

922.

COUNTY COMMISSIONERS—WHERE THEY DETERMINE IMPROVEMENT SHOULD BE MADE UNDER SECTIONS 6442 TO 6508 G. C. STATE OF OHIO BOUND AS HOLDER OF FISHING EASEMENTS—ALL RELIEF GRANTED BY SAID SECTIONS AVAILABLE TO STATE—DREDGING.

SYLLABUS:

1. *The determination of county commissioners that an improvement should be made under Sections 6442 to 6508, inclusive, of the General Code, is binding upon the State of Ohio as the holder of fishing easements.*

2. *All of the relief granted to owners of land by virtue of Sections 6442 to 6508, inclusive, of the General Code, is available to the State of Ohio as the holder of perpetual fishing easements.*

COLUMBUS, OHIO, July 24, 1939.

HON. D. G. WATERS, *Commissioner of Conservation and Natural Resources, Columbus, Ohio.*

DEAR SIR: Your request for my opinion reads as follows:

“During the last few years, the Division of Conservation has been buying up fishing rights along many of the streams of Ohio by perpetual easement, a copy of an easement being inclosed, herewith.

As you will note, this easement gives the fishing public the right to fish the stream and to trespass on twenty feet of the bank belonging to the grantor. We have endeavored, in most cases, to get long stretches of land on good fishing streams signed up under easement and to date have been very successful.

I am also attaching a map showing part of the Claibourne Township, Union County, through which Fulton Creek flows and upon which Creek we have taken several easements, which are shown in red. We still have some other easements which have not as yet been approved by your office or recorded at the County office, which we have not ‘reded in’ on this map.

The question I wish to ask you, as Attorney General, is, what are our rights on this stream when a group of farmers, who have not signed easements, have petitioned the County Commissioners for a dredging proposition which would extend up and down the stream and through farms on which we have perpetual easements.

The area covered by petition is between point ‘A’ and point ‘B’, as shown on the map, and to get the right fall to this creek,

the engineer wishes to go downstream, through farms shown in red, to point 'C'.

Again stating my question, have we, as owners of fishing easements, any legal right to make a protest to this type of stream work?"

I note from the above that certain land owners have petitioned the county commissioners to dredge a stream on which the State of Ohio has fishing easements, and you ask whether the State of Ohio, through the Division of Conservation, by virtue of having such easements, may object to or protest such work.

Although it is not stated in your letter, I assume that the petition has been filed and the county commissioners are acting in pursuance of Sections 6442 to 6508, inclusive, of the General Code, which sections are set forth under Title III of the General Code under the heading, "Drainage".

Section 6443, General Code, defines the powers of the county commissioners in this type of proceeding as follows:

"The board of county commissioners, at a regular or called session, upon the filing of a petition as provided in this chapter by any owner of any land, when the commissioners find that the granting of the petition and the construction of the improvement is necessary to drain any land, or to prevent the overflow of any land in the county, and further find that the construction of the improvement will be conducive of the public welfare, and further find that the cost of the proposed improvement will be less than the benefits conferred by the construction of the proposed improvement, may cause to be located, constructed, reconstructed, straightened, deepened, widened, boxed, tiled, filled, walled, or arched, any ditch, drain, or watercourse, or construct any levee, or straighten, deepen, or widen any river, creek, or run, or vacate any ditch, by proceedings as provided in chapters 1 and 2 of title III of the General Code of Ohio."

Sections 6444, 6446 and 6447, General Code, provide for the filing of the petition, the giving of a bond and notice to the landowners of the filing of the petition.

Section 6448, General Code, provides:

"Owners who have not joined in the petition, who are in favor of the improvement, may file applications requesting that the improvement be granted, and state their reasons therefor; owners who are opposed to said improvement may file remonstrances against the granting of the improvement and state their

reasons therefor; which applications or remonstrances may be filed at any time before a final order is made by the commissioners confirming the assessments and ordering the letting of the contracts for the construction of the improvement; or before a final order is made dismissing the petition.”

Section 6457, General Code, reads as follows:

“All claims for compensation for land taken, and all claims for damages by reason of the proposed improvement, shall be filed with the auditor of said county on or before the date of the final hearing in the proceedings to construct the improvement. Said applications for compensation or damage shall describe the land, a part of which is claimed to be taken or damaged, and shall describe the nature of and the reasons for the claim asked to be paid to each claimant.”

Section 6458, General Code, reads:

“In all claims for compensation or damages, and in all matters where the rights of the county are affected, the prosecuting attorney shall represent the county, and as such representative may appeal to the court of common pleas from any order allowing compensation or damage, if in his opinion it is excessive, and may appeal from any order levying an assessment against the county for special benefits to the highways, or to land owned by the county, if in his opinion the assessment is excessive. On appeal by any owner, he shall represent the county, in so far as the county may be affected by the appeal.”

Section 6462, General Code, provides:

“At the final hearing on said improvement, after hearing all the evidence offered in the proceedings, and after receiving and considering all the schedules and reports filed by the surveyor, the commissioners shall review and reconsider the former order made by them finding in favor of said improvement, and shall either affirm said former order and proceed to confirm the assessments, and order the letting of the contract, or shall set aside said former order and dismiss the petition. At said final hearing, if the commissioners find that the cost of the improvement will be equal to or greater than the benefits which will be derived therefrom, if constructed, or, if the commissioners find that the improvement is not necessary, or, if the commissioners find that the improvement will not be con-

ducive to the public welfare, the commissioners shall set aside the former order, finding in favor of said improvement, made by them at the first hearing, and shall dismiss the petition. In determining whether or not the improvement should be granted, the commissioners shall consider the cost of location and construction, the compensation for land taken, the damages to land along or in the vicinity of the route of the improvement, the damages, if any, to land below the lower terminus of the improvement which may be caused by constructing the improvement, the sufficiency or insufficiency of the outlet, the benefits to the public welfare, and the special benefits to land needing the improvement; and shall consider any other proper matter which will lawfully assist them in finding for or against the improvement. If the petition is dismissed at the final hearing, the petitioner for said improvement shall pay all the costs in said proceeding, save and except the costs made by the surveyor in making his surveys, reports, and schedules. The petitioner, or any owner in favor of the improvement, shall have the right to appeal from such order of dismissal, as provided in this chapter."

Section 6467, General Code, reads as follows:

"Any owner interested may appeal to the court of common pleas from a final order made by the commissioners, as provided in this chapter, and may appeal any one or more of the following questions:

- (1) Is the improvement necessary?
- (2) Will the improvement be conducive to the public welfare?
- (3) Is the cost of the improvement greater than the benefits conferred?
- (4) Is the route, termina, or the mode of construction the best to accomplish the purpose of the improvement?
- (5) Are the assessments levied according to benefits?
- (6) Is the award for compensation or damages just?

Such appeal may be taken from any order affecting any part of the improvement, as well as from any order affecting the entire improvement."

The above sections indicate that owners of land affected by the proposed improvement are subject to the above quoted provisions of law, whether signers of the petition or not. It follows, therefore, that the

State of Ohio is subject to such statutory provisions, because it is elementary that a party holding an easement or lease can have no greater interest in the subject of the easement or lease than has his grantor or lessor.

The question then arises as to what rights rest with the State of Ohio by virtue of the above quoted sections.

It will be noted that throughout Sections 6442 to 6508, inclusive, General Code, reference is made to the "owner of land". Section 6442, General Code, provides in part:

"That word 'owner' as used in chapters 1, 2 and 8 of this title, shall be construed to include any owner of any right, title, estate, or interest in or to any real property, and shall be held to include persons, partnerships, private corporations, public corporations, boards of township trustees, boards or education of school districts, the mayor or council of a city or village, the trustees of any state, county, or municipal public institution.

The word 'land' shall include any estate or interest of any nature or kind, in or to real property, or any easement in or to real property, or any right to the use of real property."

It seems clear that under the above definitions the State of Ohio may be considered the owner of land. By virtue of the easement, the State is granted a perpetual fishing easement in and to so much of Fulton Creek as flows through the lands of the grantor. In addition to this grant, the State is given the right of ingress and egress, together with the use of a twenty foot strip of land on the west bank of the creek, which strip of land is to be used for fishing purposes only.

Thus, it appears that the State would have all the rights granted to owners of land under the provisions of Sections 6442 to 6508, inclusive, General Code. As already seen from an examination of Section 6448, supra, the State would have the right to file remonstrances and objections to the proposed improvement. Section 6457, supra, provides for the making of application for damages. Section 6467, supra, provides that any owner interested may appeal to the Court of Common Pleas from a final order of the county commissioners.

The steps granted by the above sections to owners of land are available to the State of Ohio as the owner of perpetual fishing easements.

Therefore, in specific answer to your inquiry, I am of the opinion that: (1) The determination of county commissioners that an improvement should be made under Sections 6442 to 6508, inclusive, of the General Code, is binding upon the State of Ohio as the holder of fishing easements; (2) All of the relief granted to owners of land by virtue of Sections 6442

to 6508, inclusive, of the General Code, is available to the State of Ohio as the holder of perpetual fishing easements.

Respectfully

THOMAS J. HERBERT,
Attorney General.

923.

DEPARTMENT OF HIGHWAYS—SECTIONS 1196, 1206, 1207-1, ET AL., G. C.—IN RE: ESTIMATES OF COST, QUANTITIES CONTRACT—FILED FOR PUBLIC INSPECTION—OFFICE RESIDENT DISTRICT DEPUTY DIRECTOR—BINDER—CERTIFIED CHECK—CERTAIN HOLDINGS MODIFIED, OPINION 4930, OPINIONS ATTORNEY GENERAL, 1935, PAGE 1514.

SYLLABUS:

1. *Under the provisions of Sections 1196, 1207-1 and other related sections of the General Code, it is not required that estimates of cost be filed for public inspection in the Department of Highways and in the office of the Resident District Deputy Director, but it is sufficient if estimates of the quantities of the various items are so filed.*

2. *In view of the provisions of Section 1206, General Code, requiring each bidder to file a check based upon the total estimated cost, it is required that such total estimate be made available for the information of the bidders by the Director of Highways.*

3. *The provisions of Section 1196, General Code, require estimates of quantity to be filed and published and the estimates of cost referred to in Section 1197, General Code, are intended for the information of the Director for his use and guidance in awarding contracts in compliance with Section 1207, General Code, and are not required to be published, except the total estimate is required to be made available for the information of bidders in determining the amount of the certified check which is required to be submitted.*

4. *By this opinion, Opinion No. 4930 reported in Opinions of the Attorney General for 1935 at page 1514, is modified in so far as inconsistent with the holdings herein.*

COLUMBUS, OHIO, July 24, 1939.

HON. ROBERT S. BEIGHTLER, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR: Acknowledgment is made of your communication requesting my opinion which reads:

“Where the Director of the Department of Highways desires to enter into a contract upon a unit price basis as authorized