

**OPINION**  
**52-156**

May 14, 1952 (OPINION)

SOIL CONSERVATION

RE: May Commissioners Make a Second Levy for Drainage

Your letter under date of May 10, 1952, addressed to Attorney General Elmo Christianson, with reference to the construction of sec. 61-2145 of the 1949 Supplement to the 1943 Revised Code has been referred by him to me, as Special Assistant Attorney General for the State Water Conservation Commission, for consideration and reply. In your letter to the Attorney General you say:

"Certain property owners in a drainage district petitioned the Board of County Commissioners to clean out and repair the drain. Sufficient property owners signed the petition to comply with the statute and the Commissioners levied the maximum assessment permitted. The maximum levy, however, did not produce sufficient revenue to defray the cost of cleaning out and repairing said drain and the question arises whether or not under section 61-21425 the Commissioners can make a second maximum levy. . . "

Under the provisions of section 61-21421 of the 1949 Supplement to the Revised Code it is the mandatory duty of a Board of County Commissioners to keep county drains "open and in good repair" subject to the limitations imposed under section 61-21425 and section 61-21426 of said Supplement.

Under the provisions of sec. 61-21425 a board of county commissioners may levy in any year for cleaning out and repairing a drain "not to exceed fifty cents per acre on any lands in the drainage district" and "in case the maximum levy of fifty cents per acre for any year will not produce an amount sufficient to cover the cost of cleaning out and repairing such drain, the board may accumulate a fund in an amount not exceeding the sum produced by such maximum permissible levy for one year".

The language of sec. 61-21425 of the 1949 Supplement may be somewhat confusing but, in my opinion, the meaning and intent thereof, are quite clear. Under sec. 61-21425 a board of county commissioners has the authority to make the levy specified therein without being petitioned to do so by owners of land within a drainage district.

It is my opinion that it is the intent of sec. 61-21425 of the 1949 Supplement that a board of county commissioners shall, as nearly as circumstances will permit, first determine the cost of cleaning out and repairing a drain. If the estimated cost does not exceed an amount produced by the maximum levy permissible under said section, such drain may be cleaned out and repaired. But if the probable cost exceeds the amount produced by such maximum levy then the amount realized from such levy may be accumulated, a similar levy made the following year and the amount produced by such levy together with

amount accumulated may be expended for cleaning and repairing the drain.

It is my opinion that it was the intention of the legislature that not more than fifty cents per acre shall be levied in any year by a board of county commissioners for cleaning out and repairing a drain unless petitioned by the owners of lands subject to assessment for ten per cent or more of the cost of cleaning and repairing as provided in sec. 61-21426 of the 1949 Supplement. In other words, if a levy of more than fifty cents per acre in any year is needed to produce sufficient funds to meet the cost of cleaning and repairing a drain a board of county commissioners must be petitioned as provided in said sec. 61-21426 and the hearing and notice thereof therein prescribed, and procedure therein required must be strictly followed. And if after the hearing, required under said section, the owners of lands which will be subject to assessment for 51 per cent or more of the cost of cleaning and repairing have signed "the original petition" the county board may then levy the amount required to cover such cost.

It has been suggested that a board of county commissioners may levy the maximum amount permitted under sec. 61-21425 of the 1949 Supplement each year and clean out and repair a drain on a so-called installment basis. If this procedure is legally permissible a county board may clean and repair in any year as much of a drain as the maximum levy authorized under sec. 61-21425 will allow and continue to make such levy each year thereafter until the work of cleaning and repairing is completed. If this procedure is legally permissible the work of cleaning and repairing a drain would require several contracts and cleaning and repairing might extend over several years. The legality of this procedure is, in my opinion, doubtful.

In your letter to the Attorney General you also say "There has been some difference of opinion as to whether or not any such levy above referred to may be used as the basis for the issuance of certificates of indebtedness after such tax has been voted by the board of commissioners and certified to the auditor".

It will be noted that sec. 21-0201 of the Revised Code does not definitely confer the power to issue certificate of indebtedness on the basis of assessments levied for cleaning and repairing a drain. If such authority exists it must be reasonably implied. Certificates of indebtedness may be issued by the public corporations mentioned in sec. 21-0202 on the basis of general taxes which have been levied. Whether the term "uncollected taxes" as defined in section 21-0201 of the Revised Code includes special assessments levied for drainage purposes is, in my opinion, very questionable. Sec. 21-0201 provides that "a certificate of indebtedness shall be the general obligation of the issuing taxing district". In my opinion the term "taxing district" generally refers to a municipal or quasimunicipal corporation authorized to levy general taxes. However, I do not pretend to predict what the Supreme Court might hold in this regard. The safest course to follow is to issue special assessment warrants instead of certificates of indebtedness.

ELMO T. CHRISTIANSON

Attorney General