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1. MUNICIPAL CORPORATION — ANNEXATION — PORTION OF TOWNSHIP—DIVISION OF TOWNSHIP FUNDS—MADE BY COUNTY AUDITOR AS OF DATE WHEN ANNEXATION EFFECTIVE—SECTION 3557-1 G. C.
2. SECTION 3557-1 G. C. CONTEMPLATES DIVISION OF ALL FUNDS OF TOWNSHIP, RAISED BY TAXATION OR OTHERWISE—EXCEPTION, FUNDS TO PAY INDEBTEDNESS OF TOWNSHIP.
3. DIVISION OF FUNDS — UNENCUMBERED BALANCES OF FUNDS ACTUALLY ON HAND—MONEYS IN PROCESS OF COLLECTION — NOT INCLUDED IN DIVISION OF FUNDS.

## SYLLABUS:

1. Upon the annexation to a municipal corporation of a portion of a township, the division of the funds of the township required by the provisions of Section 3557-1, General Code, to be made by the county auditor, is to be made as of the date when the annexation becomes effective.

2. Section 3557-1, General Code, requiring the county auditor, on the annexation of a part of a township to a municipal corporation to make division of the township funds, contemplates the division of all funds of the township whether raised by taxation or otherwise, except funds required for the payment of the indebtedness of the township.

3. In the division of funds contemplated by Section 3557-1 General Code, only the unencumbered balances of funds actually on hand can be considered, and moneys in process of collection are not included in the division required by said section.

Columbus, Ohio, November 5, 1943.

Hon. W. Thurman Todd, Prosecuting Attorney,  
Mt. Vernon, Ohio.

Dear Sir:

I acknowledge receipt of your communication requesting my opinion, reading as follows:

“Certain territory of Clinton Township, Knox County, Ohio, was annexed to the city of Mt. Vernon by proceedings under Sections 3558 et seq., General Code. The city council of Mt. Vernon passed an ordinance on June 22, 1942, authorizing such annexation and directing the solicitor to prosecute said proceed-

ings and providing for submission of the question to the electors of the annexed territory. The annexation was voted upon on August 11, 1942, under Section 3561-1, General Code, and was approved by the voters.

A petition for such annexation was filed with the county commissioners September 8, 1942. This petition was heard November 9, 1942, and such annexation approved by resolution of the commissioners. The papers in the matter of this annexation were filed with the city auditor November 13, 1942, and were filed with the county recorder February 26, 1943.

It now becomes necessary for the county auditor to make a division of the various funds of the township. Apparently this division should be made under Section 3557-1 of the General Code, and the matters upon which I would like your opinion are as follows:

1. What date should be used to determine the balance in the various funds of the township for division?

2. Does Section 3557-1 require division of funds on hand to the credit of every fund in the township and thus apply to funds which do not have their origin from general taxation on the real or personal property duplicate but are acquired from other sources, such as gasoline tax money and motor vehicle registration fees?

3. Does this section provide for the division of funds in the process of collection?

For the purpose of arriving at an answer to your question as to the date that should be used to determine the balance in the funds of the township which is subject to division under Section 3557-1, it seems necessary to determine from an examination of the statutes just what steps are necessary to complete the proceedings for annexation.

Sections 3548 to 3557, inclusive, of the General Code, provide for annexation of adjacent territory to a municipality upon the application of the municipality itself but to some extent adopt by reference the procedure set out for the annexation of territory on the application of the inhabitants of the territory to be annexed.

Section 3558, under which your procedure was had, reads:

“When the inhabitants generally of a municipal corporation desire to enlarge its corporate limits by the annexation of con-

tiguous territory, it shall be done in the manner hereinafter specified."

Sections 3559, 3560, 3561 and 3561-1, General Code, therefore become pertinent. These sections read:

Section 3559:

"The council of the corporation, by a vote of not less than a majority of the members elected, shall pass an ordinance authorizing such annexation to be made, and directing the solicitor of the corporation, or some one to be named in the ordinance, to prosecute the proceedings necessary to effect it."

Section 3560:

"The application of the corporation to the county commissioners for such purpose shall be by petition, setting forth that, under an ordinance of the council the territory therein described was authorized to be annexed to the corporation. The petition shall contain an accurate description of the territory, and be accompanied by an accurate map or plat thereof."

Section 3561:

"When the petition is presented to the commissioners, like proceedings shall be had, in all respects, so far as applicable, as are required in case of annexation on application of citizens in this chapter."

Section 3561-1:

"A vote, by the electors residing in the contiguous territory, shall be taken under the election laws of the state of Ohio at the next general or primary election occurring more than thirty days after council passes the ordinance mentioned in section 3559 of the General Code. Thereupon all annexation proceedings shall be stayed until the result of the election shall be known. If a majority favor annexation, proceedings shall begin within ninety days to complete annexation, and if a majority vote is against annexation, no further proceedings shall be had for annexation for at least five years. \* \* \*"

It will be noted, of course, that in the order of procedure the election contemplated by Section 3561-1 precedes any action that might be taken under Section 3561. Section 3561, providing for "like proceedings \* \* \* as are required in case of annexation on application of citizens", has reference to the proceedings set forth in Section 3549, which reads as follows:

“The petition shall be presented to the board of commissioners at a regular session thereof, and when so presented the same proceedings shall be had as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as required in case of an application to be organized into a village under the provisions of this division. The final transcript of the commissioners, and the accompanying map or plat and petition, shall be deposited with the auditor or clerk of the municipality to which annexation is proposed to be made, who shall file them in his office.”

It was held in the case of *State ex rel. v. McKenzie*, 16 O. C. C. (N. S.) 172, that the reference in Section 3561 is to Section 3549, and the proceedings contemplated by that section are incorporated by reference. However, on reading Section 3549, we find that instead of setting out the proceedings required, we are again referred to the steps required by law for the organization of a village.

We must therefore look to Section 3518, et seq., General Code. Without setting out these proceedings in detail, it is sufficient to say that they contemplate the filing of a petition with the county commissioners, the fixing by the commissioners of a date for hearing which shall not be less than sixty days after the petition is filed, the publication of notice of the hearing in a newspaper printed and of general circulation in the county for a period of six weeks and the posting of a copy of the notice within the limits of the proposed corporation. This notice was held in the case of *Franklin v. Croll*, 31 O. S. 647, to be a necessary jurisdictional step in a proceeding for annexation. Section 3521, General Code, further provides for a public hearing. Section 3549, relating directly to annexation, makes the special provision that the final transcript of the finding of the commissioners and the accompanying map or plat and petition shall be deposited with the auditor or clerk of the municipality to which annexation is proposed to be made.

Section 3561, General Code, in adopting “so far as applicable” the proceedings required in annexation “on application of citizens” would involve at least the following steps: Section 3550 requires the auditor or clerk, after sixty days from the filing of the transcript, to lay the same before council, while Section 3553 allows this sixty days, within which any person interested may present a petition to the common pleas court or a judge thereof, asking for an injunction. If such petition for injunction is dismissed, or if no petition is filed, then the council shall accept or reject “the application”, and Section 3556, by way of conclusion, provides:

“When the resolution or ordinance, accepting such annexation, has been adopted, the territory shall be deemed a part

of the municipality, and the inhabitants residing thereon shall have all the rights and privileges of the inhabitants within the original limits of the municipality.”

It has been held that all of the provisions of the statutes relating to organization of villages and annexation of territory to municipalities are to be read together, so far as applicable. *Shugars v. Williams*, 50 O. S. 297; *Hacker v. Payne*, 7 Oh. App. 25. And since the sixty day period provided by Section 3553 is evidently designed to give persons affected an opportunity for an appeal to court before annexation becomes effective, I must hold that the procedure above outlined, at least up to the end of the sixty day period, or the dismissal of a petition for injunction, if any, is applicable to a proceeding for annexation initiated by a municipality. However, my conclusion stops short of the ordinance accepting the annexation, as contemplated by Section 3552. I had before me this question in an opinion which I rendered October 4, 1939, found in *Opinions Attorney General for 1939*, p. 1864, and held:

“Where proceedings for the annexation of adjacent or contiguous territory to a municipal corporation are instituted by the municipal corporation and the board of county commissioners approve such annexation, it is unnecessary for council to pass an ordinance accepting such annexation as provided in Section 3550, General Code, in order to make same effective.”

I adhere to my former view that there would be no reason whatever for council to pass a resolution or ordinance accepting the annexation when it had itself initiated it and petitioned for it.

Therefore, it is my opinion that where an annexation is carried out under the provisions of Section 3558, et seq., on the application of a municipal corporation, such annexation is complete at the expiration of sixty days from the filing with the clerk or auditor of such municipality of the transcript of the proceedings of the county commissioners approving such annexation, or, in case a petition has been filed seeking to enjoin such annexation, then immediately upon the dismissal of such petition.

This conclusion I believe is consistent with and supported by the case of *Roettker v. Cincinnati*, 56 Oh. App. 464, where it was held:

“Section 3556, General Code, is clear that the territory becomes annexed upon the passage of the ordinance accepting the territory, while Section 3557-1, General Code, deals with the apportionment of indebtedness of the assumed territory and the division of the unencumbered funds.

Annexation is valid and completed by the ordinance accepting the annexation application, subject to being avoided by the failure or refusal of council to accept the apportionment of indebtedness and division of funds."

That case of course differs from the present situation in that annexation was upon the petition of residents of the territory.

This brings me to a consideration of Section 3557-1, General Code, relating to the apportionment of the unencumbered balances of the township which the county auditor is required to make, where a portion of a township is annexed to a municipality. This section reads in part as follows:

"When proceedings have been commenced to annex a portion of a township, or portions of more than one township, to a municipal corporation upon which the tax levies made by the trustees of such township or townships for the payment of the township debt do not apply, the auditor of the county in which said territory is located shall ascertain and apportion the amount of existing net indebtedness of the township which shall be assumed and paid by the municipal corporation. The apportionment shall be made in the proportion of the total duplicate for the annexed territory transferred to the municipal corporation to the total tax duplicate remaining in and for the unannexed portion of the township or townships. He shall ascertain, adjust and divide between the municipal corporation and the unannexed portion of the township or townships *any unencumbered balance on hand to the credit of any fund* of such township, in the same proportion as is herein provided for division and apportionment of indebtedness. Provided, however, that no division shall be made of a balance in any fund of a township that is required by law for the retirement of its indebtedness. \* \* \* The apportionment provided in this section shall not be in effect until it is accepted by ordinance or resolution of the council or other legislative authority of such municipal corporation. The passage of such resolution or ordinance shall be necessary to the validity of the annexation." (Emphasis mine.)

Strangely enough, Section 3557-1 is vague as to the time as of which the balance of the funds to be divided between the township and the municipality is to be taken. Relative to the apportionment of the indebtedness of the township, the section does start with the words "when proceedings have been commenced to annex", but even that is not a definite mandate that the apportionment of indebtedness when made shall be as of the date of the first step to annexation. It appears in the case of *State ex rel. v. Heuck*, 42 Oh. App. 367, that the county auditor in making the division of funds required by Section 3557-1 did actually take the balance as of the date of the first step in the annexation proceedings, and

that the city council some fourteen months thereafter passed a resolution accepting such apportionment; that the city then being dissatisfied because it had not received any part of the taxes collected while the annexation proceedings were under way, brought the action in mandamus to compel the county auditor to allocate to it a share of such taxes. The opinion does not discuss the question whether the auditor was right in dividing the funds as of the date of the beginning of the annexation proceedings but, after quoting the closing sentences of Section 3557-1 denied the writ saying:

“Under this provision of the law, it becomes apparent that the relator is not entitled to the relief asked. The auditor made his apportionment. Had the city of Cincinnati been dissatisfied with the apportionment, it had the opportunity to object, and to seek other basis for apportionment than was used by the auditor, and, if not made satisfactorily, it could refuse to accept, by ordinance or resolution, the apportionment; whereupon, no annexation would have taken place.”

Plainly, the auditor could not make an actual division of the funds at the very commencement of the annexation proceeding. The annexation, for a variety of reasons, may never be accomplished. Nor would it seem either reasonable or practicable to make a division of “unencumbered cash balances on hand” as of the day of the first step in the proceeding when it is evidently quite possible that long delays may ensue before annexation can actually become effective. Moneys in the township treasury needed for the current operations should not be tied up indefinitely awaiting the uncertain outcome of a proceeding that might or might not justify or require their division. The statutes make it clear that when the annexation is finally accomplished, the rights of the municipality and of the inhabitants whose status has been changed become fixed. Certainly along with other rights should go the right to the proper share of the funds that are subject to division.

Accordingly, I hold in specific answer to your first question that upon the annexation to a municipal corporation of a portion of a township, the division of the funds of the township required by the provisions of Section 3557-1, General Code, to be made by the county auditor, is to be made as of the date when the annexation becomes effective.

Coming to your second question as to what funds are subject to division, I note that the statute uses the words “any fund of such township”, followed by the single exception that no division shall be made of any fund that is required by law for the payment of the township’s

indebtedness. I cannot see how "any", as used in the above quoted phrase, can be construed as meaning anything else but "all". It would follow, therefore, that the statute contemplates the division of all funds whatever their source, except the proceeds of tax levies intended for the payment of interest or principal of township indebtedness.

Therefore, in specific answer to your second question, it is my opinion that Section 3557-1, General Code, requiring the county auditor, on the annexation of a part of a township to a municipal corporation, to make division of the township funds, contemplates the division of all funds of the township whether raised by taxation or otherwise, except funds required for the payment of the indebtedness of the township.

Answering your third question, it is my opinion that in the division of funds contemplated by Section 3557-1, General Code, only the unencumbered balances of funds actually on hand can be considered, and moneys in process of collection are not included in the division required by said section. It is true that for the purposes of appropriation by taxing authorities, under the provisions of Sections 5625-26, 5625-27 and 5625-28, General Code, the various subdivisions are expressly authorized to make appropriations based on actual funds plus "estimated resources"; it is also true that under the provisions of Section 5625-33, General Code, the certificate of the fiscal officer necessary to give validity to expenditures may be based not only on funds in the treasury but also upon funds in process of collection. But the language of Section 3557-1 must be taken in its plain meaning, and the words "balance on hand" can have but one meaning, viz., money actually collected and standing to the credit of the several township funds.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.