3892.

APPROVAL, BONDS OF FRANKLIN TOWNSHIP, FRANKLIN COUNTY, OHIO—$2,000.00.

COLUMBUS, OHIO, December 28, 1931.

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

3893.

DIRECTORS CONSERVANCY DISTRICT—MAY ISSUE WARRANTS OTHER THAN IN ANTICIPATION OF THREE-TENTHS OF MILL LEVY UNDER SECTION 6828-43, GENERAL CODE—DIRECTORS MAY BORROW MONEY PRIOR TO ISSUANCE OF BONDS WHEN.

SYLLABUS:

Warrants issued by a board of directors of a conservancy district under Section 6828-44, General Code, need not necessarily be issued in anticipation of the three-tenths of a mill levy provided in Section 6828-43, General Code, and in case the proceeds of such levy have been previously expended, such board is not precluded by the Conservancy Act from borrowing money under this section prior to the issuance of bonds to the extent that funds are needed to carry out the purposes of the conservancy district.

COLUMBUS, OHIO, December 28, 1931.

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

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

> "We are enclosing herewith a letter from the Springfield Conservancy District submitting a question as to the authority of the trustees of the Conservancy District to issue warrants on which to borrow money under the circumstances recited in the letter. You are respectfully requested to furnish this department your opinion upon the question submitted."

Attached to your communication is the following letter from the Springfield Conservancy District:

> "The Springfield Conservancy District was created under and by virtue of Sections 6828-1, G. C., et seq.
>
> All the steps of the act of organization have been observed.
>
> A board of directors was duly appointed, as was a board of appraisers.
>
> An official plan was presented and approved, and an appraisal roll was prepared and filed.
>
> The preliminary tax of three-tenths (0.3) of a mill was levied, assessed and collected upon all property involved in the district.

The district consists of the City of Springfield and such adjoining rural land as was necessary for the flood program.

Hearings were had upon the appraisal roll and the court has informally stated (although the same has not been integrated into a decree) that the benefits accruing from the official plan were not sufficient to justify the execution of the official plan as now filed, and has suggested a modification thereof. The board, on motion granted, has submitted further engineering details suggestive as to how the official plan can be modified and is now awaiting the decision of the court of common pleas of Clark County, Ohio.

Originally, the City of Springfield endeavored to carry forward a flood control program, and for said purpose, by vote of the people, had authorized a bond issue of One Hundred and Fifty Thousand Dollars ($150,000), following which it engaged the services of The D-M Engineering Company to formulate a flood control program. Finding that the character and magnitude of the work entailing a full protection against floods was beyond the City's financial possibilities, the City of Springfield petitioned the Court of Common Pleas of Clark County, Ohio, for the organization of a conservancy district. After the organization of the district, by arrangement, the City of Springfield carried on the engineering work and expenses, the preliminary fund arising from the preliminary tax of the district being grossly insufficient for said work. The City of Springfield has suspended its contract with The D-M Engineering Company for engineering services necessary to the district, and the district has been endeavoring to carry forward although unable to pay the engineering, legal and administrative departments of its work. There are no funds in the treasury of Clark County, Ohio, available to pay any order which the Court of Common Pleas might make, to be given to the conservancy district for its functioning.

Query: Has the board of directors of The Springfield Conservancy District the present power to issue warrants on which to borrow money necessary to carry on its work and the requirements of the district?

The amount necessary to carry on the present work and to pay the obligations of the district already incurred, until either the official plan is ordered to be executed or the district disorganized will be Forty Thousand Dollars ($40,000).

Will you kindly give us your legal opinion in this matter?"

Provisions for the financial administration of conservancy districts such as are directly pertinent to the question presented are contained in Sections 6828-42 to 6828-44, both inclusive, General Code. These sections provide as follows:

Sec. 6828-42.

"The moneys of every conservancy district organized hereunder shall consist of three separate funds: (1) Preliminary Fund, by which is meant the proceeds of the ad valorem tax authorized by this act and such advancements as may be made from the general county funds as provided in section 43 of this act (G. C. §6828-43); (2) Bond Fund, by which is meant the proceeds of levies made against the special as-

sessments of benefits equalized and confirmed under the provisions of this act; and (3) Maintenance Fund, which is a special assessment to be levied annually for the purpose of upkeep, administration and current expenses as hereinafter provided. It is intended that the cost of preparing the official plan, the appraisal (except as paid out of the preliminary fund) and the entire cost of construction and superintendence, including all charges incidental thereto, and the cost of administration during the period of construction, shall be paid out of the bond fund.

No vouchers shall be drawn against the preliminary fund (except for advances from the general county funds) or against the maintenance fund until a tax-levying resolution shall have been properly passed by the board of directors, and duly entered upon its records; no bonds shall be issued against the bond fund until an assessment-levying resolution shall have been properly passed by the board of directors and duly entered upon its records, and until the property owners shall have been given an opportunity for a period of not less than thirty days to pay the assessments so levied against their respective properties."

Sec. 6828-43.

"After the filing of a petition under this act (G. C. §§6828-1 to 6828-79), and before the district shall be organized, the cost of publication and other official costs of the proceedings shall be paid out of the general funds of the county in which the petition is pending. Such payment shall be made on the warrant of the auditor on the order of the court. In case the district is organized, such cost shall be repaid to the county out of the first funds received by the district through levying of taxes or assessments or selling of bonds, or the borrowing of money. If the district is not organized, then the cost shall be collected from the petitioners or their bondsmen. Upon the organization of the district, the court shall make an order indicating a preliminary division of the preliminary expenses between the counties included in the district in approximately the proportions of interest of the various counties as may be estimated by said court. And the court shall issue an order to the auditor of each county to issue his warrant upon the treasurer of his county to reimburse the county having paid the total cost.

Expenses incurred thereafter prior to the receipt of money by the district from taxes or assessments, bond sales, or otherwise, shall be paid from the general funds of the counties upon the order of the court and upon certification of the clerk of the court of such order specifying the amount and purpose of the levy, to the auditor of each county, who shall thereupon at once issue his warrant to the treasurer of his county, said payments to be made in proportion of the order outlined by the court aforesaid. Upon receipt of funds by the district from the sale of bonds or by taxation or assessment the funds so advanced by the counties shall be repaid.

As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying

expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This tax shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. If such items of expense have already been paid in whole or in part from other sources, they may be repaid from the receipts of such levy, and such levy may be made although the work proposed may have been found impracticable or for other reasons is abandoned. The collection of such tax levy shall conform in all matters to the collection of taxes and assessments for the district outlined in this act, and the same provisions concerning the non-payment of taxes shall apply. The board may borrow money in any manner provided for in this act, and may pledge the receipts from such taxes for its repayment, the information collected by the necessary surveys, the appraisal of benefits and damages, and other information and data being of real value and constituting benefits for which said tax may be levied. In case a district is disbanded for any cause whatever before the work is constructed, the data, plans and estimates which have been secured shall be filed with the clerk of the court before which the district was organized and shall be matters of public record available to any person interested."

Sec. 6828-44.

"In order to facilitate the preliminary work, the board may borrow money at a rate of interest not exceeding six per cent. per annum, may issue and sell or pay to contractors or others, negotiable evidence of debt (herein called warrants) therefor signed by the members of the board, and may pledge (after it has been levied) the preliminary tax of not exceeding three-tenths of a mill for the repayment thereof. If any warrant issued by the board of directors is presented for payment and is not paid for want of funds in the treasury, that fact with the date of refusal shall be endorsed on the back of such warrant, and said warrant shall thereafter draw interest at the rate of six per cent. until such time as there is money on hand sufficient to pay the amount of said warrant with interest."

A mere cursory reading of the foregoing sections is sufficient to disclose that the legislature evidently contemplated that the three-tenths of a mill limitation therein authorized should be sufficient to take care of preliminary expenses which may be incurred prior to the issuance and sale of bonds. It is provided that the preliminary fund shall consist of the proceeds of this levy. County funds may be advanced prior to the receipt of the proceeds of this levy or warrants may be issued in anticipation of the receipt of the proceeds thereof. This is clear in view of the provision of Section 6828-44, supra, to the effect that this preliminary levy may be pledged for the payment of such warrants.

The case of *State, ex rel.* v. *Valentine,* 94 O. S. 440, is pertinent. The syllabus is as follows:

"1. The levy authorized by Section 6828-43, General Code (Section 43 of the Conservancy Act of Ohio, 104 O. L., 13, 35), of three-tenths of one mill on the assessed valuation of property lying within a conservancy

district, constitutes the final and sole source of the preliminary fund defined in Section 42 of the Conservancy Act, and is the primary fund from which the general funds of the county or counties constituting such district should be reimbursed for expenses paid out of these funds under authority of that section.

2. The board of directors of a conservancy district has no authority or discretion to delay the reimbursement of the general funds of the county or counties constituting such district, for money advanced to the preliminary fund, after the receipt of funds by the district from any source provided by the statute for the raising of revenues for the use and purposes of a conservancy district."

It is obvious in view of the holding of the Supreme Court in this case that if warrants may now be issued under the circumstances set forth in your inquiry, the proceeds of such warrants may not be paid into the preliminary fund provided by Section 6828-42, since the three-tenths of one mill levy authorized by Section 6828-43 has been spent and the preliminary fund must, under this decision, be closed. It does not necessarily follow, however, that all expenses of the conservancy district which may be properly incurred prior to the issuance of bonds must be payable out of the preliminary fund. I do not think the legislature has enacted such a requirement, as will be hereinafter shown.

A strict construction of Section 6828-44, supra, authorizing the issuance of the warrants, might lead to the conclusion that such warrants may only be issued to effectuate the purposes of the preliminary fund authorized by Section 6828-42, because of the fact that the purpose of such warrants is "to facilitate the preliminary work." If this construction should be adopted, it would necessarily follow that these warrants must in all instances be issued in anticipation of the three-tenths of a mill levy authorized by Section 6828-42, General Code, this in view of the case of *State, ex rel.* v. *Valentine,* supra. The legislature has, however, expressly provided that the entire Conservancy Act shall be liberally construed. Section 6828-74, reads:

"This act (G. C. §§6828-1 to 6828-79) being necessary for securing the public health, safety, convenience and welfare, and being necessary for the prevention of great loss of life and for the security of public and private property from floods and other uncontrolled waters, it shall be liberally construed to effect the control and conservation and drainage of the waters of the state."

Section 6828-6, General Code, contains general provisions as to the powers of conservancy districts and their officers. It is therein provided that, after holding a hearing of objections to the establishment of the district and adjudicating all questions of jurisdiction, the court of common pleas shall declare the district organized and give it a corporate name by which in all proceedings it shall thereafter be known. The section further provides that:

"* * * thereupon the district shall be a political subdivision of the State of Ohio, a body corporate with all the powers of a corporation, shall have perpetual existence, with *power* to sue and be sued, *to incur debts, liabilities and obligations;* to exercise the right of eminent domain and of taxation and assessment as herein provided; to issue bonds and

to do and *perform all acts herein expressly authorized and all acts necessary and proper for the carrying out of the purposes for which the district was created, and for executing the powers with which it is invested.* * * *."

(Italics the writer's.)

After quoting a portion of Sections 6828-6 and 6828-74, supra, this office took a definite position as to the interpretation of the Conservancy Act as a whole in an opinion appearing in Opinions of the Attorney General for 1922, Vol. I, p. 700, as set forth in the following language appearing on pp. 703 and 704:

"The last two provisions aboye quoted furnish the keynote to the interpretation of the conservancy act as a whole, and particularly of those portions of it which deal with the powers of the conservancy district and its officers. The general rule of law with which the Bureau is familiar, being called upon to apply it almost daily in the discharge of its functions, is that a grant of power to a public officer or board must be strictly construed, and that the maxim 'The expression of one thing is the exclusion of all others' is to be rigidly applied to such statutes. Under such a rule there is, of course, some room for implication, as it is almost impossible, literally speaking, to create an express power or duty without also conferring some slight degree of implied power.

In the case of the conservancy act, however, the rule and the exception as they exist in ordinary cases are precisely reversed. By the express declaration of the statutes above quoted the powers of a conservancy district as such are not to be limited to those expressly granted, but are to include also the power to perform all acts necessary and proper for the carrying out of the purposes for which the district was created. As if to make the point even clearer, it is also declared that the act as a whole shall receive a liberal interpretation and not a strict one. The framers of this act undoubtedly understood the significance of language of this kind. The first of these provisions is borrowed from the Federal Constitution in which it has received the illuminating interpretation of Mr. Chief Justice Marshall in the case of *McCulloch* vs. *Maryland,* 4 Wheaton, 316."

The then Attorney General quoted from the opinion in the famous case of *McCulloch* v. *Maryland.*

In 8 O. Jur. 23, the text, in support of which the above mentioned opinion of this office is cited, is as follows:

"By the express declarations of the statute, the powers of the district are not to be limited to those expressly granted, since the act as a whole is to be liberally construed, but are to include the power to perform all acts necessary and proper for the carrying out of the purposes for which the district was created."

The question which you present is one which goes to the power of the board of directors to carry on the proceedings to the point where the assessments may be levied and bonds may be issued. In all cases where the three-tenths of one mill levy is inadequate to carry the proceedings to this point, the entire purpose

of the act must fail if money may not be borrowed by the issuance of warrants under Section 44 of the Act, which warrants are not payable from the proceeds of this three-tenths of one mill levy. Under such circumstances, a liberal construction of the Conservancy Act is clearly authorized under Section 6828-74, supra, in answering your question.

I find no provision to the effect that the cost of preliminary work prior to the issuance of bonds must be paid solely from the preliminary fund. Section 6828-42, supra, after providing for the preliminary fund, the bond fund and the maintenance fund, expressly provides that "it is intended that the cost of preparing the official plan, the appraisal (except as paid out of the preliminary fund) and the entire cost of construction * * * shall be paid out of the bond fund." The cost of preparing the official plan and appraisal are both preliminary expenses and while either may be paid out of the preliminary fund, the legislature has provided that it is intended that either may be paid out of the bond fund.

Since all preliminary expenses, such as the payment of the cost of preparing an official plan, or, as in this case, a revision thereof, need not be payable out of the preliminary fund but may be payable out of the bond fund, the proceeds of the warrants authorized in Section 44, supra, being "to facilitate the preliminary work", need not necessarily be paid into the preliminary fund. This power to borrow money and issue warrants may well be said to be an additional power conferred upon the board of directors of conservancy districts to take care of just such a situation as you present. The provision in Section 44 that the board of directors "may pledge (after it has been levied) the preliminary tax of not exceeding three-tenths of a mill for the repayment" of the warrants therein authorized, is purely permissive if a liberal construction is to be adopted. Such being the case these warrants need not have anything to do with the three-tenths of a mill levy provided in Section 6828-43 and need not be issued in anticipation thereof. If the three-tenths of a mill levy has been previously made and the proceeds thereof expended, there is nothing in the statute to preclude the issuance of these warrants in anticipation of the issuance of bonds and the levy of special assessments.

I am well aware of the fact that under Section 6828-43, supra, expenses incurred after the organization of the district and prior to the receipt of money "from taxes or assessments, bond sales, or otherwise," shall upon order of the court be paid from the general fund of the county or counties. The legislature has recognized that money may be received by a conservancy district otherwise than from taxes, assessments or bond sales. I think the inclusion of the word "otherwise" in the foregoing phrase undoubtedly has reference to Section 6828-44, authorizing the receipt of moneys from the sale of warrants. This same section provides that "The board may borrow money in any manner provided for in this act, and may pledge the receipts from such taxes for its repayment". The authority to pledge the receipts from the three-tenths of a mill levy is again, here, permissive and not mandatory. It may be argued, of course, that the legislature contemplated that such a situation as the Springfield Conservancy District is now confronted with, to wit, the financing of the cost of the preparation of the revised plan, should be handled only by advances from the county upon order of the court. If such a construction were adopted, I think a rather incongruous result would follow for the following reasons: In the first place, the court is not limited in ordering advances from the county by the estimated amount to be received from the three-tenths of a mill levy and should the county advance, under order of the court, a greater amount than is subsequently received from

this levy, the conservancy district is in a position of having incurred indebtedness to pay the cost of expenses incurred to carry the work up to the point of levying assessments and issuing bonds in excess of the proceeds of the preliminary levy. I have little hesitancy in concluding that such an indebtedness to the county would be held by the courts to be a valid indebtedness payable from the proceeds of the sale of bonds. If, then, such an indebtedness may be incurred to the county, I think it is rather incongruous to say that it may not be incurred by borrowing money from some other creditor, particularly in view of the broad language of Section 6828-44, supra, and the express language of Section 6828-42, recognizing that the cost of preparing the official plan, which necessarily includes the cost of preparing any revision thereof, may be paid out of the bond fund.

It should be noted that power to borrow money which is to be subsequently paid from the proceeds of bonds in anticipation of the collection of special assessments subsequently to be levied is not without precedent in Ohio. Section 2293-24 provides that subdivisions may borrow money and issue notes in anticipation of the levy of special assessments or of the issuance of bonds. Section 2293-25 of the Uniform Bond Act provides that when notes are issued in anticipation of the issuance of general tax bonds, as distinguished from special assessment bonds, then the resolution or ordinance providing for the issuance of such notes, must provide for the levy of a tax during the year or years while such notes run not less than that which would have been levied if bonds had been issued without the prior issuance of such notes. In the case of notes when special assessments are levied, however, provision need not be made for the levy of such tax.

It is accordingly my opinion in specific answer to your inquiry that warrants issued by a board of directors of a conservancy district under Section 6828-44, General Code, need not necessarily be issued in anticipation of the three-tenths of a mill levy provided in Section 6828-43, and in case the proceeds of such levy have been previously expended, such board is not precluded by the Conservancy Act from borrowing money under this section prior to the issuance of bonds to the extent that funds are needed to carry out the purposes of the conservancy district.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3894.

APPROVAL, BONDS OF CLARK COUNTY, OHIO—$12,909.54.

COLUMBUS, OHIO, December 28, 1931.

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

3895.

APPROVAL, BONDS OF CITY OF IRONTON, LAWRENCE COUNTY, OHIO—$9,000.00.

COLUMBUS, OHIO, December 28, 1931.

Industrial Commission of Ohio, Columbus, Ohio.