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JOINT COUNTY DITCH—FINANCING CONSTRUCTION OF
BY ASSESSMENT AGAINST BENEFITED LANDOWNERS—
BONDS MAYY NOT BE ISSUE—SEC. 3633.07.

SYLLABUS:

Section 6133.07, Revised Code, provides the sole method of financing the construction of joint county ditch projects by assessments against the owners of benefited lands, and a joint board of county commissioners, the sole agency authorized to proceed with such joint improvements, is without authority, under Chapters 133., 6131., or 6133., Revised Code, to issue bonds or notes to finance such projects.

Columbus, Ohio, May 21, 1959

Hon. Rollo M. Marchant, Prosecuting Attorney
Fayette County, Washington C. H., Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Pursuant to Chapter 6133 of the Revised Code of Ohio the
Joint Board of Commissioners of Fayette and Madison Counties

have approved a Joint County Ditch. Bids have been advertised for and are to be opened Monday, March 9th. An approving opinion for the sale of bonds has been requested from a recognized bond counsel. This opinion has been delayed pending the clarification of the authority of a joint board of county commissioners to authorize the issuance of bonds and notes in anticipation of assessments. Your attention is directed to the case of *Suite, ex rel. Fritz v. Gongwer*, 114 O.S. 642, decided in 1926 authorizing the sale of bonds under authority of old General Code Section 6464. This section has been repealed since the date of the above case and the new ditch laws enacted. You will also note that Section 133.31 of the Uniform Bond Law granting authority to subdivisions in general to issue bonds in anticipation of assessment. The difficulty is the possible argument that only political subdivisions as defined in the Uniform Bond Law can issue such anticipatory bonds or notes, except where there is special statutory authority such as in the case of Regional Water and Sewer Districts (R.C. 6119.83).

"I therefore respectfully request your opinion in answer to the following questions:

"1. Under the Joint County Ditch Law (Chapter 6133) does the action of a Joint Board of Commissioners create a special taxing district which is authorized to issue bonds and notes in anticipation of assessments?

"2. If the Joint County Ditch Law does not create a special taxing district or, if created, bonds and notes of such district are not authorized, should each county involved in the improvement issue such obligations for its respective share of the cost or, in view of Section 6133.07, should such obligations be issued only by the county in which the petition for such improvement was filed?"

The pertinent point of the decision in *State, ex rel. Fritz v. Gongwer*, 114 Ohio St., 642, is made apparent by the following language in the syllabus:

"The provisions of the joint county ditch law (Sections 6536 to 6542, inclusive, General Code) are effective by reference to carry into those sections the provisions of Section 6464, General Code, and other applicable sections of the single county ditch law, and thereby empower a joint board of county commissioners, in the construction of a joint county improvement, to assess property specially benefited by such improvement according to such benefits, and to issue and sell the bonds of the special taxing district, composed of the entire territory of the interested counties, in anticipation of the collection of such assessments, and

to pledge the faith and credit of such district to the payment thereof.”

On this point Judge Robinson said in the opinion at page 648:

“* * * there is no difficulty in effectually carrying the provision of Section 6464, General Code, ‘the commissioners are empowered and authorized to issue and sell the bonds of the county,’ into Section 6537, General Code, by the provision therein that “the joint board of county commissioners may do and perform all the things that the commissioners may do in a single county improvement,” thereby authorizing the joint board to issue and sell the bonds of the special taxing district in anticipation of the collection of assessments levied according to benefits and to pledge the faith and credit of the entire district to the payment thereof, since the power conferred, by reference, was the power conferred upon a county board to issue and sell the bonds of its entire district, the county, and the power to pledge the faith and credit of its entire district, the county, to the payment thereof.* * *”

Section 6464, General Code, House Hill No. 569, Eighty-fifth General Assembly, 110 Ohio Laws 161, 174 (1923), to which reference is thus made, was found in the chapter containing the statutes on single county ditches and it expressly empowered the county commissioners to issue and sell bonds of the county for these particular projects.

In 1927, subsequent, of course to the Gongwer decision, Section 6464, General Code, was repealed in an act in which the Uniform Bond Act was enacted. See House Bill No. 1, Eighty-seventh General Assembly, 112 Ohio Laws, 364, 385 (1927).

Although Section 6537, General Code, was held to have incorporated by reference the provisions of the single county ditch laws by reference, such incorporation was terminated by the enactment of Section 6133.03, Revised Code, by the General Assembly in the 1953 recodification. Section 6133.03, Revised Code, provides in pertinent part:

“A joint board of county commissioners may do all the things that a board of county commissioners may do in a single county improvement, and *shall be governed by and be subject to sections 6131.01 to 6131.64, inclusive, of the Revised Code, relating to single county ditches insofar as applicable. * * **”
(Emphasis added)

Due to the repeal of various provisions of the ditch laws subsequent to 1923, the enactment of the Uniform Bond Law in 1927, and the code

revision of 1953, the rule stated in *State, v. Williams*, 104 Ohio St., 232, becomes applicable:

“Although where the general statutes of the state have undergone ‘revision and consolidation’ by codification, there is a presumption that the construction thereof should be the same as prior thereto, *yet where the language of the revised section is plain and unambiguous*, it is the duty of the court to give it the effect required by the *plain and ordinary signification of the words used whatever may have been the language of the prior statute.* * * *” (Emphasis added)

And at pages 241, 242 it is further stated in the opinion per Mathias, J.:

“* * * The rule applicable here was well stated by Minshall, J., in the case of *Heck v. State*, 44 Ohio St., 536, when he said: ‘Where the language used in a revised statute is of such doubtful import as to call for a construction, it is both reasonable and usual to refer to the statute or statutes from which the revision has been made. But where the language is plain, and leads to no absurd or improbable results, there is no room for construction, and it is the duty of the courts to give it the effect required by the plain and ordinary signification of the words use, whatever may have been the language of the prior statute, or the construction placed upon it. * * * If the plain language of a revised statute is to be departed from, whenever the language of the prior one may require it, then it may be asked, what is gained by a revision? The definition of crimes must, in such cases, be sought, not in the statutes as they are found to exist, but in the language of those that have been repealed. The more rational rule must be, as we think, to resort to the prior statute *for the purpose of removing doubts, not for the purpose of raising them.*’ ” (Emphasis added)

See 37 Ohio Jurisprudence 341 et seq., of Section 1.24, Revised Code.

It is a firmly established principle of law that a joint board of county commissioners as a mere creature of statute has only such power and jurisdiction as are expressly conferred by state. *Elder v. Smith, Aud.*, 103 Ohio St., 369.

Accordingly, we must conclude that the authority of a joint board of county commissioners with respect to Section 6133.03, *supra*, is to be found in Sections 6131.01 to 6131.64, inclusive, Revised Code, as these sections were worded at the date of the 1953 code revision.

It is to be noted that Sections 6131.01 to 6131.64, Revised Code, confer no authority to issue bonds in anticipation of the collection of special assessments. The authority to do this, in the financing of single county ditches, is now found in Chapter 133., Revised Code. Section 133.01, Revised Code, in defining the term "subdivision" does not include a joint board of county commissioners. Division (A) of Section 133.01, Revised Code, provides:

"(A) 'Subdivision' means any county, school district except the county school district, municipal corporation, joint township hospital district, or township."

As provided in Section 133.31, Revised Code, only a "subdivision" as defined in Section 133.01 (A), *supra*, may issue bonds in anticipation of the collection of special assessments.

It might be argued that the words of Section 6133.03, *supra*, that "a joint board of county commissioners may do all the things that a board of county commissioners may do in a single county improvement" would authorize the issuance of bonds by a joint board of county commissioners. I am of the opinion, however, that the definition of "subdivision" as contained in Section 133.01, Revised Code, exclusively limits the issuance of bonds in anticipation of assessments to any county, school district except the county school district, municipal corporation, joint township hospital district, or township; and that a joint board of county commissioners is, therefore, not included within the purview of such section.

Accordingly, your first question must be answered in the negative. Action by a joint board of county commissioners pursuant to the provisions of Chapter 6133., Revised Code, does not create a special taxing district which is authorized to issue its bonds and notes in anticipation of special assessments.

Coming now to consider your second question it becomes apparent that if the board of county commissioners of each county is to proceed to issue bonds of its respective county for its portion of the total assessment for the anticipated cost of a joint county ditch project, each such board would necessarily act pursuant to the *single* county ditch laws, Chapter 6131., Revised Code, and the Uniform Bond Law, Chapter 133., Revised Code. The initial question presented, therefore, is the authority to act pursuant to Chapter 6131., Revised Code, with respect to an "improve-

ment” located in or benefiting or damaging land in two or more counties. Section 6133.02, Revised Code, provides:

“When the improvement as defined in sections 6131.01 to 6131.64, inclusive, of the Revised Code, is proposed to be located in or benefits or damages land in two or more counties, the proceeding *shall* be conducted by a joint board of county commissioners, consisting of the members of the board of county commissioners of the several counties in which land may be benefited or damaged by the proposed improvement. In such case, the petition for the improvement may be filed with the clerk of the board of county commissioners of any county in which is located land that will be affected by the proposed improvement.”
(Emphasis added)

This use of the mandatory “shall” quite clearly preclude any proceedings, as to an improvement of the sort described, otherwise than by a “joint board;” and since we have concluded that a joint board may not issue bonds and notes to finance such an improvement, it follows that an improvement of this sort may not be financed by borrowing.

It thus appears that the sole method of financing of such a joint improvement project is provided in Section 6133.07, Revised Code, which reads:

“The county auditor and county treasurer of the county in which the petition authorized by section 6133.02 of the Revised Code is filed shall *ex officio* become the fiscal agents of all the counties interested in the proposed improvement. Such auditor shall certify to the auditor of the other counties a schedule of the assessments to be levied for the cost of locating and constructing the improvement and the auditor of such other county shall proceed forthwith to place such assessment upon the duplicates. The assessments so certified for collection to an auditor of another county shall be a lien on the land within such county the date such certificate is received by the auditor of such other county. The treasurer shall proceed to collect the same pursuant to the orders made in said proceedings, and such assessments when collected shall be paid to the treasurer of the county in which the petition was filed. The auditor and the treasurer shall receive and account for such funds in the same manner as they receive and account for assessments collected for single county improvements. The treasurer and the auditor with their bondsmen shall be liable on their official bonds for any misappropriation of such funds. All warrants for the payment of costs of location and for costs of construction of a joint county improvement shall be drawn by the auditor of the county in which the petition is filed, on the

treasurer of said county, payable out of the general ditch improvement fund of said county. If the petition for the improvement is dismissed after the costs and expenses have been incurred in making the county engineer's reports and schedules provided for in section 6133.08 of the Revised Code, such costs shall be paid by the several counties respectively, as the joint board of county commissioners deems just and equitable. All assessments when collected in all the counties and any amount which another county should pay shall be paid into the treasury of the county in which the petition was filed, and credited to the general ditch improvement fund of said county."

Although this section does not expressly so provide it is fairly to be inferred from its terms that contracts can be awarded for such a joint improvement project only when the drainage improvement fund has been accumulated to an extent sufficient to meet the cost of the project.

In reaching this conclusion I am not unmindful of the provisions found in Section 6131.03, Revised Code, which reads:

"Boards of county commissioners in their respective counties, or in co-operation with any conservancy district which includes all or part of the lands of the county, or in co-operation with the proper authorities of the state or the proper authorities of the United States, may formulate, create, and construct *a complete or co-ordinating system of water conservation and flood control*, subject to the approval of the proper authority of the state, with full power to maintain and carry the same forward. *Said boards, severally and jointly and in co-operation with the board of county commissioners of any other county*, or with a conservancy district, or with the state, or with the United States, may provide their respective shares of necessary funds in accordance with law for the cost and expense of the formulation, creation, construction, and maintenance of *such water conservation or flood control system*, which costs and expense shall include the cost and expense of all preliminary surveys necessary to the construction and maintenance of such water conservation or flood control system." (Emphasis added)

Even if a joint county ditch should be deemed a "water conservation or flood control system", which I seriously doubt could be justified, it is certainly not a "complete or co-ordinating system;" and that, of course, is what the term "such * * * system" clearly implies.

Accordingly, in specific answer to your inquiry, it is my opinion that Section 6133.07, Revised Code, provides the sole method of financing the construction of joint county ditch projects by assessments against the

owners of benefited lands, and a joint board of county commissioners, the sole agency authorized to proceed with such joint improvements, is without authority, under Chapters 133., 6131., or 6133., Revised Code, to issue bonds or notes to finance such projects.

Respectfully,

MARK McELROY
Attorney General