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liability of police officers enunciated in *Monroe v. Pape, supra*, in relation to the Federal Civil Rights Act, 42 U.S.C. § 1981, and the recent Indiana case of *Brinkman v. City of Indianapolis, supra*, which is a complete departure from previous Indiana precedents, it becomes rather obvious that legislation to provide counsel for police officers in tort or related actions must be considered by the General Assembly.

OFFICIAL OPINION NO. 57

December 28, 1967

**TAXATION—Special Benefits Tax Levied by Conservancy
District—As Required to be Imposed Upon
All Real Estate in District.**

Opinion Requested by Mr. Richard L. Worley, Chief Examiner, State Board of Accounts.

This is in response to your request for my Official Opinion in answer to two questions concerning Acts 1957, ch. 308, (Burns (1960) §§ 27-1501 through 27-1599) as last amended by Acts 1967, ch. 231, which provides for the creation of conservancy districts and for the levy (only upon real estate) of both a "special benefits tax," imposed at a uniform rate, and the assessment of "exceptional benefits" which may be levied in addition to the said "special benefits tax." The two questions which are presented by your letter are as follows:

"1. Is the 'special benefit tax' provided for in the act relating to conservancy districts, Burns 27-1501 et seq., required to be imposed upon the 'gross' assessed valuation of real estate or upon the 'net' as-

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sessed valuation of real estate after deducting mortgage, age 65, veterans and blind deductions.

“2. Is the ‘special benefit tax’ required to be imposed upon real estate used for municipal, educational, literary, scientific, religious, or charitable purposes, and exempt from either assessment or taxation.”

The Act to which your questions relate was the subject of the case of *Martin v. The Ben Davis Conservancy Dist.*, 238 Ind. 502, 153 N.E. 2d 125 (1958) and also of 1962 O.A.G., p. 122. While neither the opinion of the Indiana Supreme Court or such Attorney General’s Opinion answers your questions explicitly, nevertheless, I believe that what such answers must be is clear from a reference to and study of both of these opinions.

The basic issue upon which the answers to each of your questions must turn is whether the “special benefit tax” provided by said Act is simply a general *ad valorem* tax levy which is governed by Art. 10, § 1 of the Constitution of Indiana, or whether such “special benefit tax” amounts to a special assessment for the payment of a local public improvement, which assessment is a direct charge against, and upon the basis of the improvement of, the property upon which the tax is imposed. In the case of *Martin v. The Ben Davis Conservancy Dist.*, *supra*, the Supreme Court of Indiana discussed this distinction at length and at pp. 517, 518, 519 and 520 of 238 Ind., stated as follows:

“Appellant also contends that the Act violates Article 10, Section 1 of the Constitution of Indiana, which provides:

“The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal. . . .”

“The Act in question provides with reference to raising the revenue to pay for the improvement:

'All the *real property* included within the district shall constitute a taxing district for the purpose of levying *special benefit taxes* to pay for the expenses of preparing the final plan, putting it into operation by constructing the necessary works, and thereafter operating and maintaining the district. . . .' (Court's italics.) Acts 1957, ch. 308, § 62, p. 851, being section 27-1562 of Burns.

"It is argued that because the personal property in the Conservancy District is not taxed and only real estate bears the burden of raising the revenue to pay the expenses and costs of the proposed improvement, the Act is violative of the above constitutional provision. We are not prepared to and need not accept that interpretation of the constitution here, since the constitutional provision relied upon applies only to general tax levies. We do not determine here whether or not the legislature has the power to exempt personal property or other classes of property from general tax levies, since we are concerned in this case only with special benefits inuring to property by reason of proposed improvements. *School Town of Windfall City v. Somerville* (1914), 181 Ind. 463, 104 N.E. 859. *We are considering in this case a special benefit tax based upon the benefits accruing from a local public improvement in accordance with the special wording of the statute above quoted. If the purpose of the taxation is a local public improvement, as distinguished from a general political or governmental purpose, the legislature can determine what general class of property will be benefited thereby, and provide for the creating of a special taxing district to pay for such improvements.* In *Gilson et al. v. The Board of Commissioners of Rush County* (1890), 128 Ind. 65, 27 N.E. 235, this court was faced with the contention that personal property in a special taxing district should not be taxed, as well as real property. We there held that it was within the prerogative of the legislature, so long as there was a reasonable

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basis therefor, to create local taxing districts and determine the property that would be specially benefited thereby which should bear the burden of the improvements. In *Board of Comm'rs v. Harrell*, 147 Ind. 500, 46 N.E. 124 (1897), the question was again reviewed and the principle again approved. In *Hutchins v. Town of Fremont*, 194 Ind. 74, 85, 142 N.E. 3 (1924), in connection with the same question, this court said:

' . . . That is, if the legislature has determined that only the real estate in a given district is benefited, then if the assessment is uniform according to some recognized standard, such as its value, area, or frontage, the constitutional requirement is satisfied.'

"It may be also said that if the assessment or tax to pay for the local improvement is levied pro-rata in accordance with the benefits received by the real estate, it would also be in accordance with recognized standards of equality and uniformity. 5 I. L. E. Constitutional Law, Sec. 211, p. 515.

"We point out that the Act in this case, by its method of operation, creates a special tax and assessment based upon benefits received. Although Section 78 of the Acts of 1957 (Burns' § 27-1578) provides for a uniform levy within the district to raise revenue for the operation and payment of indebtedness based upon special benefits determined by appraisers, yet the Act provides for the appraisal of damages to property injured and of 'exceptional' benefits to those who receive benefits over and above those uniformly received throughout the district. This provision recognizes that there may be inequalities in the benefits received (i.e., 'exceptional' benefits as distinguished from 'special' benefits) and makes provisions for payment accordingly. In its operation the landowner pay in proportion to the benefits they receive and are granted damages in event such exist.

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Acts 1957, ch. 308, § 64, p. 869, being § 27-1564 Burns' 1957 Replacement." (Emphasis added.)

Based upon said decision by the Supreme Court of Indiana and a complete study of the Act, the Attorney General's Opinion in 1962 O.A.G., p. 122 at p. 132 stated:

"By way of summary, it is my opinion that each landowner in the conservancy district is deemed, by law, to receive special benefits, so that each owner is liable for the tax designated 'special benefit tax' imposed at a uniform rate."

That Attorney General's Opinion also stated on p. 132 as follows:

". . . Your letter implies that the special benefits tax should not be imposed upon the assessed valuation of the land benefited. I find nothing in the Act supporting such conclusion. Although the Act 'bases' the special benefits tax upon the theory of benefits received, the presumption of the Act is that all land is specially benefited, the value of such benefits being in proportion to the assessed valuation of the land so benefited. . . .

"Thus, in conclusion, it is my opinion, on this latter phase, that the special benefits tax is to be levied *upon the same assessed valuation of the real estate as is used for the levy of general taxes.*" (Emphasis added.)

First. Your first question then is whether "the same assessed valuation of the real estate," as referred to in said Opinion of the Attorney General in 1962, means the "gross" assessed valuation or the "net" assessed valuation remaining after allowing all deductions for which the owner may be eligible, as for example, the mortgage deduction, the age 65 deduction, the veterans and blind deductions, etc. Reference is made to the fact that several of such deduction statutes contain language which indicates that the amount remaining after any such given deduction shall have been

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made "shall constitute the basis for assessment and taxation." See Burns § 64-218, § 64-224, and § 64-228. Such deductions appear to have been intended to be applicable only with respect to the liability of property for taxation imposed by a general levy on all property, and not as having been intended with respect to the payment for improvements wherein an assessment is made only against the property which benefits by such improvement.

Although pertaining to exemption as distinguished from deduction, the general exemption statute (Acts 1919, ch. 59, § 5 as amended, as found in Burns § 64-201) contains only one such specific reference, your attention is directed to the "Fourteenth" item under Burns § 64-201, *supra*, which exempts the following:

"Fourteenth. Any parcel or tract of land, not exceeding one acre and improvements thereon, owned by any church and used exclusively by it as a dormitory for the students of any college or university in this state: *Provided, That, this shall not be construed to exempt such property from special assessments.*" (Emphasis added.)

This may be some indication that the Legislature did not intend that the deductions and exemptions provided by statute are to affect the amount which would otherwise be chargeable against property for special assessments, when such property is benefited by an improvement to be paid for by such special assessment. Since the basis for special assessments or (in this case) a "special benefits tax" is that such assessment or tax is to pay specifically for the improvement which has been made to the property (or from which the property benefits), it would seem only logical that such property should bear the entire amount of such assessment or of such "special benefits tax" upon the standard prescribed by the statute, so that each piece of real estate so improved would bear its pro-rata share of the costs of such improvement on the basis of total benefits received. Thus, for answer to your first question, it is my opinion that the "special benefits tax" should be imposed upon the gross assessed valuation of the real estate, without the allowance of any de-

ductions, such as the mortgage, age 65, veterans and blind deductions.

Second. From the conclusion reached for answer to your first question, I believe that the answer to your second question is almost automatic and requires that it likewise be answered by stating that the "special benefits tax" required to be imposed upon real estate is to be imposed upon *all real estate* in the conservancy district. As heretofore noted, the exemption of property from taxation apparently is intended to relieve such exempted property only from the burden of the general tax levy which is used for the general conduct of government. Such exemptions have been justified by courts upon the basis that the property exempted is used for such a purpose that a public benefit or service is received so as to entitle the property to exemption on the basis that if such use were not made of that property then the government would be required to furnish a similar public service, which in effect would increase the amount of tax revenue required. However, since the "special benefits tax" is not for the conduct of general governmental affairs but is to pay for the cost of an improvement which benefits the particular property involved, there is no logical basis upon which to exempt such real estate from the payment for an improvement which is a benefit to the real estate itself.

It should be emphasized that the advice stated in this opinion, that deductions and exemptions should not be allowed in determining the assessed valuation base to which the special benefits tax applies, results from the necessity of following the opinion of the Supreme Court of Indiana in the case of *Martin v. The Ben Davis Conservancy Dist., supra*. While that case was not concerned with your precise questions, nevertheless, the concept of the special benefits tax adopted by that Court compels this answer.

It should be further noted that the 1967 Legislature made several amendments to the Conservancy District Act by enacting Acts 1967, ch. 231. Section 62, as amended, Acts 1957, ch. 308 was further amended by said 1967 Act and said section as so amended, as found in Burns §27-1562 now provides:

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“All the real property included within the district shall constitute a taxing district for the purpose of levying special benefit taxes to pay for the expenses of establishing the district, general preliminary and administrative expenses, and the expenses of preparing the district plan, putting it into operation by constructing the necessary works, and thereafter operating and maintaining the district. This special tax shall constitute and be the amount of benefits received, and shall be based on return for the benefits.

“If a petition for the establishment of a conservancy district is filed which states that the purpose for establishing the district is providing water supply, including treatment and distribution for domestic, industrial and public use, that it is the election of the petitioners to accomplish such purpose pursuant to the provisions of chapter 334, Acts of 1963, that there shall be no special benefits tax levied, and that all costs shall be paid for by sources other than the levy of special benefits tax, and such statements are incorporated by the court into its order establishing the district; then no special benefits tax shall be levied by the board of directors of such district for such purpose and all costs of accomplishing such purpose shall be paid for by receipt of revenues from the sale of water and an assessment against each tract of real property served by the resulting water distribution system in the amount of seventy-five dollars or five per cent of the estimated average project cost according to the district plan of serving each tract of real property whichever is less. In addition, a fair and reasonable tap-in fee may be charged for water service by such district. Such assessments shall be due and payable within sixty days after notice thereof. Such assessment shall not be deemed an exceptional benefit but the provisions pertaining to exceptional benefits as elsewhere provided in this act shall apply to the collection and enforcement of such assessment.”

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All of the last paragraph of Burns § 27-1562, *supra*, was added by the 1967 amendment and seems to further support the concept that the charges against the land, as authorized by this section, constitute an improvement assessment based upon benefits to the land from such improvement.

Thus, for answer to your second question, it is my further opinion that the "special benefits tax" should be imposed upon *all real estate* which has an assessed valuation, irrespective of whether such real estate may be exempt by statute from the payment of a general tax levy.

OFFICIAL OPINION NO. 58

December 28, 1967

**TAXATION—Gross Income Tax Liability Realized from
Operation of Marina.**

Opinion Requested by Mr. James E. Vine, Chairman, Michigan City Port Authority.

This is in reply to a letter from Mr. Marcellus Meyer, Attorney for the Port Authority of Michigan City, requesting an Official Opinion in regard to the following question:

Is the Michigan City Port Authority liable for the payment of Indiana Gross Income Tax on income realized from the operation of a marina in Washington Park Basin?

Acts 1959, ch. 343, as amended, the same being Burns §§ 68-1001—68-1020, authorizes a municipal corporation, a county or a combination of municipal corporations and coun-