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1. SEWERS AND SEWAGE DISPOSAL WORKS—INSTALLATION BY COUNTY COMMISSIONERS—PORTION OF COST MAY BE ASSESSED UPON PROPERTY IN SEWER DISTRICT—NOT IN EXCESS OF SPECIAL BENEFITS TO PROPERTY—STATUS, SEPTIC TANK AND LEACHING BED—SECTION 6117.01 ET SEQ., RC.
2. IF PROPERTY IN SEWER DISTRICT IS ADEQUATELY AND PERMANENTLY SUPPLIED WITH SANITARY DRAINAGE AND DISPOSAL NO LAWFUL ASSESSMENT MAY BE LEVIED AGAINST PROPERTY FOR COST OF INSTALLATION—PROVISO, PROJECT IS IN NO DEGREE INJURIOUS TO PUBLIC.
3. COUNTY COMMISSIONERS WITHOUT AUTHORITY TO FORCE PROPERTY OWNER TO CONNECT PREMISES WITH SEWER CONSTRUCTED PURSUANT TO SECTION 6117.01 ET SEQ., RC.

SYLLABUS:

1. Under the provisions of Section 6117.01 et seq. of the Revised Code, relative to the installation by county commissioners of sewers and sewage disposal works, a portion of the cost thereof may be assessed upon property in the sewer district, not in excess of the special benefits to such property, even though it is presently provided with temporary facilities such as a septic tank and leaching bed. Such facilities, however, should be taken into consideration in determining the amount of the assessment.

2. If a property in a sewer district organized pursuant to Section 6117.01 et seq., Revised Code, is adequately and permanently supplied with sanitary drainage and disposal which is in no degree injurious to the public, and it is determined that no possible benefit can result to such property by the installation of a sewer and sewage disposal works, no lawful assessment may be levied against such property for the cost of such installation.

3. The county commissioners are without authority to force a property owner to connect his premises with a sewer constructed pursuant to Section 6117.01 et seq. of the Revised Code.

Columbus, Ohio, December 13, 1955

Hon. Calvin W. Hutchins, Prosecuting Attorney
Ashtabula County, Jefferson, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"The Commissioners of Ashtabula County, are faced with the problem of constructing sewers in pursuance of authority of Chapter 6117 of the Revised Code.

"Because of the excessive cost of this improvement, it will be necessary to assess property abutting upon the sewer lines, levy a sewer rental, sufficient in amount to service a portion of the bond issue, and levy an assessment upon the entire district.

"Certain questions have arisen to which we would like to call your attention, and ask your opinion:

"(1) Assuming that property abutting upon the proposed improvement is serviced by a septic tank and leaching bed, which have been installed under the direction of, and with the approval of the Board of Health, may this property be assessed for the proposed improvement?

"(2) May an owner of property now serviced with a septic tank and leaching bed, constructed in accordance with the rules of the Health Department, and approved by it, be forced to connect with the sewer which the Commissioners propose to install?

"(3) By what means may the County Commissioners force a property owner to connect with the proposed sewer, and what penalty can be charged and collected in the event that a property owner should fail to connect with the proposed improvement, when ordered so to do?

From an examination of Section 6117.01 et seq. of the Revised Code, it appears clear that the county has authority to establish a sewer district and construct therein sewers and sewage disposal works, and assess part or all of the cost of the same on the benefited property in such district. Section 6117.02 Revised Code, authorizes the fixing of reasonable rental charges for the service.

It appears further from Section 6117.06, Revised Code, that a county has the right to pay such part of the cost of such improvement out of

county funds as it sees fit, and assess only a part of the entire cost against benefited property within the district.

Your letter suggests that it will be necessary "to assess property abutting upon the sewer lines, levy a sewer rental and levy an assessment upon the entire district." I do not see in the statute any authority to levy two assessments upon any property in the district. Presumably all the lots and lands in the district which will be served by the sewer will sustain an assessment proportionate to their benefits. The portion that will be paid by the county at large will arise from general taxes levied upon the property of the entire county.

Your specific questions appear to relate to a special assessment upon a property which has been provided by the owner with an installation intended for the use of his property only, to wit, a septic tank and leaching bed.

I consider that it is fundamental to the right to levy a special assessment upon private property for a public improvement that the property assessed must be specially benefited by the improvement in an amount at least equal to the assessment. That principle was established in the case of Chamberlain v. Cleveland, 34 Ohio St., 551, in which it was held:

> "To enable a municipal corporation to pay for a local public improvement it may, by assessment, take from an individual whose lands are subject to assessment and specially benefited by the improvement, such a portion of the costs thereof as is the equivalent, but not in excess, of the special benefits conferred thereby."

The court in the course of the opinion said:

> "If a sum is exacted in any instance, in excess of the value of the special benefits conferred, it is, as to such excess, in that instance, private property unjustly taken for public use without compensation to the owner."

The principle in this case has been affirmed by a number of subsequent cases, including Schneider v. Overman, 61 Ohio St., 1; Walsh v. Barron, 61 Ohio St., 15; Walsh v. Sims, 65 Ohio St., 211. It was well established by the above cases that the collection of assessments in excess of such special benefits will be subject to injunction.

The mere fact, however, that a property owner may have provided himself with a means of drainage and sewerage satisfactory to himself,

does not necessarily exempt him from an assessment for an improvement which is necessary to the general public health and welfare. In the Municipal Code there is a statute, which explicitly restrains the municipal corporation from levying an assessment for the installation of a sewer where the property is already provided with drainage. This section which was formerly Section 3819 of the General Code, and is now Section 727.15 of the Revised Code, provides in part as follows:

> "The legislative authority of a municipal corporation shall limit all assessments to the special benefits conferred upon the property assessed * * * nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith."

While this restriction is not embodied in the law relating to county sewers, I deem its principle to be implicit in any procedure leading to an assessment on private property at least to the extent that an assessment cannot be levied in an amount that is in excess of the benefits conferred. If, therefore, a property is adequately and permanently provided with drainage including sanitary sewerage, it would appear that it could not be benefited by the installation of another sewer.

But a private installation in order to furnish even partial immunity from assessment for a public sewer must have a proper sanitary outlet, be so located that the owner has a permanent and vested right to its continued use, and not be in any way an infringement on the rights of others or a menace to public health, or a nuisance. Wewell v. Cincinnati, 45 Ohio St., 407; Ford v. Toledo, 64 Ohio St., 92; Hildebrand v. Toledo, 6 C.C. (N.S.), 450; Kibler v. Newark, 4 N.P. (N.S.), 641. It does not appear that a device such as a septic tank will furnish complete immunity. In the case of Kibler v. Newark supra, it was held:

> "A property owner who is provided with a drain leading to a cesspool on his own property is not, on the ground that he is already provided with local drainage, exempt from assessment for a sewer laid in the street, having a proper outlet, and built in conformity with the requirements of the statute."

In the course of the opinion the court uses the following language:

> "The question is whether the drainage of sewage into a cesspool on that lot would be such local drainage as would exempt this property from liability for assessment for this sewer constructed on North Fourth Street. From the holding of the Supreme Court, and the definition that they give of local drainage, the court thinks not. The court thinks that the city had a right to build a sewer there that would provide this land with drainage off of the premises."

One of the cases cited and reviewed by the court was Wewell v. Cincinnati, 45 Ohio St., 407. In that case the court held that a property was sufficiently supplied with drainage to exempt it from a subsequent assessment for a sewer where it was drained into an extensive sewer constructed partly by the city and partly by private persons, and discharged into a river. But the court in its opinion at page 422 said:

> "The local drainage provided, which can be effective to exempt the property drained, must, of course, be of such a character as to satisfy the statute. An ordinary surface drainage will not be sufficient. The dimensions, the mode of construction, the material used, the location, the outlet, the sanitary conditions, and other considerations should be such as would belong to a sewer or drain built substantially in conformity to the requirements of the statute. As illustrated in several of the cases growing out of this public improvement, lots drained by a wooden box drain, placed as a temporary expedient in anticipation of regular sewerage, or drained simply by flowage over the surface, are not supplied with local drainage as to be exempt from assessment."

A privately installed sewer system is not sufficient to exempt a property from assessment where it is outleted into a storm sewer. Kasselman v. Cincinnati, 57 Ohio Law Bulletin, 197. Nor where it empties into a temporary outlet provided by a municipality. Ely v. Elyria, 15 C. C. (N.S.) 133; Avondale v. Scudder, 12 C. C., 770.

It appears to me, therefore, that the question here before us is whether such an installation as is described in your injury is so constructed and so located as to provide a method of disposal that is and will continue to be adequate for the property in question and not in any way detrimental to other property owners in the vinicity or to the public in general. Those are questions of fact. Ordinarily, a cesspool is adequate for *outlying* property, if properly constructed and maintained, but it must have an outlet somewhere, and it is in danger of becoming a nuisance if not properly maintained, and is almost certain to become obnoxious and inadequate with the passage of time, and particularly when the area thickens up with dwellings. The question in your case, therefore, becomes one of fact, dependent upon circumstances existing at the time the sewer improvement is installed. I do not consider the fact that the original installation of the septic tank was approved by the board of health is of great significance, because that would be no assurance that after a lapse of years, it would continue to be in good sanitary condition.

Even though an improvement such as a sanitary sewer, with connection to a sewage disposal plant has no present utility as such to the owner of property, that fact will not exempt him entirely from assessment. In the first place, it is a well recognized principle of law that a public improvement such as the construction of a street or sewer, is presumed to confer some benefit upon abutting property. Speaking on this subject it is said in 36 Ohio Jurisprudence, page 925:

> "There is also a legal presumption that lots in a municipality will be benefited by the construction of an adequate system of sewerage through or in the streets upon which they abut. And assessments for particular improvements, within the limit of benefits, constructed under statutes making no provision for the consideration of benefits, have been upheld in some cases upon the theory of a legislative presumption that the benefits would equal the amount of the assessment."

Cleaneay v. Norwood, 14 O. F. D., 469; Westenhaver v. Hoytsville, 8 C.C. (N.S.), 284.

It is also the well established doctrine of assessment law that future benefits may be taken into consideration in determining the reasonableness of an assessment. It is said in 36 Ohio Jurisprudence, page 927:

> "And property may be specially benefited by the construction of an improvement so as to authorize an assessment for the cost thereof although there is no present need for the services or facilities which the improvement is intended to provide. But since a benefit that is necessarily prospective is not of equal value with a benefit that is immediately enjoyable, the time when the service intended to be supplied by an improvement will be needed should be considered in determining the benefits resulting to particular property therefrom."

Citing Duchler v. Portsmouth, 45 Ohio App., 15.

It should also be recognized that potential and prospective benefits may arise when land abutting on an improvement may be subdivided so that the services may be available to a considerable number of users.

All of these considerations lead to the conclusion that in assessing property for the cost of a sanitary sewer, not only the present usefulness to the owner but all further elements that may point to the benefits to the property must be given consideration. If we were to hold a property entirely exempt because its present occupant has a septic tank such as

mentioned in your letter we would be overlooking the fact that that device is not permanent and also the fact that both he and his successors in case of a division of his land might claim the right in the future to tap into the sewer without having borne any part of the cost thereof.

Under the provisions of Section 6117.06 supra, a "tentative assessment" is to be made, and every property owner to be assessed is to be given notice by mail of the time and place when objections to the assessments will be heard.

Under provisions of Section 6117.07, Revised Code, the board of county commissioners shall hear complaints and may cause such revision to be made of the tentative assessments as it considers necessary, and may then proceed to make the improvement.

Section 6117.09, Revised Code, authorizes any owner of property to be assessed for such improvement to appeal to the Probate Court from the action of the county commissioners either as to (A) the necessity of the improvement (B) the boundaries of the assessment district and (C) the *tentative apportionment* of the assessment.

It will thus be seen that the answer to your questions as to the right to assess the owner of a property who has installed a septic tank and leaching bed must be somewhat indefinite, and dependent upon facts which are not before me in the particular case. Generally speaking, it would appear in the light of the facts given, and the above authorities, that an assessment against the property in question which takes into consideration the factors above referred to, would be a proper and lawful proceeding, being subject, however, to the right of the property owner to object and ultimately to have his objections passed upon by the Probate Court.

Your third question is as to the right of the county commissioners to force a property owner to connect with a sewer constructed by them. I do not find any statute giving the commissioner such power. In case his refusal to do so should result in a public nuisance, he would come under the jurisdiction of the board of health, and might be proceeded against for maintaining such nuisance.

In specific answer to your questions it is my opinion:

1. Under the provisions of Section 6117.01 et seq. of the Revised Code, relative to the installation by county commissioners of sewers and sewage disposal works, a portion of the cost thereof may be assessed upon

property in the sewer district, not in excess of the special benefits to such property, even though it is presently provided with temporary facilities such as a septic tank and leaching bed. Such facilities, however, should be taken into consideration in determining the amount of the assessment.

2. If a property in a sewer district organized pursuant to Section 6117.01 et seq., Revised Code, is adequately and permanently supplied with sanitary drainage and disposal which is in no degree injurious to the public, and it is determined that no possible benefit can result to such property by the installation of a sewer and sewage disposal works, no lawful assessment may be levied against such property for the cost of such installation.

3. The county commissioners are without authority to force a property owner to connect his premises with a sewer constructed pursuant to Section 6117.01 et seq., of the Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General