

2317.

SEWER IMPROVEMENT—FAIRFIELD BEACH ASSOCIATION—PETITION—ITS NECESSARY CONTENTS—WHEN FILED, MANDATORY THAT COUNTY COMMISSIONERS PROCEED—IF DISMISSED, APPEAL TO PROBATE COURT.

SYLLABUS:

1. *Where the owners of all the lots and lands within a certain district petition the county commissioners, in writing, to provide for the construction, maintenance and operation of a sewer improvement or sewage treatment works for the service of such district, describing the improvement or improvements desired and the lots and lands to be assessed to pay the cost and maintenance of such improvement or improvements, consenting that said lots and lands may be assessed to pay the entire cost thereof and waiving notice and the publication of all resolutions and legal notices provided for in Sections 6602-1 to 6602-14, inclusive, General Code, and otherwise comply with the provisions of Section 6602-6, General Code, it is mandatory upon the county commissioners to proceed with the construction of such improvement or improvements.*

2. *Where the county commissioners upon receipt of such petition dismiss the same or refuse to grant the prayer thereof, any owner of property may appeal from such action to the probate court under the provisions of Sections 6602-3b, et seq., General Code.*

COLUMBUS, OHIO, July 5, 1928.

HON. JOHN E. MONGER, M. D., *Director of Health, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent request for my opinion, which reads as follows:

“At the request of the representatives of the Fairfield Beach Association, which is composed of owners of property on the south shore of Buckeye Lake in Walnut Township, Fairfield County, we would like to know if the following procedure under Sections 6602-1, et seq., may be followed:

The owners of property in the Fairfield Beach Association desire to petition the county commissioners to establish a sewer district and proceed with the installation of sewerage. The association states that a substantial majority of the property owners in the Fairfield Beach area will sign such a petition. In the event that the county commissioners refuse to establish the district and proceed with the improvements can the petitioners appeal from the decision of the board of county commissioners as might be implied by Section 6602-3b and 6602-3n or other intervening or subsequent sections?”

Your attention is directed to Section 6602-6, General Code, as amended by the 87th General Assembly (112 O. L. 275, 286), which provides:

“Whenever the owners of all the lots and lands to be benefited by, and to be assessed for, any sewer improvement or sewage treatment works, provided for in Sections 6602-1 to 6602-14, inclusive, of the General Code, shall, by petition in writing, request the board of county commissioners to provide for the construction, maintenance and operation of any such improvements, describing the improvement or improvements desired and the lots and lands owned by them respectively to be assessed to pay the cost and maintenance

of such improvement or improvements, and consenting that their said lots and lands may be assessed to pay the cost of such improvement and of maintenance and operation as provided in said sections and shall waive notice and the publication of all resolutions and legal notices provided for in said sections, the board of county commissioners shall have prepared the necessary plans, specifications and estimates of cost of construction, maintenance and operation thereof, and a tentative assessment, and when all the owners of the lots and lands to be benefited by and assessed for the proposed improvement shall in writing state that they have examined the estimated cost and tentative assessment as made by the county sanitary engineer, that they have no objection thereto, and that in case bonds are sold prior to the construction of the improvement they waive their right of option to pay the assessments in cash, then the board of county commissioners shall proceed, as in said sections provided, to cause such improvement to be constructed and provision to be made for the payment of the cost of construction, maintenance and operation, as in said sections provided, except that none of the notices or publications required by law need be made nor any opportunity be given for filing of objections to the improvement or to the assessment or, if bonds have been sold, for paying the assessments in cash, and the board of county commissioners shall forthwith proceed to authorize and issue bonds or certificates of indebtedness and to levy and collect the assessments herein authorized, and no person, firm or corporation shall have the right to appeal from any decision or action of the board in the matter except refusal by the board to proceed with such improvement. The tentative assessment herein provided for shall be for the information of property owners and shall not be certified to the auditor for collection. On completion of the work, the cost thereof shall be determined, including incidental expense as defined in this act, and a revised assessment shall be prepared by the sanitary engineer based on such actual cost and in substantially the same proportion as the tentative assessment. The board of county commissioners shall confirm such revised assessment and certify the same to the county auditor for collection."

Section 6602-6, *supra*, provides for the construction of sewer improvements or sewer treatment works in territory outside of municipalities, upon petition of the property owners whose lands are to be benefited by and to be assessed for such improvement. Upon an analysis of the section it appears that the petition (1) must be in writing, signed by the owners of *all* the lots and lands to be benefited by and to be assessed for the improvement; (2) must request the board of county commissioners to provide for the construction, maintenance and operation of the improvement; (3) must describe the improvement or improvements desired and the lots and lands owned by the signers to be assessed to pay the cost and the maintenance of the improvement; (4) must consent that the lots and lands may be assessed to pay the entire cost of the improvement and of maintaining and operating it; and (5) must waive notice and the publication of all resolutions and legal notices provided for in Sections 6602-1 to 6602-14, inclusive.

Upon the presentation of such a petition the county commissioners are directed to cause to be prepared the necessary plans, specifications and estimates of cost and a tentative assessment, whereupon, if the property owners state in writing that they have examined the estimated cost and the tentative assessment, that they have no objection thereto, and that in case bonds are sold prior to the construction of the improvement they waive their right of option to pay the assessments in cash, the county commissioners are directed to proceed, as set out in Sections 6602-1 to 6602-14,

inclusive, to construct the improvement and provide for the payment of the cost of such construction, maintenance and operation.

In your communication you say that the Fairfield Beach Association states that a substantial majority of the property owners in the Fairfield Beach area will sign such a petition. In order, however, that such a petition may have the effect of requiring the county commissioners to proceed with the improvement it is necessary, under the provisions of Section 6602-6, supra, that the petition be signed by the owners of *all* of the lots or lands to be assessed for the cost of the improvement.

Assuming that the signatures of the owners of all the lots and lands can be obtained, your next inquiry is as to whether or not, in the event the county commissioners refuse to establish the district and proceed with the improvements, the petitioners can appeal from such decision of the board of county commissioners. You indicate that implied authority for such appeal is to be found in Sections 6602-3b and 6602-3n and other sections. Section 6602-3b provides, in part, as follows:

"Any owner of property to be assessed or taxed for any improvement under Sections 6602-1 to 6602-14, inclusive, or under Sections 6602-17 to 6602-33, inclusive, of the General Code, may appeal to the probate court from the action of the board of county commissioners in determining to proceed with the improvement in regard to any of the following matters:

1. The necessity of the improvement, including the question whether the cost of the improvement will exceed the benefits resulting therefrom.
2. The boundaries of the assessment district.
3. The tentative apportionment of the assessment.

Provided, however, that such appeal be effected within ten days after the passage of the resolution to proceed with the improvement. *Such property owner may also appeal from the decision of the board in refusing to grant the prayer of any petition for improvements under this act. * * **" (Italics the writer's.)

Section 6602-3c provides, briefly, that any person desiring to appeal from the final order or judgment of the county commissioners upon any of the questions (which includes the question of the necessity of the improvement) shall give notice, in writing, of an intention to appeal, specifying therein the matters to be appealed from. The section provides further that the county commissioners shall fix the amount of the bond to be given by the appellant and that the appellant, within ten days thereafter, shall file with the auditor a bond in the amount so fixed.

Section 6602-3d provides:

"In case the petition for an improvement is dismissed, or the prayer thereof be not granted, then a person, firm, or corporation desiring to appeal therefrom must give the notice hereinbefore provided on the date when the order is made dismissing said petition, or refusing to grant the prayer thereof, and file the bond required within the time prescribed herein."

Sections 6602-3e to 6602-3m, inclusive, prescribe the procedure on appeal, and Section 6602-3n to which you refer, provides:

"If an appeal is taken from the order of the county commissioners dismissing or refusing to grant the prayer of the petition, and the probate court find in favor of such improvement, the probate court shall render judgment establishing such improvement, unless a new trial is granted by the probate court, and the said improvement shall henceforth be established unless the judgment of said court be reversed by proceedings in error."

Reading the provisions of Section 6602-3d, supra, together with those of Section 6602-3b, it is my opinion that there is ample statutory authority for an appeal from a decision of the county commissioners refusing to establish a sewer district and proceed with the improvement, where a petition for such improvement has been signed by the owners of all the property benefited by the improvement and to be assessed to pay the cost thereof.

Specifically answering your question, it is my opinion that:

1. Where the owners of all the lots and lands within a certain district petition the county commissioners, in writing, to provide for the construction, maintenance and operation of a sewer improvement or sewage treatment works for the service of such district, describing the improvement or improvements desired and the lots and lands to be assessed to pay the cost and maintenance of such improvement or improvements, consenting that said lots and lands may be assessed to pay the entire cost thereof and waiving notice and the publication of all resolutions and legal notices provided for in Sections 6602-1 to 6602-14, inclusive, General Code, and otherwise comply with the provisions of Section 6602-6, General Code, it is mandatory upon the county commissioners to proceed with the construction of such improvement or improvements.
2. Where the county commissioners upon receipt of such petition dismiss the same or refuse to grant the prayer thereof, any owner of property may appeal from such action to the probate court under the provisions of Sections 6602-3b, et seq., General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.