

2507.

APPROVAL, THREE GAME REFUGE LEASES IN MONTGOMERY COUNTY, OHIO.

COLUMBUS, OHIO, November 5, 1930.

HON. JOHN W. THOMPSON, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval the following Game Refuge Leases:

<i>No.</i>	<i>Lessor</i>	<i>Acres</i>
2085	Grand View Hills Company, Washington Township, Montgomery County -----	175.15
7086	Grand View Hills Company, Washington Township, Montgomery County -----	69.13
2087	Miami Conservancy District of Dayton, Ohio, Butler Township, Montgomery County -----	50.00

Upon examination, I find that the errors in these leases pointed out in my Opinion No. 2503, addressed to you on November 3, 1930, have been corrected and therefore I am approving all of said leases and returning them to you herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2508.

APPROVAL, BONDS OF SCOTT TOWNSHIP, MARION COUNTY, OHIO—\$2,684.53.

COLUMBUS, OHIO, November 5, 1930.

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

2509.

FEES—COUNTY COMMISSIONERS NOT ENTITLED TO RECEIVE FEES PROVIDED FOR BY SECTION 6602-14, GENERAL CODE—FEES IN INSTANT CASE BASED ON SEWER AND WATER IMPROVEMENTS.

SYLLABUS:

A county commissioner who was in office from January 1, 1923, to January 1, 1927, is not entitled to receive fees provided for by Section 6602-14, General Code, based on sewer and water improvements, the legislation for which was passed subsequent to July 29, 1923, the effective date of said enacted section.

COLUMBUS, OHIO, November 6, 1930.

HON. R. L. THOMAS, *Prosecuting Attorney, Youngstown, Ohio.*

DEAR SIR:—This acknowledges receipt of your request for my opinion as follows:

"A member of the board of commissioners of this county, from January 1, 1923, to January 1, 1927, has requested the county auditor to pay to him, fees provided for by Section 6602-14 of the General Code.

The legislation for the improvements under the provisions of the above mentioned statute, was passed subsequent to July 29, 1923.

I am enclosing herein, a copy of an opinion rendered to the county sanitary engineer by my predecessor, which may be of some assistance to you.

I would like to know whether or not the county auditor may legally pay the fees which he has been holding."

Your communication presents the question of whether a county commissioner whose term of office began before the effective date of Section 6602-14, General Code (July 29, 1923), is entitled to the additional compensation provided by that law for services in connection with the improvements contemplated in the section. In order to answer that question, it is necessary to determine whether the additional compensation provided by that section may be said to be "salary" within the meaning of that word as used in Article II, Section 20, Ohio Constitution. Said constitutional provision is as follows:

"The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Section 6602-14, General Code, as enacted (110 O. L. 341), reads as follows:

"In addition to the regular salary provided by law for county commissioners, each commissioner serving in a county having one or more regularly created county sewer districts, shall be paid the following amount; for time spent in connection with the establishing of any sewer district or the preliminary work preceding the awarding of any contract for either sewer or water improvements or both, or for the acquiring of sewer or water supply lines already constructed, the sum of five dollars per day for each day actually employed, but not exceeding the aggregate sum of seventy-five dollars on each or any sewer or water improvements; for each and every sewer or water improvement actually installed under this act (G. C. §§ 6602-1 et seq.), a sum equivalent to the following schedule of costs for all improvements or parts of improvements actually constructed during the current year ending June 30th; for the first \$200,000, one-third of one per cent; for all above \$200,000, and not exceeding \$400,000, one-fourth of one per cent; for all above \$400,000, and not exceeding \$600,000, one-sixth of one per cent; for all above \$600,000, one-tenth of one per cent, provided, however, that the maximum compensation received by any commissioners or sanitary engineer serving in any county affected by this measure shall not exceed the amount of compensation received during the current year by the county auditor serving in the said county. The cost of any improvement shall be determined by estimates paid to the contractor for such improvements plus the cost of all engineering, publication and other costs of such improvements, as defined in this act, exclusive of the compensation provided in this section.

The method of payment of the above shall be as follows—the sum of five dollars per day, as specified above, shall be paid by warrants issued by the county auditor upon the county treasurer upon the filing in the county

auditor's office of an itemized statement by each county commissioner for such service. For improvements actually installed, as specified above, payments shall be made by warrants issued by the county auditor upon the county treasurer upon the filing in the county auditor's office of a bill properly authorized and certified by the county sanitary engineer, based upon monthly estimates of work constructed by any contractor or contractors regularly engaged in performing work upon any sewer or water contract or both plus the engineering and incidental costs as provided in this act exclusive of the compensation provided in this section. The funds to pay the above additional compensation to county commissioners shall be included in the incidental cost of each improvement, and the moneys shall be provided as already provided in this act. In the event that any improvement, either sewer or water or both, is installed upon which a per diem fee has been previously paid, deduction shall be made of the amount so paid when the bills based upon the percentage allowance are regularly presented to the county auditor by the sanitary engineer for payment."

From the provisions of the above section, it is evident that the county commissioners receive pay for their work in connection with sewer or water improvements by fees based on the cost of the improvements. The question now arises whether such fees may be regarded as salary or compensation.

At the outset, I may say that your question is not without precedent. My predecessor, Hon. C. C. Crabbe, on July 28, 1923, received a communication from the Bureau of Inspection and Supervision of Public Offices, presenting three questions arising from the enactment of the section last above quoted. The first question propounded was the exact question that is now presented. In reply to this query, the then Attorney General above mentioned on October 8, 1923, advised the Bureau as follows:

"There is a long line of Ohio cases as well as former opinions of this department which would tend to an affirmative conclusion to your first question.

Thompson vs. Phillips, 12 O. S. 617;

Gobrecht vs. Cincinnati, 51 O. S. 68;

Opinions of Attorney General, 1919, Vol. 2, p. 1609.

But so long as the judgment in the case of *State ex rel. Lueders, Probate Judge, vs. Beaman, Auditor*, stands unreversed and not distinguished from the above cases, it would seem that this case should be followed."

Two days later on October 10, 1923, a second letter was addressed to the Bureau by the then Attorney General, affirming the first letter and stating that the Lueders case should be followed. I feel that it is unnecessary to go into a further discussion of this question. The opinion of your predecessor which you have submitted with your inquiry thoroughly discusses the cases of *Thompson vs. Phillips*, 12 O. S. 617; *Gobrecht vs. Cincinnati*, 51 O. S. 68; and the Attorney General's opinion in 1919, all of which were mentioned in the letter of my predecessor addressed to the Bureau and which would tend to show that money received on a fee basis is compensation and not salary. However, the Lueders case, reported in 106 O. S. 650, although having no syllabus, being a per curiam opinion, seems to hold that Probate judges in office at the time of the passage of Section 5348-10a, General Code, which provided for a fee of five dollars for said judges for each proceeding in which an inheritance tax fee was assessed, and three dollars when not assessed, could not receive such fees on the ground that they constitute salary within the inhibition of Article II, Section

20, supra. Hence, it appears that this case is analogous to the situation which you present and is decisive of your question. Furthermore, I may say that the Bureau has followed the informal ruling of Mr. Crabbe which I have already quoted.

Accordingly, I am of the opinion in specific answer to your question that a county commissioner who was in office from January 1, 1923, to January 1, 1927, is not entitled to receive fees provided for by Section 6602-14, General Code, based on sewer and water improvements, the legislation for which was passed subsequent to July 29, 1923, the effective date of said enacted section.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2510.

APPROVAL, BONDS OF TORONTO VILLAGE SCHOOL DISTRICT,
JEFFERSON COUNTY, OHIO—\$20,426.25.

COLUMBUS, OHIO, November 6, 1930.

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

2511.

APPROVAL, AGREEMENT BETWEEN STATE OF OHIO AND THE NEW
YORK CENTRAL RAILROAD COMPANY FOR ELIMINATION OF
GRADE CROSSING IN TRURO TOWNSHIP, FRANKLIN COUNTY,
OHIO.

COLUMBUS, OHIO, November 6, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted a proposed form of agreement, in triplicate, between the State of Ohio and The New York Central Railroad Company, relating to the following improvement:

“In the matter of the elimination of the grade crossing of the New York Central Railroad and State Highway No. 49, located at a point south of Bexley in Truro Township, Franklin County, Ohio.”

After examination, it is my opinion that said proposed agreement is in proper legal form, and when properly executed will constitute a binding contract.

Said agreement is being returned herewith.

Respectfully,
GILBERT BETTMAN,
Attorney General.