

1036

1. DITCH—JOINT COUNTY—STATE PROPERTY INVOLVED—CONTRACT APPROVED UNDER SECTION 6555 G. C.—STATE DEPARTMENT ENGINEER—COUNTY AUTHORITIES MAY PROCEED TO CLEAN AND REPAIR DITCH—MEET EXPENSE FROM DISBURSEMENTS FROM GENERAL DITCH IMPROVEMENT FUND—GENERAL ASSEMBLY— FAILED TO APPROPRIATE FUNDS TO REIMBURSE COUNTY FOR STATE'S SHARE OF COST.
2. STATE OWNED LANDS—BENEFITED—PROJECT TO REPAIR AND CLEAN JOINT COUNTY DITCH—SECTION 6691 ET SEQ., G. C.—STATE DEPARTMENT ENGINEER—FAILURE OR REFUSAL TO CONSENT—SECTION 6554 ET SEQ., G. C.—GENERAL ASSEMBLY—MORAL OBLIGATION—EXPENDITURES FROM COUNTY GENERAL FUND.

SYLLABUS:

1. County authorities are authorized to proceed in the cleaning and repair of a joint county ditch in a case where state property is involved and where the contract for such work is approved under the provisions of Section 6555, General Code, by the state department engineer concerned; and the county authorities may, in such case, meet the expense thereby incurred by disbursements from the general ditch improvement fund notwithstanding the fact that the General Assembly has so far failed to appropriate any funds which can be applied to reimburse the county for the state's share of the cost of such improvement.

2. Where county authorities proceed, under the provisions of Section 6691, et seq., with a project of repairing and cleaning a joint county ditch in a case where state-owned lands will be benefited, the statutory authority to consummate such project is not affected by the fact that the state department engineer concerned has failed or refused to consent to such project under the provisions of Section 6554, et seq., General Code. In such case, pending the appropriation of funds by the General Assembly with which to discharge any moral obligation thus recognized by that body, the deficiency in the county general ditch improvement fund, caused by the failure of the state to assume any share of the cost of such project, may be met by expenditures from the county general fund.

Columbus, Ohio, December 28, 1951

Hon. Thomas F. Dewey, Prosecuting Attorney
Sandusky County, Fremont, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I have been requested by the Board of County Commissioners of Sandusky County, Ohio, to obtain your opinion on the following question:

"A petition has been filed with the County Commissioners of Sandusky and Erie Counties for the cleaning of a joint county ditch, situated in Sandusky and Erie Counties. The Department of Conservation, State of Ohio, owns considerable real estate situated in Erie County, which is being used as a game preserve, which is benefited by the ditch improvement. An assessment has been made against the State of Ohio in the sum of \$386.05 to cover the State's share of the cost of the ditch improvement. At the final hearing on the improvement a representative of the Conservation Department of the State of Ohio advised that the amount of the assessment was proper, but that the State of Ohio had no money with which to pay its assessment.

"Question: If the State of Ohio has no money with which to pay this assessment, who is to bear the cost of the assessment against the State for the ditch improvement?"

"According to Sections 6554, through 6558 of the General Code of Ohio, the State shall pay its assessment for ditch improvements if a state engineer approves the contract as let.

"Question: If the state does not pay its assessment can the Board of County Commissioners of Erie County pay the state's assessment?"

The cleaning and repair of county ditches is provided for in Section 6691, et seq., General Code. In this chapter the responsibility for proceeding with such work is placed with the county commissioners, but provision is made for the delegation of such duty to the county engineer, or to a specially appointed ditch supervisor.

Provision is made also for application to the commissioners by owners of affected land for the cleaning and repair of particular ditches and following the approval of such application it becomes the duty of the ditch supervisor to apportion the work involved among the owners of affected

land in proportion to the benefits accruing to them. Section 6697, General Code.

In cases where the owners involved neglect or refuse to carry out the work so allotted to them, the ditch supervisor is required to have the work performed by contract. In this connection, Section 6700, General Code, provides :

“If the owner to whom an apportionment is allotted neglects or refuses within the time set by the ditch supervisor to clean out or repair such ditch, drain or watercourse, the ditch supervisor shall sell the work of cleaning or repairing that apportionment of the ditch, drain or watercourse at public outcry to the lowest responsible bidder and take a bond with surety to the approval of the supervisor for the satisfactory completion of the work. The ditch supervisor shall take separate contracts for each working section. Payment to the contractor shall be made out of the general ditch improvement fund upon the certificate of the ditch supervisor and the approval of the commissioners. If any part of the apportionment for the cleaning or repairing of a ditch, drain or watercourse is apportioned to a county, township, municipality, or school district, the ditch supervisor shall let the contract for the completion of such work and give a certificate of the completion of such work to the contractor ; if apportioned to the county, the contractor shall be paid upon allowance by the commissioner out of the general ditch improvement fund, and if apportioned to the township, municipality, or school district, he shall be paid out of the general or contingent funds. All contracts entered into by the ditch supervisor and all bonds taken by him, shall be subject to the approval thereof by the commissioners.”

The reimbursement of the county for the funds so expended is provided for in Section 6702, General Code, which reads as follows :

“Upon completion of the work as provided in this chapter, whether by contract or otherwise, the supervisor shall certify the cost thereof to the commissioners, who shall examine and correct the same, and shall order the auditor to place the correct amount upon the duplicates to be collected as other taxes and assessments ; and this shall be credited to the general ditch improvement fund ; such cost shall be a lien on the land to which said work was apportioned from the date of the filing of such certificate with the auditor.

“In all cases where the work has been under the supervision of the ditch supervisor and where the ditch repair or clean out has been done as a unit, the ditch supervisor shall make an

estimate of the cost of such improvement, and shall apportion the estimated cost thereof according to benefits to the several tracts of land benefited, and shall file such estimates with the auditor; the auditor shall report such apportionments to the commissioners, and the commissioners shall fix a time when such apportionment shall be heard which shall be not more than twenty days after the date of filing such estimates.

“Upon the fixing of such time, ten days’ notice of such hearing, as provided in chapter one of this title shall be given by the ditch supervisor and the hearing shall proceed the same as the hearing on the report of the surveyor in chapter one of this title, and all parties shall have the rights and remedies as provided in chapter one of this title. The commissioners shall correct and approve such assessments, and shall order the ditch supervisor to let the contract according to sections 6700 and 6701.

“Upon the letting of the contract the auditor shall place the assessments as finally confirmed by the board of county commissioners against the lands of each owner for collection by the county treasurer as other assessments are collected and said assessments shall be a lien against the lands upon which the assessment is placed until the assessment is paid.”

There is, however, in the case at hand no authority to levy and collect these assessments against the state. In *State ex rel Monger v. Commissioners*, 119 Ohio St., 93, the court, in a per curiam opinion, said:

“* * * the legislature is without power to delegate to a board of county commissioners the legislative power to levy and collect an assessment against the state.”

Relying to a large extent on the decision in the *Monger* case, *supra*, it was held in Opinion No. 728, Opinions of the Attorney General for 1946, p. 51:

“A municipal corporation is without legal authority to levy and collect a special assessment for the construction of a flood wall to the extent that the same is made against property belonging to the state of Ohio.”

Again relying largely on the *Monger* decision, it was ruled in Opinion No. 658, Opinions of the Attorney General for 1949, p. 315, as follows:

“In the absence of legislative permission, officers or agents of a local subdivision are without legal authority to levy and collect a special assessment for the repair, maintenance or improvement of county ditches to the extent that the same is made against property belonging to the State of Ohio.”

The General Assembly, apparently in recognition of the difficulty here presented, enacted, effective July 13, 1949, Section 6554 et seq., General Code. These sections read:

Section 6554:

“The state of Ohio is hereby authorized and empowered to enter into negotiations with any political subdivision of the state in the construction of any county, joint county or township ditch in the manner provided by law, or in the construction of any other drainage project in which state property is involved and benefits therefrom accrue to the state.”

Section 6555:

“In the formulation of such program on the basis of the benefits to be received by the state, an engineer in the employ of the state highway department or an engineer in the employ of any other department or division or bureau of state government, having control of the state property involved in such drainage project, shall approve all contracts before the same may be let, in the manner hereinafter provided.”

Section 6556:

“In the determination of the proportionate amount of the assessment to be allotted to any department, division or bureau of state government, the engineer in charge shall prorate and evaluate the total percent of lineal feet involved, abutting on or passing through property of the state of Ohio, based on the state's proportion of the entire length of the drainage improvement, on the basis of the benefits accruing to the state of Ohio. On the approval and acceptance of such contract on the basis of the total benefits involved to the state of Ohio the state shall pay to the county treasurer of the county in which the state's property is located, on vouchers approved by the state engineer in charge, the state's proportionate share of the cost of such improvement.”

Section 6557:

“There is hereby established a rotary fund, subject to reimbursement from time to time by the general assembly, out of which all state expenditures for drainage improvement projects on state lands or property, as hereinabove set forth, shall be paid on vouchers signed by the state engineer in charge. The moneys in the custody of the treasurer of state for the use of the various state departments, divisions or bureaus hereinabove specified shall be known as the ‘drainage assessment rotary fund’ and shall be disbursed on the order of the auditor of state in form

prescribed by him, drawn on the treasurer of state as custodian, pursuant to vouchers or invoices signed by the state engineer in charge of the aforesaid drainage project, and approved by the director of finance, as provided in section 154-28 of the General Code, in such form as the auditor of state shall prescribe. The cost of the state's share of all such drainage and ditch improvement projects, as hereinabove provided for, shall be chargeable against such moneys in the custody of the treasurer of state."

Section 6558:

"However, prior to the letting of such contract, if the engineer in charge representing a department, division or bureau of state government, upon due investigation and hearing, finds that the construction of the drainage improvement is not necessary (f) or the best interests of the state of Ohio, or will not be conducive to the public welfare, or that the cost will probably exceed the benefits, such engineer shall not proceed with said drainage improvement project, and the state of Ohio shall thereby certify its refusal to enter into or contribute any part of the cost of such drainage project."

In your inquiry you state that "a representative of the Conservation Department of the State of Ohio advised that the amount of the assessment was proper, but that the State of Ohio had no money with which to pay its assessment."

There is nothing in this statement to indicate that the "representative" of the department was an engineer, nor that a contract had been submitted to him for approval under the provisions of Section 6555, supra. It does, however, indicate the probability that a department engineer, if the matter were properly presented to him, would approve a contract for the work here contemplated so that a determination of the state's share of the cost could be made under the provisions of Section 6556, supra, and an obligation created for the payment of such amount under the provisions of Section 6557, supra. We may, therefore, first consider whether a ditch supervisor is authorized to proceed under the provisions of Section 6700, supra, to have the cleaning and repair work done by contract, with payment being made to the contractor from the county's general ditch improvement fund, in a case where a state engineer has approved such contract as authorized by the provisions of Section 6555, supra, despite the fact, known to all concerned, that no funds have been appropriated by the General Assembly for the use of the statutory rotary fund "established" by Section 6557, supra.

It will be noted that the language of Section 6554, supra, refers expressly to the "construction of any * * * ditch * * *," and makes no reference to maintenance. I have no difficulty, however, in concluding that where a public agency is expressly authorized by statute to "construct" a public work through the expenditure of public funds, such statute, in the absence of an express authorization for maintenance in some other way, must be deemed to constitute an implied authorization for such public agency to "maintain" such public work by keeping it in a proper state of repair. Specifically, I conclude that the provisions of Section 6554, et seq., General Code, are sufficiently broad to include cleaning and repair of joint county ditches.

It is further to be observed that Section 6556, supra, provides that where a state engineer has approved a ditch construction contract, payment shall be made by the state "to the county treasurer of the county in which the state's property is located." Thus it is clear that the state is not itself a party to the contract here involved, and it would follow, therefore, that such contract is one which is executed under authority of the provisions of Section 6700, supra, and that the state's payment to the county treasurer is in reimbursement of funds already expended under the provisions of this section, from the county's general ditch improvement fund.

In this situation it is clear that in the enactment of Sections 6554, et seq., the General Assembly has provided a special (and constitutional) means of securing payment for ditch improvements where state-owned property is involved. It is clear also that this means is provided as a substitute for the assessment proceedings set out in Section 6702, supra, without disturbing the previously existing statutory provisions of Section 6700 relative to the letting of the contract work and initial payment therefor from the county's general ditch improvement fund.

In these circumstances it is obvious that in every case of a ditch improvement contract, where the benefited land owners fail themselves to perform the work apportioned to them, the county will initially advance the funds to cover the expense of the work, and that some delay will result in securing reimbursement therefor from the owners concerned. This is true whether such reimbursement is effected through assessments against owners who are private persons, or through payments by the state under the provisions of Section 6554, et seq., supra. In the case at hand, such delay in reimbursement by the state will be prolonged, and even made

uncertain of consummation, by reason of the fact that the General Assembly has, to this date, failed to appropriate any funds for the statutory "drainage assessment rotary fund." This circumstance, however, can hardly be supposed to prevent the creation of an obligation on the part of the state to make such reimbursement, even though, under the rule in the Monger case, *supra*, such obligation is only a moral one. I find nothing in the provisions of Section 6700, *supra*, nor in the related statutes, which would indicate that its operation is to depend upon the existence of a legal right of reimbursement on the part of the county, enforceable through assessment proceedings. Rather, Section 6700, in this instance, must be considered in relation to Section 6554, *et seq.*, and must be considered applicable in situations where the final reimbursement will depend upon the inclination of the General Assembly eventually to appropriate the funds necessary for such purpose. I conclude, therefore, that the county authorities are authorized to proceed in the cleaning and repair of a joint county ditch in a case where state property is involved and where the contract for such work is approved under the provisions of Section 6555, General Code, by the state department engineer concerned; and the county authorities may, in such case, meet the expense thereby incurred by disbursements from the general ditch improvement fund notwithstanding the fact that the General Assembly has so far failed to appropriate any funds which can be applied to reimburse the county for the state's share of the cost of such improvement.

Implicit in your inquiry is the question of the power of the county authorities to proceed with ditch repair work in a case where state property is involved and where the state engineer concerned has either failed or refused to approve such project under the provisions of Section 6555, *supra*.

As to this question, it may be observed that the provisions of Sections 6691 to 6701, General Code, are such as to repose full responsibility and authority in the county commissioners and the ditch supervisor to proceed with ditch repair projects subject only to the necessity, in a proper case, for a hearing on protests of property owners relative to the work apportioned to them under the provisions of Section 6697, *supra*. The authority so conferred is not, so far as I can perceive, in any way dependent on the efficacy of subsequent proceedings by the county authorities to bring about the reimbursement of the county general ditch improvement fund by collections from the owners of property benefited by such improvement.

As a practical matter, it might well happen that a deficiency in such ditch improvement fund would result in a case where, due to unusual economic conditions, there was a failure to collect a sufficient amount, under the special assessment procedure provided in Section 6702, to reimburse such fund in full for expenditures theretofore made with respect to a particular project. Whether or not the funds so expended from such ditch improvement fund consisted of the proceeds of general obligations of the county, I see no reason why such deficiency could not be met by drawing on the county general fund. On this point, attention is invited to the following provision in Section 5625-5, General Code:

““The purpose and intent of the general levy for current expenses is to provide one general operating fund derived from taxation from which any expenditures for current expenses of any kind may be made and the taxing authority of a subdivision may include in such levy the amounts required for the carrying into effect of any of the general or special powers granted by law to such subdivision, including the acquisition or construction of permanent improvements and the payment of judgments, but except the construction, reconstruction, re-surfacing or repair of roads and bridges in counties and townships and the payment of debt charges. * * *”

It is clear, I think, that a county ditch is a “permanent improvement” and here, too, we may properly conclude that the statutory authority to construct implies the authority to maintain.

For these reasons, I conclude that where county authorities proceed, under the provisions of Section 6691, et seq., General Code, with a project of repairing and cleaning a joint county ditch in a case where state-owned lands will be benefited, the statutory authority to consummate such project is not affected by the fact that the state department engineer concerned has failed or refused to consent to such project under the provisions of Section 6554, et seq., General Code. In such case, pending the appropriation of funds by the General Assembly with which to discharge any moral obligation thus recognized by that body, the deficiency in the county general ditch improvement fund, caused by the failure of the state to assume any share of the cost of such project, may be met by expenditures from the county general fund.

Respectfully,

C. WILLIAM O'NEILL

Attorney General.