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MUNICIPAL CORPORATION—CREATION OF SEWER DISTRICTS—729.31 *Et Seq.*, RC—NO AUTHORITY UNDER 729.39 RC TO ASSESS ENTIRE COST OF SUCH IMPROVEMENTS UPON REAL PROPERTY IN MUNICIPALITY: NOTWITHSTANDING PETITION UNDER 727.30 RC HAS BEEN PRESENTED TO MUNICIPAL LEGISLATIVE AUTHORITY.

SYLLABUS:

A municipal corporation which has adopted a plan of sewerage of the municipality by the creation of sewer districts within the municipality pursuant to and in accordance with Section 729.31, *et seq.*, Revised Code, is not authorized by Section 729.39, Revised Code, to assess the entire cost of such improvements upon the real property abutting upon easements in which sanitary sewers are constructed, notwithstanding the fact that a petition which purports to be in accordance with Section 727.30, Revised Code, has been presented to the legislative authority of such municipality.

Columbus, Ohio, April 11, 1957

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“The matter of the assessment of the cost of sewer improvements has recently been raised in the municipality of W. It is contemplated that sanitary sewer extensions be installed in a new development in W, such sewers to be placed in easements rather than in streets or alleys. More than sixty per cent of the abutting property owners have petitioned for the improvement and it is the desire of the officials to assess the entire cost of the improve-

ment against such abutting property owners. However, since the installation is not to be made in streets or alleys, a sewer district has been created under the provisions of Sections 729.31, et seq., Revised Code of Ohio.

“It would appear that the authority to assess the entire cost of the improvement should attach to improvements made pursuant to the sewer district laws. However, there is an apparent difference of opinion in this regard and I have been able to find no opinions of the Attorney General nor any cases directly in point.

“Under these circumstances, it is requested that you consider this problem and favor us with your opinion as to the following question :

“Can the entire cost of improving a part of a municipal sewer district by constructing a sanitary sewer in an easement between the two streets be assessed against abutting property owners when a petition for such improvement has been filed in accordance with Section 729.30, Revised Code of Ohio?”

It is my assumption that the reference in your inquiry to Section 729.30, Revised Code, should have read 727.30, Revised Code; and this opinion will be based on that assumption.

You have stated that the municipality in question is proceeding under Section 729.31, *et seq.*, Revised Code, which authorize a municipal corporation to divide the municipality into sewer districts for the purpose of securing an efficient system of sewerage. It then becomes necessary to determine how the General Assembly has directed that the cost of such system, or a portion thereof, shall be assessed upon the real property affected. For this we turn to Section 729.39, Revised Code, which reads in pertinent part as follows :

“After the publication of notice as provided in section 729.38 of the Revised Code, the legislative authority of the municipal corporation shall determine whether or not it will proceed with the proposed improvement, and if it decides to proceed an ordinance for the purpose shall be passed. Such ordinance shall contain a statement of the districts or parts thereof proposed to be constructed, the character of the material to be used, a reference to the plans and specifications, the mode of payment therefor, and shall provide for assessing the cost of the improvement, including the cost of a sewage disposal works, treatment plant, and pumping stations, *upon the lots and lands in each district as other assessments are levied. Such lots and lands shall be assessed by district*, except that the cost of the construction of any main sewer which serves as a common outlet for two or more districts

shall be apportioned between the districts, and such cost shall be assessed on the lots and lands in the respective districts in proportion to the benefits accruing thereto.” (Emphasis added.)

I am unable to find in this or any other section of the law relating to the creation of a sewer district by a municipality, any provision which authorizes the assessment of the cost of such improvement upon the lots and lands abutting upon an easement in which a part of such system has been installed. On the contrary, Section 729.39, Revised Code, expressly directs that a municipal ordinance expressing a decision to make such improvements shall also provide for assessing the costs upon the lots and lands *in each district* and that such lots and lands shall be assessed *by district*. There is no reference whatever to an assessment upon abutting real property.

The section quoted above also clearly directs the municipality to make provision in the ordinance to assess the cost “as other assessments are levied.” This can only mean as other assessments are levied by a municipality. A determination of how they are levied involves an examination of Chapter 727., Revised Code, as the legislative authority of a municipal corporation may proceed under either Section 727.01, *et seq.*, Revised Code, or Section 729.31, *et seq.*, Revised Code, in providing a system of sewerage for the municipality. In Section 727.01, *et seq.*, Revised Code, general power is granted to a municipal corporation to levy and collect special assessments to improve any “street, alley, dock, wharf, pier, public road or place;” Section 729.31, *et seq.*, Revised Code, relates to the additional power of the municipality to act under these sections to create sewer districts for the purpose of providing an efficient sewerage system. There will be no attempt here to compare or distinguish the two methods of procedure except to the extent necessary to determine the power of the legislative authority of the municipal corporation to assess upon the owners of abutting property the costs of such improvements, and to collect such assessments through the county taxing authorities. See Sections 727.51 and 729.39, Revised Code.

When a municipality is proceeding under Section 727.01, *et seq.*, Revised Code, there is a definite statutory limitation upon the total amount, as measured by a percentage of the actual value of the lot or land improved, of assessments which may be levied upon any particular lot within a five-year period. Section 727.15, Revised Code, reads as follows:

“The legislative authority of a municipal corporation shall limit all assessments to the special benefits conferred upon the property assessed. In no case shall there be levied upon a lot or parcel of land in the municipal corporation any assessment or assessments, for any or all purposes within a period of five years, in excess of thirty-three and one-third per cent of the actual value thereof after improvement is made. Assessments levied for the construction of main sewers shall not exceed the sum that, in the opinion of the legislative authority, would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith.”

More important, however, is the direction in Section 727.16, Revised Code, that a municipal corporation must pay a certain proportionate share of the costs and expenses of improvements. The said Section 727.16, Revised Code, reads:

“The municipal corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as the legislative authority thereof deems just, which part shall be not less than one fiftieth of all such cost and expense, and in addition thereto, the municipal corporation shall pay the cost of intersections.”

Thus, it is apparent that in all cases except those falling within a certain exception found in Section 727.30, Revised Code, a municipality, acting pursuant to Section 727.01, Revised Code, may not assess the entire cost of improvements upon the real property benefited by such improvements. The exact exception provided by Section 727.30, Revised Code, is shown by quotation of the pertinent language of that section:

“When a petition, subscribed by three fourths in interest of the owners, or the owners of sixty per cent of the foot frontage of property abutting upon a *street, alley, or highway* of any description between designated points in a municipal corporation, is regularly presented to the legislative authority thereof for that purpose, *the entire cost of any improvement of such street, alley or highway, including the cost of intersections, regardless of the limitations of section 727.16 of the Revised Code,* and without reference to the value of the lands of those who subscribed such petition, may be assessed and collected in equal annual installments, proportioned to the whole assessment, in a manner which may be fixed by the legislative authority. * * * When the lot or land of one who did not subscribe the petition is assessed, such assessment shall not exceed thirty-three and one-third per cent of

the actual value of such lot or land after the improvement is made. The guardians of infants or insane persons may sign such petition on behalf of their wards only when expressly authorized by the probate court on good cause shown.” (Emphasis added.)

The language in Section 727.30, Revised Code, is without ambiguity. In the situations provided for therein the owners of abutting property may initiate action looking toward the improvement of a *street, alley or highway*; when they so proceed the limitation of Section 727.16, Revised Code, does not apply. I, however, find no statutory authority for the owners of property to be benefited to proceed in this manner except in strict compliance with that section. It is quite apparent that the improvement to which your inquiry relates is not the improvement of a street, alley or highway.

I am unable to conclude that by the use of the words “as other assessments are levied” in Section 729.39, Revised Code, the General Assembly contemplated incorporating therein the limited exception, found in Section 727.30, Revised Code, from the otherwise all-inclusive limitations upon the power of a municipality to assess upon real property the entire cost of certain improvements. In fact, there is no language in the municipal sewer district laws which either expressly or by implication authorizes the municipality to proceed upon the application of any property owners; Section 729.31, and the succeeding sections of the Revised Code clearly have reference to a municipality proceeding under a comprehensive improvement plan adopted by the municipality and carried out as therein described.

Section 729.39, Revised Code, also, quite specifically provides that the costs are to be assessed by district upon the lots and lands in the district, which direction is inconsistent with the suggestion that the costs may be assessed only upon and entirely upon that real property which abuts upon an easement in which certain sanitary sewer extensions are placed. The words “as other assessments are levied” used in Section 729.39, Revised Code, must be interpreted as referring not only to the limitations, hereinbefore discussed, on the powers of a municipality to assess the costs of an improvement, but also to the procedure prescribed by Section 727.51, Revised Code, to be followed by a municipality in the collection of special assessments. Such assessments are, pursuant to Section 727.51, Revised Code, to be certified by the clerk of the legislative authority of a municipi-

pality to the county auditor to be placed upon the tax list; the actual collection of the assessments then becomes the duty of the county treasurer.

It is, therefore, my opinion and you are advised that :

A municipal corporation which has adopted a plan of sewerage of the municipality by the creation of sewer districts within the municipality pursuant to and in accordance with Section 729.31, *et seq.*, Revised Code, is not authorized by Section 729.39, Revised Code, to assess the entire cost of such improvements upon the real property abutting upon easements in which sanitary sewers are constructed, notwithstanding the fact that a petition which purports to be in accordance with Section 727.30, Revised Code, has been presented to the legislative authority of such municipality.

Respectfully,

WILLIAM SAXBE

Attorney General