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CONSERVANCY DISTRICT—MAUMEE WATERSHED—BOARD OF DIRECTORS—MAY PROPERLY USE PROCEEDS OF PRELIMINARY TAX, THE LEVY AUTHORIZED FOR CERTAIN EXPENSES—REIMBURSE OR PAY PRIVATE INDIVIDUALS FOR EXPENSE OR ORGANIZATION, SURVEYS AND PLANS, INCIDENTAL EXPENSES—PAYMENTS AND REIMBURSEMENTS MAY INCLUDE FEES FOR LEGAL SERVICES PRELIMINARY TO FORMATION OF DISTRICT—SECTION 6828-43 G.C.

SYLLABUS:

Under the provisions of Section 6828-43, General Code, the board of directors of a conservancy district may properly use the proceeds of the preliminary tax, the levy of which is therein authorized, to reimburse or pay private individuals for the necessary expenses of organization, for surveys and plans, and for other incidental expenses in the formation of such district; and such payments and reimbursements may properly include fees for legal services necessarily incurred by the petitioners preliminary to the formation of such district.

Columbus, Ohio, June 9, 1952

Hon. Karl H. Weaner, Jr., General Counsel
Maumee Watershed Conservancy District, Defiance, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The board of Directors of the Maumee Watershed Conservancy District requests your opinion on the following question:

“On September 22, 1947, attorneys for various petitioners filed a petition in the Court of Common Pleas of Defiance County, Ohio, asking the formation of a Conservancy District under authority of Section 6828-1 et seq. of the General Code to embrace all or parts of 15 counties in northwestern Ohio. After the conclusion of a trial the Maumee Watershed Conservancy District was organized by a journal entry of the Court filed on June 8, 1950. Thereafter attorneys for the petitioners presented statements for their services rendered in connection with the preparation and trial which culminated in the formation of said District.

“QUESTION: May the Board of Directors allow and pay said attorney fees for legal services rendered on behalf of the petitioners preliminary to the formation of said Conservancy District?”

The purposes for which a conservancy district may be organized are stated in Section 6828-2, General Code, which reads as follows:

“Any area or areas situated in one or more counties may be organized as a conservancy district, in the manner and subject to the conditions provided by this chapter of the General Code, for all or any of the following purposes:

“(a) of preventing floods;

“(b) of regulating stream channels by changing, widening and deepening(sic) the same;

“(c) of reclaiming or of filling wet and overflowed lands;

“(d) of providing for irrigation where it may be needed;

“(e) of regulating the flow of streams and conserving the waters thereof;

“(f) of diverting, or in whole or in part eliminating water courses;

“(g) of providing a water supply for domestic, industrial, and public use;

“(h) of providing for the collection and disposal of sewage and other liquid wastes produced within the district;

“(i) of arresting erosion along the Ohio shore line of Lake Erie.

“But nothing herein shall be deemed to terminate the existence of any conservancy district heretofore organized entirely within a single county.

“Subject to the provisions of this section, the purposes of a conservancy district may be altered by the same procedure as provided for the establishment of such a district.”

In Section 6828-3, General Code, it is provided that proceedings for the establishment of a conservancy district shall be initiated by the filing of a petition in the office of the clerk of the court of common pleas of one of the counties containing territory within the proposed district. Such petition is required to be signed either by 500 freeholders or by a majority of the freeholders or by the owners of more than half of the property, in

either acreage or value, within the limits of territory proposed to be organized into a district. This statute requires also that such petition shall set forth, among other things, "the necessity for the proposed work and that it will be conducive to the public health, safety, convenience or welfare."

Section 6828-6, General Code, provides for a judicial hearing on such petition by a special conservancy court consisting of one judge from each of the counties included in whole or in part within the proposed district. This statute provides that if upon such hearing "it shall appear that the purposes of this chapter will be subserved by the creation of a conservancy district, the court shall, * * * declare the district organized * * *."

A provision is found in Section 6828-4, General Code, requiring the filing of a bond by the petitioners, "sufficient to pay all the expenses connected with the proceeding in case the court refuses to organize the district."

In the event, however, that the district is actually organized, the following provision for the payment of preliminary expenses is made in Section 6828-43, General Code:

"After the filing of a petition under this chapter, and before the district shall be organized, the costs 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.

"As soon as any district shall have been organized under this chapter, 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 in each of not more than two years a preliminary tax of not to exceed three-

tenths of a mill on the assessed valuation thereof at 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. * * ** (Emphasis added.)

Here it will readily be observed that provision is made for the payment of preliminary expenses in two general categories by two quite different methods. In the first paragraph set out above, there is a provision for the payment, prior to the organization of the district and during the pendency of the proceedings, of publication and other official costs from the general funds of the county in which the cause is being heard. Official costs would not, of course, include attorney fees in the absence of a statutory provision therefor (11 Ohio Jurisprudence, 10, Section 1,) and I do not understand your inquiry as suggesting that such action is contemplated in the instant case.

Coming then to consider the provisions of the second paragraph of this section, we may observe a clear implication in the final sentence quoted above from Section 6828-43, General Code, that the General Assembly contemplated the possibility, if not the absolute necessity, of certain items of expense, other than the publication and official costs already mentioned, being incurred prior to the date on which a conservancy district is organized. This implication is found in the language which provides for reimbursement of "such items of expense" which "have already been paid in whole or in part from other sources." It seems clear that the words, "items of expense" refer to "expense of organization, * * * surveys and plans and * * * other incidental expenses which may be necessary up to the time money is received from the sale of bonds," as this language is used earlier in this section.

Here it is to be remembered that the petitioners, in initiating action to have a conservancy district organized, must allege in their petition that the proposed work is necessary and that it will be conducive to the public health, safety, convenience and welfare. The question thus presented must, of course, be determined by the special conservancy court

before the district can be ordered organized. It is obviously quite impossible for the court to give proper consideration to this issue unless there shall have been submitted to it for consideration a considerable amount of engineering data, surveys, plans, etc., in order that some opinion can be formed as to the probable results flowing from the establishment of the district. Quite obviously also it is necessary that such engineering data, surveys and plans be prepared in advance of the actual date of such hearing and, of course, in advance of the date of the actual organization of the district. In this view of the matter, we may well suppose that the General Assembly, in providing for the reimbursement of such preliminary expense contemplated that the expenditure of funds other than public funds in these activities would be an absolute necessity; and for that reason made provision for reimbursement to those who, in the public interest, have advanced funds to meet such expenses.

That the furnishing of such funds from private sources is subservient to the public interest in a case where a district is later organized, can scarcely be doubted. It is true that the inference could be drawn that the petitioners in initiating action to form a conservancy district might well, in the first instance, be motivated in part by the benefits which might be expected to accrue to property owned by them through the establishment of the conservancy district. However, where a conservancy court has judicially determined that the establishment of such district is in the public interest, its decision is necessarily also, in effect, a determination that preliminary expenses necessarily incurred in the proceedings have been incurred in the public interest. Of course, the opposite is true where the court determines the issue adversely to the petitioners, and in such case, as already noted, all expenses connected with the proceeding must be met by the petitioners and their bondsmen.

The question of reimbursement, under the provisions of Section 6828-43, supra, of private individuals for preliminary expense incurred in connection with the organization of a conservancy district was considered in Opinion No. 3389, Opinions of the Attorney General for 1922, p. 700, the sixth paragraph of the syllabus in which is as follows:

“6. Where *preliminary to the formation* of a conservancy district, an unofficial committee of citizens incur expenses in the formation of plans, etc., such expenses will be reimbursed by the district out of funds procured by the special assessment for organization expenses.”
(Emphasis added.)

Questions 5 and 6 in the inquiry to which this opinion was a response read as follows :

“When it was determined by the original plan to construct the Huffman dam, it became necessary to move the village of Osborn. It would seem that by requiring the people to move from said village that the inhabitants or most of them would suffer damages to their business. To compensate them the district assumed various and sundry ‘business claims.’ These claims varied in amount from those of laborers at \$25.00 to the claim of Tranchant & Finnell, millers, of over \$27,000.00. The aggregate of such claims at the date of this audit was \$148,435.00. They were secured by Judge Brown in the form of contracts, he representing a committee of unnamed business men of Dayton, and in a large measure said contracts were executed prior to the time when the district was functioning. Some of such claims were actually paid by the Dayton citizens relief commission along with the costs of the preliminary engineering, etc., the amounts so paid being later refunded to said commission from the district funds.

“Question 5: Are the payments of such business claims legal?

“Question 6: Is the refund to the citizens’ relief commission of over \$300,000 as referred to above legal?”

The answer to the 6th question thus propounded was stated by the writer of this opinion in the following language, p. 711 :

“The Bureau submits no facts in connection with its sixth question, but the attached statement of the secretary-treasurer of the district, shows the citizens’ relief commission incurred a large expense involving surveys, plans, expenses of organization and other incidental expense which became necessary in the organization of the district before and money could be derived from the sale of bonds or otherwise by the directors; and the authority to reimburse for these promotion expenses can be found in section 6828-43 of the General Code. The section provides in effect that preliminary expenses which cannot be immediately met out of funds of the district are to be paid out of the general funds of the county comprising the district, subject to reimbursement out of the district treasury when it is in funds. It also makes provision for the levy of an assessment for organization and other incidental expenses ‘which may be necessary up to the time money is received from the sale of bonds or otherwise.’ It also provides that ‘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.' There is no limitation here on the character of 'other sources' from which expense subject to repayment in this manner may be incurred in the first instance. In the opinion of this department this expenditure is authorized."

It must be conceded that the question here presented is not wholly free from doubt and if it were one of first impression some consideration would necessarily have to be given to the possibility of interpreting the statutory language here involved as authorizing payment from the proceeds of the preliminary tax of only those incidental expenses incurred after organization of the district and prior to the date on which the proceeds of taxes and bond issues are available. However, in the 1922 opinion we have clearly expressed conclusion that "such items as expense * * * already * * * paid from other sources * * * includes expenses of organization incurred prior to the actual date of organization, i.e., prior to the date on which the conservancy court declared the district to be organized. Approximately thirty years have intervened since the rendition of this opinion, and it has not, to my knowledge, been questioned during that time in any judicial proceeding. It is, of course, a familiar rule that an administrative interpretation of this sort is presumptively known to the legislature, and where that body over a long period of time makes no change in the statute so interpreted, a presumption arises that such interpretation is in accord with the legislative intent.

I am inclined to concur in the conclusion reached in the 1922 opinion by reason of the provision made in the statute for paying "expenses of organization" from the proceeds of the preliminary tax. As already noted, under the provisions of Section 6828-6, supra, it is the function of a conservancy court, if its finding is in favor of the petitioners, to "declare the district organized." This makes it clear that such district is actually "organized" on the date that the court's action in such matter is entered on its journal. This being the case, it must necessarily follow that any expenses thereafter incurred will be expenses of operation rather than expenses of organization.

Accordingly, I conclude, in harmony with the 1922 opinion, that the expenses of organization for the payment or reimbursement, of which provision has been made in the second paragraph of Section 6828-43, supra, properly include expenses necessarily incident to the preliminary

work of organization of a conservancy district and include such expenses as are incurred prior to the actual date of organization.

Our specific question is, therefore, whether legal expense incurred by the petitioners as a necessary incident to the organization of a conservancy district may properly be considered to be included in "incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise," as this language is used in Section 6828-43, supra. We have already observed that it would be wholly impossible for a special conservancy court to form an opinion on the necessity of the organization of a conservancy district without having before it for consideration a great amount of engineering data, surveys, plans, etc.; and we have already observed that the expense of procuring this material must ordinarily be made from private sources and that reimbursement therefor is clearly authorized by law.

It is necessary at this point to bear in mind that engineering services would be wholly useless and unavailing in the matter of securing the formation of a conservancy district unless that material were presented to the conservancy court in a judicial proceeding. This, of course, can only be done by attorneys at law, and their services in this regard may therefore clearly be said to be indispensable in the matter of effecting the organization of such a district. Moreover, where the special conservancy court has found that the organization of the district is in the public interest, it clearly follows that the legal services thus supplied are rendered in the public interest. I conclude, therefore, that payment of or reimbursement for the expense of such services is authorized under the provisions found in the second paragraph of Section 6828-43, supra.

Respectfully,

C. WILLIAM O'NEILL

Attorney General