

3019.

STREET LIGHTING SURVEY—COST—PURPOSE, TO SECURE INFORMATION FOR MUNICIPAL CORPORATION TO NEGOTIATE CONTRACT FOR STREET LIGHTING RATE — MAY NOT LAWFULLY BE INCLUDED WITHIN SPECIAL ASSESSMENT LEVIED UNDER SECTIONS 3812, 3812-4 G. C.

SYLLABUS:

The cost of making a street lighting survey for the purpose of securing information to be used by a municipal corporation in negotiating for a street lighting rate contract may not lawfully be included within a special assessment levied under authority of Sections 3812 and 3812-4, General Code.

Columbus, Ohio, November 16, 1940.

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

Gentlemen:

This will acknowledge receipt of your request for my opinion which reads as follows:

“Will you kindly examine the enclosed correspondence from our Examiner, and advise us if the cost of making a street lighting survey may be included as a part of the cost of street lighting, to be specially assessed against the benefited property.”

The enclosed correspondence referred to in the above request reflects that the council of the City of X made an appropriation from the "property owner's portion of the street lighting fund" to pay the cost of a street lighting survey conducted by an engineer employed by the city manager, which survey is to be used by the city in its negotiations for a proposed rate contract for street lighting.

The theory of a special assessment is that the property of the person assessed for the improvement, is benefited to an extent equal to or greater than the amount of the burden imposed. One of the leading cases on the subject of special assessments is *Norwood v. Baker*, 172 U. S. 269, decided by the Supreme Court of the United States, wherein it is stated in the headnotes:

"The principle underlying special assessments upon private property to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore that the owners do not in fact pay anything in excess of what they receive by reason of such improvement.

The exaction from the owner of private property of a cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation, of private property for public use without compensation. * * * "

The authority to levy and collect special assessments is vested in the legislature, however, this power may be delegated to a municipal corporation which was done by the legislature in its enactment of Section 3812, General Code, which provides as follows:

"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 entire cost and expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, watercourses, water mains, or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and 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, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkhead, culverts, approaches, flood gates, or water ways or drains incidental thereto, 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.

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

Second: In proportion to the benefits which may result from the improvement, or

Third: By the foot front of the property bounding and abutting upon the improvement."

To carry out the authority granted to municipal corporations under the provisions of Section 3812, General Code, *supra*, the legislature enacted Section 3812-4, General Code, which provides as follows:

"The council of a city upon the recommendation of the director of public service, or the council of a village, may provide for lighting any street, alley, dock, wharf, pier, public road or place, or parts thereof, and levying and collecting special assessments therefor, by any one of the methods mentioned in section 3812, General Code of Ohio.

Resolution: notice. For the purpose of carrying out the provisions of this supplementary section one resolution, ordinance or contract may be made to include one or more streets, alleys, docks, wharves, public roads or places, or parts thereof, and the proceedings by council providing for such lighting and levying and collecting special assessments therefor shall be the same as provided in this chapter for proceedings by council for the improvement of streets, except that notices of the passage of the resolution declaring the necessity for such lighting shall be given to the owners of the lots and lands to be assessed for the payment of the cost and expense of such lighting by publishing such resolution once a week for two consecutive weeks in two newspapers of opposite politics published and of general circulation within the corporation, and no other or further notice shall be required; provided, however, that in municipal corporations in which no two newspapers of opposite politics are printed, as defined in section 6255 of the General Code, notice of the passage of such resolution shall be given to the owners of the lots and lands to be assessed for the payment of the cost and expense of such lighting by publishing such notice in either of the following manners to be determined by council, viz: by posting copies thereof in not less than five (5) of the most public places in the municipality, to be determined by council, for a period of not less than fifteen (15) days prior to the taking effect thereof, or by publication thereof in any newspaper printed in Ohio and of general circulation in such municipality; provided further that in all municipal corporations which have adopted a charter the notice to the property owners may be published in accordance with the provisions of such charter."

The authority of a municipal corporation to levy and collect special assessments for street lighting is contained in the phrase of Section 3812, supra, wherein it is stated, "any part of the cost of lighting streets". The question now arises as to what items of expense the legislature contemplated could be included within the "cost of lighting streets". At this point it is necessary to ascertain the rule of statutory construction placed upon statutes authorizing special assessments. In this connection it is stated in the case of *Curry v. Lybarger*, 133 O. S., 55, at page 59:

"It is fundamental that all statutes imposing taxes and public burdens of that nature are to be strictly construed and any doubt as to construction or effect must be resolved in favor of those on whom the burden is sought to be imposed. * * * "

As the provisions of Section 3812, supra, grant authority to a municipal corporation to impose a public burden, by way of special assessment for street lighting, the rule laid down by the Court in the case of *Curry v. Lybarger* compels the conclusion that the provisions of this section should be strictly construed.

As hereinbefore stated, a special assessment is justified only when actual benefits are bestowed upon the property of the assessed owners, equal to or greater than the burden imposed. Since the value of the survey is a mere matter of conjecture and may be of no actual benefit to the assessed owners it cannot be fairly concluded that the legislature intended that such an expenditure should be made by the taxing authority from funds derived by special assessments for actual benefits bestowed.

Upon this subject it is stated in 25 R. C. L., Section 13, page 99:

"In order to justify the assessment of property for public improvements the benefits must be substantial, certain, and capable of being realized within a reasonable time. * * * "

It is therefore, my opinion in specific answer to your inquiry that the cost of making a street lighting survey for the purpose of securing information to be used by a municipal corporation in negotiating for a street lighting rate contract may not lawfully be included within a special assessment levied under authority of Sections 3812 and 3812-4, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.