of the completed ditch. Section 6131.51, Revised Code, sets forth the purposes for which payments may be made from the general drainage improvement fund. This section reads in part:

“All costs and expenses of improvements under sections 6131.01 to 6131.64, inclusive, of the Revised Code, including con-

tract prices of construction and the costs of locating the improvement, shall be paid from the general drainage improvement fund. No warrants shall be drawn to be paid from such fund unless it contains a sufficient amount not otherwise specifically appropriated to pay the same."

In addition to the expenditures set out above, the fund might be used in certain other specific situations, such as for compensating a ditch supervisor under Section 6141.03, Revised Code, or furnishing material pursuant to Section 6141.15, Revised Code. Although there is no express authority for expending funds from the general drainage improvement fund for the normal repairs and maintenance of a single county ditch, this authority must necessarily be implied from Section 6141.13, Revised Code, which reads in part:

"Upon the completion of the work as provided in sections 6141.02 to 6141.17, inclusive, of the Revised Code, whether by contract or otherwise, the ditch supervisor shall certify the cost thereof to the board of county commissioners, which shall examine and correct the same, and shall order the county auditor to place the correct amount upon the duplicates to be collected as other taxes and assessments *and this shall be credited to the general ditch improvement fund*. Such cost shall be a lien on the land to which said work was apportioned from the date of the filing of such certificate with the auditor." (Emphasis added)

This procedure was, apparently, what the writer of Opinion No. 2390, Opinions of the Attorney General for 1940, p. 547, had in mind when he concluded that funds from the general ditch improvement fund could be used for the repair and maintenance of a county ditch. This section, however, is clearly inapplicable to the disposition of excess funds accumulated from assessments levied under the provisions of Chapter 6131., Revised Code, for subsequent maintenance of the ditch for which the original levy was made.

If an actual unexpended balance does exist, serious questions may be raised as to the reason for this surplus when consideration is given to Section 6131.43, Revised Code, which reads:

"Upon the completion of the contracts as provided in section 6131.41 of the Revised Code, the board of county commissioners shall order the county auditor to reduce pro rata the assessments confirmed by it by the difference between the estimated cost of the construction and the final cost, and the assessments so reduced, but with the cost of location, engineering, compensation, damages,

contingency, and the assessment for maintenance for one year included therein, shall be levied upon each parcel of land, each public corporation and each department, office, or institution of the state of Ohio as stated in the schedules as of the date of the order of the board approving the contracts and ordering the levying of the assessments. The auditor shall forthwith place said assessments so levied upon the duplicates of the county, and said assessments shall be a lien upon the several parcels of land respectively from and after the date of the order of the board approving the completion of the contracts and ordering the levying of the assessments. The auditor shall be liable on his bond for any damages sustained by any person by reason of such auditor's failure to place promptly said assessments upon the proper duplicates of the county. * * *

But whatever the implication to be drawn from the above quoted section, assuming that a funded debt was involved in connection with the construction of this project, any such excess funds should be utilized as provided for in Section 5719.16, Revised Code, which reads in part :

“If any bonds or notes issued in anticipation of the levy or collection of such installments are outstanding, the money derived from such payments shall be used only for the payment, redemption, or purchase of, and the payment of interest on, such bonds or notes, and if the subdivision has no such bonds or notes outstanding, such money shall be used for the payment of any other funded debt of the subdivision. If the subdivision has no funded debt, such money shall be credited to its general fund and used for the purposes thereof.”

In view of what has been said above, it is my opinion and you are advised :

1. Excess funds accumulated from assessments levied under the provisions of Chapter 6131., Revised Code, may not be used for the repairs and maintenance of a single county ditch but must be placed in the general ditch improvement fund as provided in Section 6131.50, Revised Code.

2. Such excess funds should be utilized to pay any funded debt of the subdivision, or transferred to the general fund, as provided in Section 5719.16, Revised Code, if the subdivision has no such funded debt.

Respectfully,
WILLIAM SAXBE
Attorney General