

power of cities not having a board of park commissioners to purchase either contiguous or non-contiguous lands outside of the city limits for park purposes.

In view of the fact that the establishment of a board of park commissioners in any city is a matter that is wholly optional with the electors of such city, and of the other considerations hereinabove noted touching the proper construction of Section 4060, General Code, I am of the opinion, by way of answer to the specific question submitted, that a city not having a board of park commissioners may purchase lands outside of the city limits and not contiguous thereto for park purposes, when the acquisition of such land is reasonably necessary for said purpose.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1362.

COUNTY COMMISSIONERS—AUTHORITY AS TO CONSTRUCTING AND REPAIRING TOWNSHIP DITCHES—SECTION 6603, GENERAL CODE, DISCUSSED.

SYLLABUS:

1. *The county commissioners are vested with sole authority in regard to the constructing, cleaning and repair of township ditches, except that the township trustees have authority under the provisions of Section 6603, General Code, to improve a township ditch or drain within the limitations contained in said section.*
2. *When a petition is filed under the provisions of Section 6603, General Code, it is the mandatory duty of the township trustees to proceed under said section.*

COLUMBUS, OHIO, December 14, 1927.

HON. JOHN H. HOUSTON, *Prosecuting Attorney, Georgetown, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

“The Code of Ohio seems very ambiguous as to specifying upon what officials devolve the construction and repair of ditches, drains and water courses under Section 6601, General Code of Ohio, et seq.

Specifically, should the trustees in any case lay out and keep in repair any ditches, whatsoever, or should this duty be placed upon the board of county commissioners? If the trustees may supervise any ditch construction and repair, is such duty mandatory upon them, or merely permissive?

Upon the passage of the above quoted sections, were all ditches heretofore constructed, automatically placed within the jurisdiction of the commissioners, or did such ditches as were heretofore under the township trustees and known as township ditches remain under the jurisdiction of the trustees of the township?”

Previous to 1919, township trustees had power to construct public ditches and had other duties to perform in reference thereto, but the ditch laws were codified in 1919 and this act took away from said trustees and all township officials practically all duties concerning ditches. The Act of 1919 was unsatisfactory and the legislature

in 1923 enacted a new act, and to a certain limited extent again placed certain duties and powers on township officials. Section 6603, General Code, provides as follows:

"A petition for the improvement of a ditch or drain which is located wholly within a township, which does not pass into or through a municipality, which has an outlet within the township in a public watercourse, which does not benefit or damage land outside of the township, and which has not theretofore been located as a county ditch, may be filed with the clerk of such township instead of with the auditor of the county as provided in chapter one (G. C. 6442 to 6508) of this title. If such petition is filed with the clerk of the township, the clerk of the township shall at his office, do all things required to be done by the auditor, and the board of trustees of the township shall at their usual place of meeting do all things required to be done by the board of county commissioners in drainage improvements as is provided in chapter one of this title. The proceedings for such improvement shall be had pursuant to the provisions of chapter one of this title, and shall be governed by all the provisions of chapter one of this title, except as modified in this chapter."

It is noted that under the limitations of this section:

- (1) The proposed ditch must be wholly within the township.
- (2) It must not pass through a municipality.
- (3) It must have an outlet in a public watercourse within the township.
- (4) The proposed ditch must not damage or benefit land outside of the township.
- (5) It must not be laid over a county ditch.

If a ditch is proposed that does not conflict with any of the above limitations then the township trustees have power to construct the same and have the same power as county commissioners, and the clerk the same duties as the county auditor under Sections 6443 to 6545, General Code. This is one instance in which the township trustees may construct and repair township ditches. You ask whether the duty devolved upon township trustees is mandatory or permissive. It will be noted that Section 6603, General Code, provides that when the petition for the improvement of the ditch or drain within the limitations provided in said section is filed with the clerk of the township the clerk of the township shall do all things required to be done by the auditor and the board of trustees of the township shall at their usual place of meeting do all things required to be done by the board of county commissioners in drainage improvements. It is evident that these express requirements are mandatory upon the township trustees under the provisions of said section. As stated before, herein, the act of 1919 took away from township trustees practically all duties concerning ditches and the act of 1923 again placed certain duties and powers upon township officials, but only to a limited extent. It therefore seems clear from the last named act that all ditches theretofore constructed were automatically placed within the jurisdiction of the county commissioners and this of course included township ditches. Under the provisions of Section 6607, General Code, the commissioners, in proceeding under Chapter I, (General Code Sections 6442 to 6508) of this title, shall have the right to locate and construct an improvement in the route or course of a township ditch. The trustees shall have no right to locate a township ditch in the route or course of a county ditch.

Section 6691, General Code, reads as follows:

"In any township or townships in which a ditch, drain or watercourse or part thereof has been or may hereafter be located and constructed, the county commissioners for the purpose of keeping such ditches, drains or watercourses clean and in repair, may delegate such duty to the county surveyor who shall execute the necessary work and assess the cost thereof in accordance with the provisions of this chapter as they relate to the duties of a ditch supervisor, or employ a ditch supervisor for such township; the same person may be employed as a ditch supervisor for one or more townships in the county; no person shall be so employed unless he is a resident of the county in which he is employed; he may be removed by the county commissioners at any time for cause, and his duties may be delegated to another supervisor or the county surveyor, or another supervisor may be appointed in his place.

Where the term ditch supervisor is used in this chapter and the duties of ditch supervisor are being performed by the county surveyor, the term 'ditch supervisor' shall be construed to refer to county surveyor."

This section refers to township ditches, drains and watercourses which at the time of its enactment had been or have or may hereafter be located and constructed. It also provides that the county commissioners may delegate to the county surveyor the duty of keeping said ditches, drains and watercourses clean and in repair, or said commissioners may employ a ditch supervisor for such township and also for other townships in said county. This section also gives the commissioners the power to remove for cause said ditch supervisor.

Section 6692, General Code, reads as follows:

"Such ditch supervisor shall receive such compensation as the county commissioners may determine, not to exceed three dollars per day for the time actually employed on ditch work, which compensation shall be paid from the general ditch improvement fund upon presentation of an itemized account certified upon oath by the ditch supervisor and allowed by the commissioners. When actually engaged in measuring a ditch, drain or watercourse, the supervisor shall be allowed one assistant who shall receive compensation, as the commissioners may determine, not to exceed two dollars and a half per day for the time actually employed; and shall be paid from the general ditch improvement fund upon the certificate of the ditch supervisor and the allowance of such claim by the commissioners."

This section provides that the county commissioners shall fix the compensation of the ditch supervisor and that said compensation shall be paid from the general ditch improvement fund. When allowed by the commissioners it also provides that the commissioners may compensate assistants to the ditch supervisor.

Section 6693, General Code, provides as follows:

"The ditch supervisor shall have supervision of the cleaning out or repair of all ditches, drains or watercourses located and constructed in his township or townships, which have theretofore been located and constructed by township trustees, or by county commissioners as single county ditches, or by county commissioners as joint county ditches, and shall at all times be under the direction and control of the commissioners. The ditch supervisor is authorized to repair tile that are broken, uncovered, or stopped up; to open the outlet of tile; to repair any abutment, catch basin, or retaining wall that

has been constructed on any ditch, drain or watercourse; and to clean out and keep ditches, drains, or watercourses in repair as provided by law; he shall annually report to the county commissioners the work done by him on ditches, drains or watercourses, and any money collected by him, which report shall be made between the fifteenth and thirty-first days of December of each year; no part of the compensation of the supervisor or his assistant shall be assessed against the land or constitute a charge against the owners of affected land.

If the ditch supervisor owns land that may be affected by the cleaning out or repairing of a ditch, drain or watercourse, he shall report such fact to the commissioners. The commissioners upon receiving such report shall forthwith designate a ditch supervisor of some other township of the county to act as ditch supervisor on said ditch and such ditch supervisor so designated by the commissioners shall do and perform all acts that may be done by a ditch supervisor on said ditch as provided in this chapter."

It is noted that under this section the ditch supervisor shall have supervision of the cleaning out or repair of all ditches, drains and watercourses located or constructed in his township of townships which have thereto been located and constructed by township trustees or by county commissioners, as single county ditches or joint county ditches, and the ditch supervisor is authorized to make repairs and do other work necessary to keep in proper repair all ditches and watercourses.

Section 6694, General Code, provides certain duties for the ditch supervisor where the owners are negligent in performing said work.

Section 6695, General Code, provides that any owner of land that will be affected by the cleaning, recleaning or repair of a ditch or watercourse may file an application with the ditch supervisor of the township in which his land is located, and said section also provides that upon the filing of such application the ditch supervisor or the commissioners shall take the necessary steps to clean or repair such ditch, drain or watercourse, and the remainder of this chapter referring to cleaning and repair of ditches, drains and watercourses provides that the ditch supervisor shall perform under the direction of the county commissioners all duties previously performed by the township trustees. Under the specific provisions of the foregoing sections township ditches and all other ditches, drains and watercourses are placed under the control of the county commissioners.

In an opinion of this department, Opinions of the Attorney General, 1926, at page 296, Sections 6603 to 6607, inclusive, were construed and the duties of township trustees defined. The question there considered was as to whether the township trustees could levy a ditch tax for the purpose of paying, in the first instance, the cost of the location and construction of a ditch. The answer was in the affirmative, and it was also stated in said opinion that:

"Chapter five of the Ditch Code, relating to township ditches is very brief, containing only five sections * * *

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Section 6495 of the General Code, found in 110 O. L. 161-190, provides as follows:

'The trustees of a township to which is apportioned by the commissioners a portion of the expenses of the construction of an improvement, shall levy annually upon the grand duplicate of the township, a tax sufficient to pay said apportionment, but not to exceed five-tenths of one mill on a dollar, and certify this to the auditor, on or before the fifteenth day of May in each year, until all installments are provided for.'

The latter section would seem to limit the levy to the purpose of paying the township's portion of the expenses of construction of an improvement by the county commissioners.

Nowhere can be found a section specifically authorizing the township trustees to levy a tax to pay for the initial expenses of locating and constructing a township ditch. * * *

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Section 6603 of the General Code, supra, it is believed can be construed in connection with the other sections of the Ditch Law as authorizing the township trustees to levy a tax for the purpose of a general ditch fund to be used in paying the cost in locating and constructing a ditch."

Summarizing, it appears that township trustees are now limited in their authority pertaining to the construction and repair of township ditches, drains and watercourses to the provisions of Section 6603, General Code. Said trustees are authorized, however, under the provisions of Section 6495, General Code, to levy taxes for the purpose of paying the initial cost of the location and construction of a township ditch.

Specifically answering your questions it is my opinion that :

1. The county commissioners are vested with sole authority in regard to the constructing, cleaning and repair of township ditches, except that the township trustees have authority under the provisions of Section 6603, General Code, to improve a township ditch or drain within the limitations contained in said section.

2. When a petition is filed under the provisions of Section 6603, General Code, it is the mandatory duty of the township trustees to proceed under said section.

Respectfully,

EDWARD C. TURNER,
Attorney General.

1363.

STATUTE OF LIMITATIONS— SECTION 11221-1, GENERAL CODE, NOT APPLICABLE TO ACTIONS ACCRUING BEFORE EFFECTIVE DATE THEREOF — INAPPLICABLE TO STATE OF OHIO — ACTIONS AGAINST CARRIERS, DISCUSSED.

SYLLABUS:

1. *Section 11221-1, General Code, which provides for limitation of actions against carriers, does not apply to any cause of action accruing before the effective date thereof, to-wit, July 15, 1925.*

2. *Said section does not apply to claims of the State of Ohio against a carrier for recovery of overcharges for transportation of persons or property in Ohio.*

COLUMBUS, OHIO, December 14, 1927.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion, as follows :

"We respectfully request your written opinion upon the following question, to-wit :