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1. CONSERVANCY DISTRICT -- WHERE BOARD OF DIRECTORS ASSESSED A CITY WITHIN DISTRICT FOR PAYMENT OF BONDS AND TAX LEVIED BY CITY YIELDED MORE MONEY THAN NECESSARY TO PAY CITY'S SHARE, CITY NOT REQUIRED TO PAY SUCH EXCESS TO CONSERVANCY DISTRICT NOR TO COUNTY TREASURER — SECTION 6828-50 G.C.
2. SUCH EXCESS FUND MAY BE TRANSFERRED FROM SPECIAL FUND WHERE DEPOSITED TO CITY GENERAL FUND, OR SINKING FUND OR BOND RETIREMENT FUND — SECTION 5625-13 G.C.

SYLLABUS:

1. When, acting under authority of Section 6828-50 of the General Code, the board of directors of a conservancy district has made an assessment against a city within the district for the payment of bonds issued by such district, and the city levies a tax in the amount of such assessment which tax yields more money than is necessary to pay the city's proportionate share of such outstanding bonds, the conservancy district may not receive the excess of such tax proceeds from the city and the city is not required to pay the same over to the county treasurer.

2. Such excess may, under the provisions of Section 5625-13 of the General Code, be transferred from the special fund of the city into which the same was paid, to the general fund, or to the sinking fund or bond retirement fund of such city.

Columbus, Ohio, August 13, 1942

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

Gentlemen:

Your request for my opinion reads:

“We are inclosing herewith certain data and correspondence pertaining to an amount of money now on deposit in the treasury of the City of Springfield, that was levied and collected for the purpose of paying the assessment levied against said City, as a political entity, by the Springfield Conservancy District.

Will you kindly examine the inclosures and give us your opinion in answer to the following questions:

Question 1. Where special tax levies outside the ten mill limitation are made by a city for the purpose of paying an assessment levied against said city by a Conservancy District, is it the duty of said city to pay over to the county treasurer the proceeds of such special levies as payment of said assessment regardless of the fact that all bonds and interest of the District have previously been paid and such proceeds are not needed by the Conservancy District for that particular purpose?

Question 2. If the answer to the first question is in the negative, what disposition of the proceeds of a special levy now on deposit in the city treasury to the credit of the Conservancy District Transfer Account, may be made by the City of Springfield?”

From your request it is not apparent how such excess funds could arise. I, therefore, quote from one of the inclosures mentioned in your request, as follows:

“The Springfield Conservancy District is a Conservancy District heretofore organized pursuant to the Conservancy Act of Ohio, the territory of which consists mainly of the territorial limits of the City of Springfield, Ohio, a municipal corporation, together with certain additional lands adjacent thereto; in other words, The Springfield Conservancy District includes lands in addition to those contained within the corporate limits of the City of Springfield.

After the organization of the District in 1929 plans for the construction of the improvements for which the District was created were prepared and in connection with such improvement appraisal records were prepared and approved and thereafter bonds of the District were issued in anticipation of the

collection of levies to be made as provided for by Section 6828-47 et seq., General Code, and annually thereafter pursuant to the authority granted by Section 6828-50, General Code, levy was made for the purpose of securing funds sufficient to pay said bonds and interest as the same respectively mature. This levy was made for the Conservancy purposes outside of the 10 mill limitation prescribed by Constitution and statute. In order to meet these specific requirements of the Conservancy Act and to be assured at all times of having a sufficient sum of money on hand with which to pay the bonds and interest as the same accrued the District found itself after the last half tax year 1940 collection with funds levied for more than were required to pay the final installment of bonds and interest. By reason of the nature of the District and the territory thereof the assessment or tax levy was assessed against the City of Springfield, Ohio, as a legal entity. By virtue thereof the moneys were annually paid into the City of Springfield, Ohio, which would pay the amount of the tax levy assessed against it for Conservancy District purposes to the County Treasurer.

This levy for the last year was made in good faith and the same was collected in the sum of \$38,024.88. However, contrary to its former practice the City has failed and neglected to make payment thereof to the County Treasurer, the result of which is that such sum duly and properly levied for Conservancy District purposes has not been made available for the purposes of the Conservancy District."

From the inclosures submitted it would appear that no balance of the funds from such levies existed on January 1, 1940, but that during the year 1940, from such levies, the City of Springfield became possessed of \$69,795.02, of which \$31,770.14 was paid to the Conservancy District and used for the retirement of the bonds in question, leaving a balance in the Springfield City Treasury of \$38,024.88.

The authority of law for the levy of assessments for the purpose of the creation and construction of conservancy district improvements, at the time of the issuance of the bonds in question, was contained in former Section 6828-45 of the General Code, which then read in part:

"After the list of real property, with the appraised benefits as approved by the court, or that part thereof from which no appeal is pending, has been filed with the secretary of the district, then from time to time, as the affairs of the district demand it, the board of directors shall levy on all real property, upon which benefits have been appraised, an assessment of such portion of said benefits as may be found necessary by said board to pay the cost of the execution of the official plan in-

cluding superintendence of construction and administration, plus ten per cent of said total, to be added for contingencies, but not to exceed, in the total of principal, the appraised benefits so adjudicated. The said assessment shall be apportioned to and levied on each tract of land or other property in said district in proportion to the benefits appraised, and not in excess thereof, and in case bonds are issued as provided herein and hereafter, then the amount of interest, which will accrue on such bonds, as estimated by said board of directors, shall be included in and added to the said assessment, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of the cost of construction in determining whether or not the expenses and costs of making said improvement are or are not equal to or in excess of the benefits appraised. * * *

Such language was amended in 117 O.L. 192, to read as follows:

“After the appraisal record as approved by the court, or that part thereof from which no appeal is pending, has been filed with the secretary of the district, then from time to time, as the affairs of the district demand it, the board of directors shall levy on all real property and on all public corporations, upon which benefits have been appraised, an assessment of such portion of said benefits as may be found necessary by said board to pay the cost of the execution of the official plan including superintendence of construction and administration, plus one-ninth of said total, to be added for contingencies, but not to exceed in the total of principal, the appraised benefits so adjudicated. The said assessment shall be apportioned to and levied on each tract of land or other property and each public corporation in said district in proportion to the benefits appraised, and not in excess thereof, and interest at a rate not to exceed six per cent per annum, payable semi-annually, shall be included in and added to the said assessment, but such interest shall not be considered as a part of the cost in determining whether or not the expenses and costs of making the improvement are or are not equal to or in excess of the benefits appraised.”

The authority to issue bonds in anticipation of the collection of special assessments was and is contained in Section 6828-47 of the General Code, which contains the following language:

“The board of directors may, if in their judgment it seems best, issue bonds in amount not to exceed ninety per cent of the total amount of the unpaid portion of an assessment, exclusive of interest, levied under the provisions of this chapter of the General Code, in denominations of not less than one hundred dollars, bearing interest from date at a rate not to exceed six per cent per annum, payable semi-annually, to mature at annual or semi-annual intervals within thirty years,

commencing not later than five years, to be determined by the board of directors, both principal and interest payable at the office of the treasurer of the state of Ohio. * * * Whenever such notes have been issued in anticipation of the issuance of bonds the proceeds of the bonds when issued and sold and of the assessment pursuant to which the bonds are issued shall be applied to the payment of the notes and interest thereon until both are fully paid. * * *

Bonds shall show on their face the purpose for which they are issued, and shall be payable out of money derived from the bond retirement fund.

All assessments the collection of which has been anticipated by the issuance of bonds or notes shall, when collected, be paid into the bond retirement fund for the purpose of paying the principal and interest of bonds and notes and for no other purpose. * * * ”

Then existing Section 6828-50 of the General Code read in part as follows:

“The board of directors shall each year thereafter determine, order and levy the part of the total assessments levied under this act, which shall become due and be collected during each year at the same time that state and county taxes are due and collected, which annual levy shall be evidenced and certified by said board not later than September 1st each year to the auditor of each county in which the real property of said district is situate. The certificate of said annual levy shall be substantially as in the schedule herein. * * *

In the event of any failure or neglect of the board of directors of the district to determine and order an annual levy for the purpose of paying the interest and principal of any bonds pursuant to this act, it shall be the duty of the auditor of the county in which the lands subject to such assessments are situated, to make and complete a levy of the taxes or special assessments necessary for the said purpose against the lands in the said district, and each piece of property therein against which benefits shall have been appraised; any assessment so made and completed by the county auditor shall be made and completed by him in the manner hereinbefore provided for the making and completion of an assessment by the board of directors of the district, and shall have the same force and effect as a levy of assessments determined and ordered by the board of directors.”

Such language was amended in 1937 (117 O.L. 201) to read as follows:

“The board of directors shall each year thereafter deter-

mine, order and levy the annual levy which shall include all assessments, or installments of assessments, together with interest, levied under this chapter, which become due in the ensuing year; and such annual levy shall be due and be collected at the same time that state and county taxes are due and collected. After bonds have been sold, in the determination of an annual levy, the rate of interest upon the unpaid installments of an assessment shall be the rate borne by the bonds which have been issued and sold pursuant to such assessment. The annual levy as recorded in the conservancy assessment book, herein provided for, shall be signed and certified by the president and secretary of the board of directors, attested by the seal of the district, not later than the first day of July each year and the same shall thereafter become a permanent record in the office of the district. The certificate of said annual levy shall be substantially as set forth in section 6828-78 of the General Code. * * *

In the event of any failure or neglect of the board of directors of the district to determine and order an annual levy for the purpose of paying the interest and principal of any bonds pursuant to this chapter, it shall be the duty of the auditor of the county in which the lands and public corporations subject to such assessments are situated, to make and complete a levy of the special assessments necessary for the said purpose against the lands and public corporations in said district, and each piece of property therein against which benefits shall have been appraised; any assessment so made and completed by the county auditor shall be made and completed by him in the manner hereinbefore provided for the making and completion of an assessment by the board of directors of the district and shall have the same force and effect as a levy of assessments determined and ordered by the board of directors."

Section 6828-55 of the General Code read in part as follows at the time of the issuance of the bonds in question:

"Whenever, under the provisions of this act, an assessment is made or a tax levied against a county, city, village or township, it shall be the duty of the governing or taxing body of such political subdivision, upon receipt of the order of the court which established the district, confirming the appraisal of benefits and the assessment based thereon, to receive and file the said order, and to immediately take all the legal and necessary steps to collect the same. It shall be the duty of the said governing or taxing body or persons to levy and assess a tax, by a uniform rate upon all the taxable property within the political subdivision, to make out the proper duplicate, certify the same to the auditor of the county in which such subdivision is, whose duty it shall be to receive the same, certify the same for collection to the treasurer of the county, whose duty it shall be to collect the same for the benefit of the conservancy dis-

trict, all of said officers above named being authorized and directed to take all the necessary steps for the levying, collection and distribution of such tax.

Nothing in this section shall prevent the assessment of the real estate of other corporations or persons situated within such political subdivision, which may be subject to assessment for special benefits to be received. * * *

In 117 O.L. 205, the first paragraph of such section was amended to read as follows:

“Whenever, under the provisions of this chapter, the board of directors shall have determined, ordered and levied an annual levy in accordance with section 6828-50, the board shall certify to the governing or taxing body of each political subdivision assessed, a notice and statement of such annual levy setting forth the total amount payable by such political subdivision and included in such annual levy, and the items making up such total. The said governing or taxing body shall receive and file said notice and shall promptly take all the legal and necessary steps to provide for the payment of such annual levy. It shall be the duty of said governing or taxing body to include the amount of such annual levy in the tax budget for the ensuing year and to levy and assess a tax at a uniform rate upon all the taxable property within the political subdivision so as to provide sufficient funds for the payment of such annual levy after deduction of any portion thereof paid from other sources, and to certify such tax to the county auditor; and the proceeds of such tax when received by such political subdivision shall be deemed to be appropriated for the payment of such annual levy. It shall be the duty of the county auditor to receive the certificate of such tax levy and to certify the same for collection to the county treasurer whose duty it shall be to collect the same, all of said officers herein named being authorized and directed to take all the necessary steps for the levying, collection and distribution of such tax. * * *

Since Section 6828-45 of the General Code, as it existed at the time of the issuance of the bonds in question, only authorized the levy of assessments for the bond retirement fund against “each tract of land or other property in said district in proportion to the benefits appraised” and did not authorize the levy of such assessments to be made against “public corporations,” as such, I assume, for the purposes, hereof, that there has been a readjustment of the assessments pursuant to the authority of Section 6828-49 of the General Code, as amended. In view of the specific provisions of Section 6828-55 of the General Code, above quoted, it would appear that upon the levy of the assessment against

the municipality, it became the duty of such city to levy *a tax*, as distinguished from a special assessment, upon all of the taxable property within the municipality for the purpose of paying such assessment "and the proceeds of such tax when received by such political subdivision shall be deemed to be appropriated for the payment of such annual levy".

Under authority of that portion of Section 6828-55 of the General Code, above quoted, it became the duty of the municipality to levy a tax upon all the taxable property within the municipality sufficient in amount to provide the moneys necessary to pay the assessment made by the board of directors of the conservancy district for the purpose of the retirement of the bonds, less, however, such amount as may have been appropriated by the municipality from its water department under authority of Section 6828-55a of the General Code.

Since such levy was made for a specific purpose, viz., the payment of a conservancy district assessment, by reason of the provisions of Section 5625-10 of the General Code it became the duty of the city to place such funds so derived in a special fund for the purpose of the payment of such assessment. Such section provides in part that:

"All revenue derived from a special levy shall be credited to a special fund for the purpose for which the levy was made."

In the inclosure accompanying your request it is stated that after the moneys, derived by the levy for a specific purpose by the subdivision, had been accumulated in the special fund it was determined that there was an excess in such fund beyond that necessary for the retirement of all outstanding bonds—such being the specific purpose for which the levy was made—to the extent of \$38,024.88. It should be observed that Section 6828-55, General Code, did not authorize the city to levy special assessments against the benefited property in the subdivision for the purpose of paying the assessment made by the conservancy district, but rather requires the city to include the amount of its assessment in its budget and to levy *a tax* for the purpose of paying such assessment. Your inclosure directs attention to the fact that the conservancy district made an erroneous calculation of the amount needed to retire the remaining bonds which resulted in an erroneously excessive assessment against the city. Section 6828-46 of

the General Code requires that the assessment against the city be according to the benefits accruing to the city and sufficient in amount to pay the bonds. I am not unmindful that Section 6828-48 of the General Code also authorizes the district to make assessments against the city for the purpose of maintaining the district and its equipment. In the inclosures accompanying your request it is suggested that the surplus moneys now possessed by the city should be paid to the district and used by it for the purpose of paying maintenance charges to accrue in the future. Such Section 6828-48 of the General Code contains the following description of the "maintenance assessment":

"To maintain, operate and preserve the reservoirs, ditches, drains, dams, levees, canals, sewers, pumping stations, treatment and disposal works or other properties or improvements acquired or made pursuant to this chapter of the General Code and to strengthen, repair and restore the same, when needed, and for the purpose of defraying the current expenses of the district, the board of directors may upon the substantial completion of said improvements and on or before the first day of September in each year thereafter, levy an assessment upon each tract or parcel of land and upon each public corporation within the district, subject to assessments under this chapter, to be known as a 'Conservancy Maintenance Assessment'; but no such assessment shall be made with respect to works and improvements acquired or constructed for the purpose of providing a water supply for domestic, industrial and public use within the district. Said maintenance assessment shall be apportioned upon the basis of the total appraisal of benefits accruing for original and subsequent construction, shall not exceed one per cent thereof in any one year unless the court shall by its order authorize an assessment of a larger percentage, and shall be certified to the auditor of each county in which lands of said district are situate, in the conservancy assessment book but in a separate column in like manner and at the same time as the annual installment of the assessment levied under section 6828-45 is certified, under the heading 'Maintenance Assessment'. Said auditor shall certify the same to the treasurer of the county at the same time that he certifies the annual installment of the assessments levied under section 6828-45, and the sum of such levies for any tract or public corporation may be certified as a single item. The treasurer shall demand and collect the maintenance assessment and make return thereof, and shall be liable for the same penalties for failure or neglect so to do, as may be provided herein for the annual installment of the assessment levied under section 6828-45.

The amount of the maintenance assessment paid by any parcel of land or public corporation shall not be credited against the benefits assessed against such parcel of land or public corporation; but the maintenance assessment shall be in addi-

tion to any assessment that has been or can be levied under section 6828-45.”

From such statutes it is evident that the legislative intent was to grant to the conservancy district two powers, namely:

1. To levy an assessment equal to the cost of the improvement against the benefited property within the district in proportion to the benefits thought to accrue and to issue bonds in anticipation limited to ninety percentum of such assessment.
2. To levy an assessment for the maintenance of the system after constructed.

The assessments against the city, for which the taxes in question were levied, was for the creation of the conservancy district improvements. The proceeds of the original assessment were anticipated by the issuance and sale of bonds and the application of the proceeds of such sale to the construction of the improvement. Such being true, it is self-evident that any moneys left in the hands of the district after the payment of the bonds could have resulted only from the levy of an assessment in excess of the actual cost of the improvement.

There is an established rule in Ohio that where assessments for improvements are made against benefited property owners in excess of the actual cost, such excess must be returned to the payor. It might be urged that such rule is applicable only to municipal assessments by reason of the provisions of Section 3909 of the General Code, which provides with reference to municipal assessments for improvements that “in case a larger amount is collected than is needed, it shall be returned to the persons from whom collected in proportion to the amount collected from such persons respectively”. However, in the case of *Crawford v. Zangerle*, 126 O.S. 118, 124, the Supreme Court has declared such to be the rule, even in the absence of such statutory provision, outside of municipalities. The court in that case had before it a question as to whether a county which had made and collected assessments for highway improvements was required to return such excess. The court says:

“We are unable to find any provision of the General Code applicable to the situation relating to county assessments out-

side municipalities. We are of opinion that by analogy to Section 3909, relative to municipalities, the county should repay the money to the persons who appear of record to have paid it."

It, thus, would appear that if the city were to pay the moneys in question to the district, the district would immediately be required to pay such moneys to the city.

Similarly, it has been held that when assessments are so made in excess of the cost of the improvement, the collection of such excess may be enjoined or if paid may be recovered in an action brought under authority of Section 12075 of the General Code. See *Groesbeck v. Cincinnati*, 51 O.S. 365. It would, therefore, seem that the conservancy district has no claim on the funds in question.

One further inquiry is contained in your communication and that is: What use may be made of the moneys derived from the tax levied by the city for a particular purpose but no longer needed for such purpose?

Pertinent to such inquiry are the following provisions from Section 5625-13 of the General Code:

"No transfer shall be made from one fund of a subdivision to any other fund, by order of the court or otherwise, except as hereinafter provided: * * *

d. Unless otherwise provided by law, the unexpended balance of any special fund, other than an improvement fund, existing in accordance with section 5625-9, paragraphs (d), (f), or (g) or section 5625-11 of the General Code, may be transferred to the general fund or to the sinking fund or bond retirement fund after the termination of the activity, service or other undertaking for which such special fund existed, but only after the payment of all obligations incurred and payable from such special fund. * * *"

As I have above pointed out, the moneys in question are not in an improvement fund created under authority of Sections 5625-9 or 5625-11 of the General Code. It would, therefore, appear that since such moneys were proceeds of a tax levied for the payment of specific indebtedness which has been paid in full, they may now, under authority of Section 5625-13, sub-paragraph (d), General Code, be paid into the city's general fund, its sinking fund or bond retirement fund.

Specifically answering your inquiry, it is my opinion that:

1. When, acting under authority of Section 6828-50 of the General Code, the board of directors of a conservancy district has made an assessment against a city within the district for the payment of bonds issued by such district, and the city levies a tax in the amount of such assessment which tax yields more money than is necessary to pay the city's proportionate share of such outstanding bonds, the conservancy district may not receive the excess of such tax proceeds from the city and the city is not required to pay the same over to the county treasurer.

2. Such excess may, under the provisions of Section 5625-13 of the General Code, be transferred from the special fund of the city into which the same was paid, to the general fund, or to the sinking fund or bond retirement fund of such city.

Respectfully,

THOMAS J. HERBERT
Attorney General.