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DITCH IMPROVEMENT PROJECTS; CHAPTER 6131 R. C.—MAINTENANCE; CHAPTER 6137 R. C. AS EFFECTIVE AUG. 23, 1957—APPEAL, DETERMINATION CONDITION PRECEDENT TO AWARDING CONTRACTS, §6131.19 R. C.—DEFICIENCY, GENERAL DRAINAGE IMPROVEMENT FUND; TRANSFER FROM GENERAL FUND; §6131.51 R. C.

SYLLABUS:

1. In the absence of a petition filed pursuant to Section 6137.02, Revised Code, as effective prior to August 23, 1957, by three or more landowners in a drainage area which will be affected by an incompleated ditch, maintenance of ditch improvement projects constructed under authority of Chapter 6131., Revised Code, is governed by Chapter 6137., Revised Code, as enacted effective August 23, 1957.

2. A final determination of appeals from orders allowing compensation or damages to property owners as provided in Section 6131.19 *et seq.*, Revised Code, is a condition precedent to the awarding of contracts for a ditch improvement project constructed pursuant to Chapter 6131., Revised Code.

3. Where a deficiency in the general drainage improvement fund, established as provided in Section 6131.50, Revised Code, is caused by an award of compensation or damages to an owner of lands affected by a particular ditch improvement project, such award being made subsequent to the certification of the total cost of such improvement by the county auditor as provided in Section 6131.22, Revised Code, such deficiency may be met by a transfer of funds to such general drainage improvement fund from the county general fund as provided in Section 6131.51, Revised Code.

Columbus, Ohio, Oct. 30, 1958

Hon. Mary F. Abel, Prosecuting Attorney
Logan County, Bellefontaine, Ohio

Dear Madam:

I have your request for my opinion reading as follows:

“I have before me your Opinion No. 2511 addressed to Hon. William E. Didelius, Prosecuting Attorney, Sandusky, Ohio. I am confronted with a similar situation in our county but have a couple of additional questions on which I would like your opinion, at your earliest convenience.

“In my case the petition was filed prior to August 23rd, 1957, an appeal was taken, the Court finding in favor of the improvement. I have advised our engineer that he must proceed under

the old law and advertise for sale this ditch. Thus far he has failed to do so and has asked me to submit to you the following:

“1. Even though the ditch is sold as provided prior to August 23rd, 1957, must there be a hearing in order to set up maintenance assessments?

“2. There will be claims for damages filed in the Common Pleas Court. If damages are allowed how are they to be paid?”

Answering your questions in the order you have presented them, I invite your attention to the following language of Opinion No. 2511, Opinions of the Attorney General for 1958, p. 478, to which you make reference in your request:

“Nowhere in the new enactment is there any language which ‘expressly’ provides that the remedial, or procedural, provisions of the new enactment are to apply to proceedings pending on the effective date of the act designed to bring about a *construction* of the improvement of the sort here involved; and we may conclude, that any such proceedings may properly go forward as provided in the earlier statutes.

“The matter of establishing a fund for the maintenance of any such improvement, constructed under authority of the earlier law, is scarcely a procedural matter, however, and it is quite evident that the General Assembly could quite properly, at any time, amend the laws relating to the maintenance of such improvement whether heretofore or hereafter constructed, since maintenance following completion of the improvement represents a problem completely separate from that of actual construction, and from proceedings leading to such construction.” (Emphasis added)

The hearing for the establishment of maintenance assessments, to which you make reference, I presume to be the hearing provided by Section 6137.02, Revised Code, effective prior to August 23, 1957:

“When three or more landowners in a drainage area affected by a county or joint county ditch, or which shall be affected by an incompleated ditch, petition for the establishment of a maintenance fund to be permanently created for upkeep and repair on such ditch, hearings shall be conducted, in the case of a county ditch by the board of county commissioners and for a joint county ditch by a joint board of county commissioners, in the manner prescribed in sections 6131.20 and 6131.21 of the Revised Code.”

As I understand the facts presented, the petition which was presented to the board of county commissioners prior to August 23, 1957, related to the *construction* of a ditch improvement and not to the *maintenance* of

a completed project. If in fact there was a petition for the establishment of a maintenance fund as provided by Section 6137.02, *supra*, the subsequent repeal of such section would not affect *pending proceedings* under Section 6137.02, *supra*. However, if there was no petition presented pursuant to Section 6137.02, *supra*, prior to August 23, 1957, then Section 6137.02, Revised Code, effective August 23, 1957, would control, and would require the establishment of a ditch maintenance fund for each improvement constructed under the provisions of Chapter 6131., Revised Code. See Opinion No. 2511, *supra*.

Accordingly, in answer to your first question it is my opinion that in the absence of a petition filed pursuant to Section 6137.02, Revised Code, as that section existed prior to August 23, 1957, by three or more landowners in a drainage area which will be affected by an incomplected ditch, maintenance for ditch improvement projects constructed pursuant to Chapter 6137., Revised Code, effective August 23, 1957.

In answer to your second question, I invite your attention to the following provisions of Chapter 6131., Revised Code, effective prior to August 23, 1957:

Section 6131.19, Revised Code:

“* * * An appeal may be taken by any claimant from the order of the board refusing the allowance of compensation or damages, and an appeal may be taken by any claimant from an order allowing compensation or damages if, in his opinion, the amount awarded is less than the actual damages sustained, or less than the fair value of the land taken. Such appeal shall be taken and perfected as provided in sections 6131.01 to 6131.64, inclusive, of the Revised Code.”

Section 6131.24, Revised Code:

“*If an appeal has been taken to the court of common pleas, as provided in sections 6131.01 to 6131.64, inclusive, of the Revised Code, the bids may be received and tabulated, but the deposits with the bids shall forthwith be returned to the bidders, and no further steps shall be taken on the bids. If no appeal has been taken, the engineer shall proceed to receive the bids, as provided in such sections.*” (Emphasis added.)

Section 6131.36, Revised Code:

“After the final judgment, order, or decree upon any appeal is rendered by the court of common pleas, the clerk of the court of

common pleas shall, within twenty days, make a transcript of the same, and shall certify and transmit it with all original papers in the case to the county auditor. The auditor receiving such transcript and papers shall forthwith notify the board of county commissioners of the receipt of such papers and of the judgment, order, or decree entered by said court, and such judgment, order, or decree shall be entered upon the journal of the board. If the judgment, order, or decree is in favor of the granting of the improvement, the board shall proceed with said improvement proceedings in compliance with such final judgment, order, or decree, from the point at which they were terminated by such appeal, or from the point at which the court orders the board to proceed.

“The board shall proceed with the improvement and shall, at the proper time, again fix the time for letting the contracts, and the county engineer shall proceed to give notice of the letting of the contracts. If an appeal is perfected to the court of appeals, and a supersedeas bond is given, the board and the engineer shall stay their proceedings until the final determination of the proceedings in the court of appeals or in the supreme court.”
(Emphasis added)

On the basis of the foregoing, it is apparent that the board may not let the contracts for the project until appeals have reached *final determination*. Since the amounts of damages will then be known, as will the remainder of the estimated cost of the project, the county engineer and the board of county commissioners can proceed to advertise, receive and consider bids. There is the possibility, however, that an owner of lands affected by such improvement, *who has not received notice and an opportunity to be heard*, may, as provided by Section 6131.55, Revised Code, bring an action to recover assessments already paid or to enjoin the levy of any assessment in the future; such a situation would render the amount of assessments insufficient to pay the total cost of the project. In this regard I direct your attention to my Opinion No. 1381, Opinions of the Attorney General for 1957, p. 717, the syllabus reading:

“1. Where the assessment for the cost of a joint county ditch has been made and certified to the county auditor as provided in Section 6131.22, Revised Code (Section 6463, General Code), and where the cost of such improvement has been increased by reason of an award by the Common Pleas Court, made some years later, for damages to a landowner attributable to such construction, such award represents an obligation “legally incurred” within the meaning of Section 6131.51, Revised Code, but the amount of such cost may not be met by a supplemental or amended assessment against the benefited land.

“2. When obligations legally incurred exceed the amount in the drainage improvement fund, an amount of the general revenue fund in the county treasury, unless otherwise appropriated, equal to the deficiency, may by resolution of the board of county commissioners be transferred to the general drainage improvement fund as provided in Section 6131.51, Revised Code.”

In the absence of the situation described above, the total cost of the project will be known before the contracts are awarded and the assessments certified to the county auditor as provided in Section 6131.22, Revised Code, effective prior to August 23, 1957.

It is thus apparent that the question you present, in the usual case, will not arise. Opinion No. 1381, *supra*, points out the proper course of action in any situation where damages are allowed *after the certification of assessments*.

In sum, therefore, it is my opinion and you are accordingly advised:

1. In the absence of a petition filed pursuant to Section 6137.02, Revised Code, as effective prior to August 23, 1957, by three or more landowners in a drainage area which will be affected by an incompletditch, maintenance of ditch improvement projects constructed under authority of Chapter 6131., Revised Code, is governed by Chapter 6137., Revised Code, as enacted effective August 23, 1957.

2. A final determination of appeals from orders allowing compensation or damages to property owners as provided in Section 6131.19 *et seq.*, Revised Code, is a condition precedent to the awarding of contracts for a ditch improvement project constructed pursuant to Chapter 6131., Revised Code.

3. Where a deficiency in the general drainage improvement fund, established as provided in Section 6131.50, Revised Code, is caused by an award of compensation or damages to an owner of lands affected by a particular ditch improvement project, such award being made subsequent to the certification of the total cost of such improvement by the county auditor as provided in Section 6131.22, Revised Code, such deficiency may be met by a transfer of funds to such general drainage improvement fund from the county general fund as provided in Section 6131.51, Revised Code.

Respectfully,
WILLIAM SAXBE
Attorney General