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APPROVAL, NOTES OF MUHLENBERG TOWNSHIP RURAL SCHOOL DISTRICT, PICKAWAY COUNTY, OHIO—\$2,400.00.

COLUMBUS, OHIO, February 28, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

177.

SPECIAL ASSESSMENTS—MUNICIPALITY MAY NOT LEVY ASSESSMENTS TO PAY COST OF STREET LIGHTING INCURRED IN PREVIOUS YEAR.

SYLLABUS:

A municipality may not legally levy special assessments for the purpose of paying an obligation incurred for the lighting of streets at a time prior to the completion of the proceedings provided in Sections 3812, et seq., General Code.

COLUMBUS, OHIO, March 1, 1933.

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

GENTLEMEN:—Your letter of recent date is as follows:

“The City of W. has been unable to pay its bill for street lighting from December 1, 1931, to December 31, 1932, and it is now proposed to levy special assessments against the benefited lots and lands under the provisions of Sections 3812 and 3812-4 of the General Code, in order to raise funds for the payment of this obligation. We are inclosing a letter from the city solicitor which explains the situation and also a copy of the proposed resolution which has been prepared by the solicitor for council’s consideration.

Question. May a municipality legally levy special assessments in one year to pay for the cost of street lighting incurred in the year previous?”

The city solicitor’s letter reads as follows:

“The City of W. has used its street lighting service under a ten year contract which expired September 1st, 1932. By emergency legislation it was extended to January 1st, 1933, at which time a month to month contract was entered into and it is anticipated that the new contract will be extended throughout 1933.

Under the former contract the city owes \$38,765.13 for lighting service furnished between December 1st, 1931, and December 31st, 1932. At the first council meeting of this year a sum sufficient to pay for street lighting in January, February and March was appropriated but no money is in sight to pay for street lighting during the balance of this year, esti-

mated at \$20,000. You will observe that the city is therefore bound to pay the past due indebtedness of \$38,765.13, plus future indebtedness of \$20,000, aggregating about \$58,000.00, and I am asked to prepare legislation whereby this sum, less one-fiftieth, plus the cost of intersections, may be specially assessed upon abutting lots and lands according to a percentage of the tax value of the property assessed.

Sections 3812 and 3812-4, Ohio General Code, apparently authorize the levying of special assessments to cover street lighting. I do not think there is any question as to the legality of assessing for the current year 1933, nor do I find any express restriction against assessing at this time for the year 1932 but since it is rather an unusual procedure to assess for a former year I would like to have your advice upon the subject."

Section 3812-4, General Code, provides in so far as is pertinent 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.

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, * * * * *"

There follows an exception as to the manner of service of notice of the passage of the resolution of necessity. It becomes necessary, in view of the express provision in the foregoing section that the proceedings for such lighting and assessing therefor shall be the same as provided in the case of the improvement of streets, to consider the provisions of Title XII, Division III, Chapter 5, General Code. An examination of these sections with respect to levying assessments for the improvement of streets discloses a clear legislative intent that the proceedings may not follow but must precede the construction of the improvement.

Section 3814, General Code, relating to the passage of a resolution of necessity provides that "when it is deemed necessary by a municipality to make a public improvement *to be paid for* in whole or in part by special assessments, council shall declare the necessity thereof by resolution". There is no provision in this section to the effect that after an improvement has been made and obligations incurred to pay for the same, council may pass a resolution to assess the cost thereof. The section is purely prospective and not retrospective.

Section 3816, General Code, provides as follows:

"At the time of the passage of such resolution, council shall have on file in the office of the director of public service in cities, and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which

plans, specifications, estimates and profiles shall be open to the inspection of all persons interested."

The foregoing section, of course, contemplates an improvement which is to be constructed. It is obviously not entirely applicable to the improvement of a street by lighting the same in the event the lighting equipment is already installed. Under these circumstances, there may be no plans, specifications or profiles which may be filed as therein provided but certainly estimates as to cost are required to be filed under such a situation. The obvious purpose of the section is to afford opportunity to all persons who are interested in the improvement to file remonstrances with respect thereto.

Section 3818, General Code, provides for the service of notice of the passage of the resolution of necessity, which method of service is abrogated by the special provisions of Section 3812-4. Section 3818, however, further provides that "whether by service or publication, such notice shall be completed at least twenty days before the improvement is made or the assessment levied". Obviously, neither the assessment may be levied nor the improvement made until after the completion of the notice of the passage of the resolution of necessity. In the instant case, the improvement is made when the street or streets are lighted.

Section 3824, General Code, provides as follows:

"At the expiration of the time limited for so filing claims for damages, the council shall determine whether it will proceed with the proposed improvement or not, and whether the claims for damages so filed shall be judicially inquired into, as hereinafter provided, before commencing, or after the completion of the proposed improvements."

Here again is a clear expression of a purely prospective legislative intent. Obviously council has no authority to proceed with the lighting of a street the cost of which is to be assessed on specially benefited property until the expiration of the time for filing claims for damages. While claims for damages may be unusual in the case of lighting a street, I am unable to say as a matter of law that under all circumstances such claims would be necessarily improper and wholly unfounded.

Section 3825, General Code, provides that "if the council decides to proceed with the improvement, an ordinance for the purpose shall be passed."

I am aware of no adjudicated cases in Ohio which are directly dispositive of your inquiry. The Supreme Court has, however, indirectly recognized the impropriety of or a lack of authority for assessing the cost of an improvement after it has been made when council had, prior to making the improvement, elected to pay the cost from the general fund. I direct your attention to the language of the court in *Chamberlain vs. Cleveland*, 34 O. S. 551, 569:

"It is claimed, in substance, that this assessment was levied to reimburse the general fund of the city, for moneys taken from that fund to pay the bonds of the city issued in anticipation of the collection of the assessment, and not for the purpose of paying the damages and expenses incurred in opening Bond street.

The assessment was made payable in several installments, as provided in section 577. The bonds were issued, and the faith of the city

pledged for their payment, to enable it to pay for the lands appropriated, under section 663, as amended February 1, 1873. 70 Ohio L. 21.

The purpose of the council from the beginning, was that the costs of the appropriation should be paid by assessment, and there is nothing to indicate that it ever elected to pay the cost thereof from the general fund of the city. The bonds were issued in anticipation of the assessment, which the city is now seeking to collect. Owing to delays in making and collecting the assessment, the city, in the meantime, has been compelled to pay some of the bonds, while the assessments are not all collected yet.

Under such circumstances, the city may lawfully collect proper assessments to pay for the land appropriated." (Italics the writer's.)

I am not unmindful of the fact that Section 3911, General Code, provides that proceedings with respect to improvements shall be liberally construed and that merely formal objections shall be disregarded. The section, however, also provides that "the proceedings shall be strictly construed in favor of the owner of the property assessed."

In view of the foregoing and in specific answer to your question, it is my opinion that a municipality may not legally levy special assessments for the purpose of paying an obligation incurred for the lighting of streets at a time prior to the completion of the proceedings provided in Sections 3812, et seq., General Code.

Respectfully,

JOHN W. BRICKER,
Attorney General.

178.

INSTALLMENT CONTRACT—COUNTY COMMISSIONERS MAY NOT PURCHASE LAND FOR CHILDREN'S HOME AND AGREE TO FORFEIT INSTALLMENTS ALREADY PAID IN CASE OF DEFAULT.

SYLLABUS:

While Section 2433, General Code, authorizes the board of county commissioners to purchase lands adjoining a children's home for the purpose of such institution, such section does not authorize the board to enter into a contract to purchase lands under a land contract and to agree to pay therefor over a period of nine years, and thereupon receive a deed to the property, the installments of the purchase price to be forfeited in the event of a default in the terms of payment as stipulated in the contract.

COLUMBUS, OHIO, March 1, 1933.

HON. CEDRIC W. CLARK, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—Your recent request for opinion reads as follows:

"I am enclosing herewith copy of Resolution adopted by the Board of County Commissioners of Meigs County, and copy of form of contract entered into under and by virtue thereof. I believe the resolution complies with Section 2414, G. C., and that the purchase is authorized