

2511

DITCHES—APPLICATION OF H. B. 220, 102nd GA—CHAPTER 6137. R.C.—PENDING PROCEEDINGS—DETERMINATION OF NATURE OF PROJECT, ONE OF FACT FOR BOARD OF COUNTY COMMISSIONERS—CHAPTER 6131. R.C.

SYLLABUS:

1. The provisions of Chapter 6137., Revised Code, as enacted in House Bill No. 220, 102nd General Assembly, effective August 23, 1957, have no application to improvements constructed under authority of Chapter 6131., Revised Code, as such chapter existed prior to such date.

2. An improvement must be deemed to have been constructed under authority of Chapter 6131., Revised Code, as it existed prior to August 23, 1957, in any instance in which the petition therefore was filed prior to such date by an owner of benefited land as provided in Section 6131.04, Revised Code, whereby the jurisdiction of the board of county commissioners was invoked to make a finding that such proposed improvement is necessary.

3. The question of whether a particular project relating to a county ditch or other drainage work amounts to a new improvement or is maintenance only is a question of fact for determination in the first instance by the board of county commissioners; but a project consisting of "deepening" and "widening" an existing drainage improvement is included in the definition of "improvement" found in Section 6131.01, Revised Code, and adopted by reference in Section 6131.37, Revised Code. Such project should be accomplished as provided in Chapter 6131., Revised Code, and a fund for its maintenance should thereafter be established as provided in Chapter 6137., Revised Code.

Columbus, Ohio, August 11, 1958

Hon. William E. Didelius, Prosecuting Attorney
Erie County, Sandusky, Ohio

Dear Sir:

Your request for my opinion presents the following questions:

"1. Does Section 6137.02, Revised Code, as amended, apply to improvements already in existence on August 23, 1957, the effective date of said statute?

"2. If the answer to number one is "NO," must a fund be set up when the county commissioners undertake to deepen or widen an existing improvement?

"3. Are the duties of the county engineer, as set forth in Section 6137.06, Revised Code, as amended, applicable to improvements in existence prior to August 23, 1957?"

Section 6137.02, Revised Code, to which your first specific question refers, was enacted in House Bill No. 220, 102nd General Assembly, and became effective on August 23, 1957. That section reads as follows:

“The board of county commissioners of each county shall establish and maintain a fund within each county for the repair, upkeep, and permanent maintenance of each improvement constructed under the provisions of Chapter 6131., of the Revised Code. After the effective date of this act a maintenance fund also shall be established and maintained by each board of county commissioners for the repair, upkeep and permanent maintenance of each improvement constructed under the provisions of Chapter 6133., of the Revised Code. A maintenance fund shall also be established for the repair, upkeep and permanent maintenance of each improvement constructed under the provisions of Chapter 6135., of the Revised Code. If the improvement affects only a single county of the state of Ohio, the board of county commissioners of that county shall establish and maintain such fund. If two or more counties, of the state of Ohio, are affected by the improvement, the joint board of county commissioners organized under the provisions of Chapter 6135., of the Revised Code, shall establish and maintain such fund.”

The prior analagous section, repealed with the enactment of House Bill No. 220, *supra*, was Section 6137.01, Revised Code, which reads as follows:

“The board of county commissioners of each county is hereby authorized to establish and maintain a fund within each county for the repair, upkeep, and permanent maintenance of county or joint county ditches constructed for the purpose of drainage, which fund may be established as provided in sections 6137.01 to 6137.09, inclusive, of the Revised Code.”

A comparison of these two sections readily leads to the conclusion that the substitution of the language “shall establish and maintain a “fund” for the language “authorized to establish and maintain a fund,” has the effect of making the establishment and maintenance of such fund mandatory where it had hitherto been a matter of discretion only.

The precise question here presented, of course, is whether the language “constructed under the provisions of Chapter 6131., Revised Code” as used in Section 6137.02, *supra*, has reference to (1) improvements hitherto constructed under authority of Chapter 6131., Revised Code, prior to August 23, 1957, and to improvements the proceedings to construct which were pending on such date, or (2) those improvements as to which proceedings to construct were begun after such date. On the point of

pending proceedings, we may note the following provision in Section 1.20, Revised Code:

“When a statute is repealed or amended, such repeal or amendment does not affect pending actions, prosecutions, or proceedings, civil or criminal. When the repeal or amendment relates to the remedy, it does not affect pending actions, prosecutions, or proceedings, unless so expressed, nor does any repeal or amendment affect causes of such action, prosecution, or proceedings, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

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 improvements 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.

In passing, we may note that here again is an unfortunate instance of legislative failure to provide for any interim or “transition procedure” in the process of substituting the new system for the old. For example, there is no clear indication of how a maintenance fund, heretofore established by the board under the discretionary provisions of the former statute, and involving funds from an annual assessment based on acreage, is to be utilized in the event it should be concluded that the new act is applicable to existing improvements. On the other hand, if such new act is not applicable to existing improvements, then the repeal of all the provisions formerly found in Chapter 6137., Revised Code, would leave such improvements without any means of maintenance, except that provided in Chapter 6141., Revised Code.

As above indicated, the precise question to be resolved is one of statutory construction, *i.e.*, what is meant by the language “constructed

under the provisions of Chapter 6131., Revised Code," as used in the new enactment.

Before examining, in detail, the provisions of the new enactment, it may be helpful to outline, to some limited extent, the history of Ohio legislation relative to the construction and maintenance of county ditches.

Although laws relating to ditches and drainage were enacted at a very early date in Ohio history, it appears that they were for the first time effectively consolidated and codified with the enactment of House Bill No. 569, 85th General Assembly, 110 Ohio Laws, 161. Included in that enactment were all of the statutes which eventually became codified as Chapter 6131., Revised Code, relating to the construction of single county ditches; as Chapter 6133., Revised Code, relating to the construction of the joint county ditches; and as Chapter 6135., Revised Code, relating to the construction of interstate county ditches.

Also included in that enactment were numerous statutory provisions for the cleaning and repairing of such ditches, which provisions have now been codified as Chapter 6141., Revised Code.

In 1947, the statutory provisions later codified as Chapter 6137., Revised Code, were enacted in substance in House Bill No. 311, 97th General Assembly, 122 Ohio Laws, 655. This enactment provided, as previously indicated, for the discretionary establishment of a ditch maintenance fund in each county; and because it appears to have provided an alternative means of maintenance of ditches to that provided in the statutes since codified in Chapter 6141., Revised Code, it becomes appropriate to compare the provisions of each as they existed during the period September 25, 1947, to August 23, 1957.

In the first place, it is clear that the provisions of Chapter 6141., Revised Code, applied to all improvements constructed under authority of Chapter 6131., Revised Code, this in view of the definitions set out in Section 6141.01, Revised Code. The provisions of Chapter 6137., Revised Code, appear to have identical application, at least so far as county or joint county ditches are concerned. See Section 6137.01, Revised Code.

In each case, the maintenance procedures were discretionary; that is to say, the establishment of the maintenance fund under Chapter 6137., Revised Code, was a matter to be decided by the board of county commissioners upon the petition of land owners affected; and proceedings for

the cleaning and repairing of ditches under the authority of Chapter 6141., Revised Code, were initiated only upon application of the land owners involved, whereupon action by the ditch supervisor and the county commissioners appear to be mandatory.

The actual procedure under Chapter 6141., Revised Code, to effect the cleaning and repairing of ditches may be outlined as follows :

1. The owner makes application for such cleaning, repairing, etc., to the ditch supervisor of the township whereupon the ditch supervisor and the board of county commissioners "shall" proceed with work. See Section 6141.06, Revised Code.

2. The ditch supervisor, or supervisors, must (a) divide the project into working sections and (b) apportion such sections to the several owners for the actual accomplishment of the work. See Section 6141.08, Revised Code.

3. Upon the petition of two-thirds of the owners concerned, the ditch supervisor is required to cause the work to be done as a unit, to sell the contract therefor to the lowest bidder, and to apportion the contract cost among the several owners according to benefits. See Sections 6141.11, 6141.12 and 6141.13, Revised Code.

4. Payment to the contractor for such work is made from the "general ditch improvement fund." See Section 6141.11, Revised Code. Although Chapter 6141., Revised Code, makes no other reference to this fund, nor otherwise identifies it than by name, the fund would appear to be that which is established as provided in Section 6131.50, Revised Code, and which consists of (1) taxes levied for drainage purposes, (2) proceeds of bond issues, (3) collections from special assessments for benefits to property, and (4) other funds as provided by law. In this connection, it is to be observed that this possibility of utilizing funds from this source for maintenance purposes, under the special provisions of this chapter, were not noted in Opinion No. 2400, Opinions of the Attorney General for 1958, p. 446, although there was, of course, no indication in the inquiry to which that opinion was responsive that the special provisions of Chapter 6141., Revised Code, had been invoked by the application of an interested owner as provided in Section 6141.06, Revised Code.

5. Following such apportionment of costs of the work, whether accomplished by contract or otherwise, the same is certified by the ditch super-

visor to the board of county commissioners and by them, in turn, to the county auditor for collection on the tax list and duplicate against benefited lands; and when collected, credited to the general ditch improvement fund. See Section 6141.13, Revised Code.

Coming now to compare this procedure with that provided in Chapter 6137., Revised Code, during the ten year period from 1947 to 1957, we may note that the maintenance fund provided in that chapter was established in the discretion of the board of county commissioners upon the application of interested owners of land. See Sections 6137.02 and 6137.03, Revised Code.

If it were decided to establish the fund an annual assessment was made on benefited lands "of such sum per acre as is estimated by the engineer and found adequate by the board or joint board to effect the purpose." Such annual assessment was continued only until the maintenance fund equaled 20% of the estimated cost of the improvement and was thereafter discontinued until the fund was reduced below such maximum. See Section 6137.04, Revised Code.

Such maintenance fund would be used by the board, or joint board, in its discretion as the need for ditch maintenance is demonstrated, either upon consideration of written complaints of the owners or through the board's observation. See Section 6137.05, Revised Code.

Before turning to the consideration of the provisions of the new enactment, House Bill No. 220, *supra*, it is important to note that Chapter 6137., Revised Code, when enacted in 1947, was apparently intended to apply to then previously existing improvements, as well as to those thereafter constructed. This is evident from the following provisions in Section 6137.06, Revised Code, formerly Section 6551, General Code.

"In case a *new ditch* is, or an *old ditch* has been, constructed in part as an open ditch and in part as a tiled ditch, if the cost thereof has been or is to be assessed according to special benefits without regard to or discrimination of varying cost of open or tiled portions, then in fixing the rate for the maintenance fund as provided by section 6137.04 of the Revised Code, there shall be no discrimination as to lands adjacent to or benefited by the improvement, whether or not lying along the open or tiled portion of such ditch. If the tiling of such a ditch *has been or is to be done* at the private expense of the landowners adjacent to it, the rate of assessment on such lands shall be made by the board of county commissioners to correspond equitably to the probable

lessened expense of maintenance of a tiled ditch as compared with an open one. In such case the certificate to the county auditor required by section 6137.04 of the Revised Code shall specifically designate the lands subject to the lesser rate." (Emphasis added)

The purpose of House Bill No. 220, *supra*, as stated in the title, was "to amend" numerous sections in Chapters 6131., 6133., and 6135., Revised Code; to amend *all* sections in Chapter 6137.; and "to enact" Sections 6137.10 to 6137.14, inclusive, Revised Code, the latter, of course, being new enactments.

Section 6137.01, Revised Code, as amended, reads as follows:

"As used in sections 6137.01 to 6137.14, inclusive, of the Revised Code, 'owner,' 'benefit,' and 'improvement,' have the meaning set forth in section 6131.01 of the Revised Code."

Section 6131.01, Revised Code, was also amended in House Bill No. 220, *supra*, greatly expanding the definition of the word "owner," to include for example, the several departments of the state of Ohio, and divers public corporations; and there was a similar expansion of the definitions of the words "improvement," "person" and "benefits."

We have already noted that Section 6141.01, Revised Code, adopted by reference the definitions found in Section 6131.01, Revised Code. Section 6141.01, Revised Code, was not changed, or even mentioned, in the new enactment. Since the legislature is presumed to have known of its provisions,, it may be well argued that the amendment of the adopted statute has the effect of amending by necessary implication the reference statute, although the cases in Ohio appear to have established the contrary rule. See 37 Ohio Jurisprudence, 341.

In any event, it is clear that there are duplicative inconsistencies between Chapters 6141., and 6137., Revised Code, and that these are a matter of some concern since Chapter 6137., Revised Code, clearly appears to be mandatory. In this situation, if the whole Chapter 6141., Revised Code, is not repealed by necessary implication, it can be given effect only in those situations where (1) the funds provided for maintenance under Chapter 6137., Revised Code, are not sufficient to accomplish all needed maintenance, so that the procedure set out in Chapter 6141., Revised Code, alternative in some respects to that established in Chapter 6137., Revised Code, could be invoked; or (2) the provision of the new enactment being regarded as applicable only to future improvements, the provisions of Chapter 6141.,

Revised Code, represent the sole remaining means for maintenance of improvements existing on the effective date of the new act, and of those where proceedings to construct them were pending on such date.

Coming now to consider in some detail the provisions of the new enactment we note initially in Section 6137.02, Revised Code, that provision is made, in mandatory language, for the establishment of a fund as to improvements constructed under the provisions of (1) Chapter 6131., Revised Code, (2) Chapter 6133., Revised Code, and (3) Chapter 6135., Revised Code. One curious feature of this language is that in the second sentence, that relating to improvements constructed under Chapter 6133., Revised Code, it is provided that the maintenance fund shall be established "after the effective date of this act". This language apparently is not directed to the other two classes of improvements, but I am unable to regard it as anything more than harmless surplusage since it is obvious that none of the provisions of the entire act could apply otherwise than after such effective date, and that thereafter they do apply.

In Section 6137.03, Revised Code, as amended, provision is made for an assessment, in the amount of 1% or other such percentage estimated by the engineer and found adequate by the board, applied to the "appraisal of benefits for construction of the improvement." The term "appraisal of benefits," as such, appears to refer to the figure arrived at under the provisions of Section 6131.15, Revised Code, *as amended*; and this term was not employed, so far as I can discover, in any of the provisions of Chapter 6131., Revised Code, prior to such amendment. In this connection, Section 6131.15, Revised Code, reads in part:

"During the survey and preparation of plans, the county engineer shall appraise the benefits accruing to public corporations and any department, office, or institution of the state of Ohio. * * * He shall prepare a schedule of assessments containing the name and address of each public corporation and each department, office, or institution of the state of Ohio so benefited, the amount of the appraised assessment and an explanation of the benefits upon which the assessment is based.

"The county engineer shall prepare a second schedule of assessments containing the name and address of each private owner of land and a description of the land believed to be benefited by the proposed improvement, which names and descriptions shall be taken from the tax duplicates of the county. He shall enter in such schedule the amount of the appraised assessment to be assessed to each tract of land, and an explanation of the benefits, by

reason of the construction of the improvement, upon which the assessment is based. The total of these appraised assessments plus the total appraised assessments allocated to public corporations and the state of Ohio shall equal the estimated cost of the proposed improvement.”

If the new enactment is to be applied in case of previously existing improvements, it is clear that (1) the term “appraisal of benefits for construction,” as designated in Section 6137.03, Revised Code, as the basis of annual assessments, must be construed to refer to the aggregate of the cost of construction of such existing improvements under the earlier provisions of Chapter 6131., Revised Code, as apportioned under the provisions of such chapter to the owners concerned. Even if this is done, however, it would be impossible to deal with the problem of the expanded definitions now found in Section 6131.01, Revised Code, and adopted by reference in Section 6137.01, Revised Code. It is evident, for example, that in the case of any such pre-existing improvement, no part of the cost of construction was apportioned to the several state departments and institutions and other public agencies which are now included in the definition of “owner,” but were not so included at the time of such apportionment. It is evident also that in apportioning such costs under the prior statutes consideration may well not have been given to all the factors that are now enumerated in the present statutory definition of that term. This, in my mind, is a cogent argument for the view that the new enactment was not designed to apply to existing improvements else the General Assembly would have taken care, in Section 6137.03, Revised Code, to provide for a *reappraisal* of benefits as to such existing improvements, taking into consideration the changed definitions of “owner” and “lands,” and evaluating the “benefits” according to the new statutory definition of that term.

Coming now to Section 6137.04, Revised Code, we note that the board of county commissioners is “authorized to combine improvements within the same watershed into a drainage maintenance district, in which the maintenance assessment shall be the same percentage of original cost for each improvement to be maintained.” It may be assumed that there are few watersheds in any county in which there were not at least some improvements existing on August 23, 1957; and this language would suggest, in view of the obvious engineering convenience and efficiency to be attained thereby, that *all* such improvements, old and new, within a

particular watershed were to be combined in the formation of such district. This suggestion is somewhat supported by the final sentence in the first paragraph of Section 6137.04, Revised Code, which reads:

“* * * a maintenance district may include all or any part of a county.” * * *

We may safely assume, I think, that there were no counties in Ohio on August 23, 1957, which did not have at least one existing county ditch, and such a provision for placing “all” of a county within one district would probably be impossible to apply unless existing improvements are included. Persuasive as this argument is, however, it is not compelling, for it would clearly be possible to give some effect to this language if the entire new enactment should be deemed applicable only to new improvements.

Referring again to the expanded definitions of “owner” *etc.*, as effected by the new enactment, and the difficulty of ascertaining the “appraisal of benefits” as to such owners as were not previously included in such definition, we may note in Section 6137.11, Revised Code, a new enactment with respect to the permanent assessment base. In that section it is provided that the board of county commissioners may, at any time, “add to the schedule of benefited owners, any other owner who in the judgment of the board is benefited by the operation and maintenance of the improvement, as the result of new conditions that have arisen since the improvement was constructed.”

The “new conditions” thus mentioned, would appear to refer to new physical conditions affecting the drainage process, and they could scarcely be deemed to include the passage of a new statute relative to such maintenance.

Finally, it is to be noted that in the same act in which Chapter 6137., Revised Code, is virtually rewritten, there were accomplished numerous amendments of the provisions of Chapter 6131., Revised Code, making very substantial changes in procedures to construct such improvements. This being the case, and such changes having involved new “owners” and a new concept of “benefits,” and there being a plain lack of any “transition provision” directing how the new system of maintenance should be substituted for those previously in effect, I am led to the conclusion that where reference is made in Section 6137.02, *et seq.*, Revised Code, as amended, to improvements “constructed under the provisions of Chapter 6131., Revised Code,” has reference to Chapter 6131., Revised Code, *as amended*

in House Bill No. 220, supra; and I reach a like conclusion as to those improvements "constructed" under the provisions of Chapter 6133., Revised Code, and Chapter 6135., Revised Code.

It follows, therefore, that your first specific question must be answered in the negative. Coming then to your second question, by referring to the definition of "improvement" as set out in Section 6131.01, Revised Code, and adopted by reference in Section 6137.01, Revised Code, you will observe that it embraces "widening" and "deepening" * * * "any ditch." Thus, although it would appear that where the board of county commissioners undertakes any ditch project a question of fact is involved (1) whether it is a reconstruction of a project, and hence amounts to a new improvement, or (2) whether it is merely maintenance, a deepening and widening project would appear now to fall into the category of improvement rather than maintenance. Hence, your second question must be answered affirmatively.

The conclusions reached above with respect to your initial question require a negative answer also to the third question presented.

One remaining question to be resolved is that of proceedings which were pending on August 23, 1957, which have culminated, or will culminate, in the construction of improvements under authority of Chapter 6131., Revised Code, as it existed prior to the enactment here in question. By referring to Section 6131.02 *et seq.*, Revised Code, as it existed prior to its recent amendment, it will be observed that provision is made for the filing of a petition with the board of county commissioners for a proposed improvement, and that the commissioners are thereafter authorized, but not otherwise, to hear arguments for, or remonstrances against, such proposed improvements, and thereafter make a finding that such improvement is necessary. In view of the fact that filing of the petition by such owners appears to be jurisdictional it is my conclusion that such proceedings to construct under authority of this chapter become "pending" within the meaning of Section 1.20, Revised Code, upon the filing of such petition. Accordingly, where such a petition was pending before the board on August 23, 1957, we may conclude that the improvement in question, when finally constructed will have been constructed under the provisions of Chapter 6131., Revised Code, as that chapter existed prior to the amendment in question.

In sum, it is my opinion :

1. The provisions of Chapter 6137., Revised Code, as enacted in House Bill No. 220, 102nd General Assembly, effective August 23, 1957, have no application to improvements constructed under authority of Chapter 6131., Revised Code, as such chapter existed prior to such date.

2. An improvement must be deemed to have been constructed under authority of Chapter 6131., Revised Code, as it existed prior to August 23, 1957, in any instance in which the petition therefor was filed prior to such date by an owner of benefitted land as provided in Section 6131.04, Revised Code, whereby the jurisdiction of the board of county commissioners was invoked to make a finding that such proposed improvement is necessary.

3. The question of whether a particular project relating to a county ditch or other drainage work amounts to a new improvement or is maintenance only is a question of fact for determination in the first instance by the board of county commissioners ; but a project consisting of "deepening" and "widening" an existing drainage improvement is included in the definition of "improvement" found in Section 6131.01, Revised Code, and adopted by reference in Section 6131.37, Revised Code. Such project should be accomplished as provided in Chapter 6131., Revised Code, and a fund for its maintenance should thereafter be established as provided in Chapter 6137., Revised Code.

Respectfully,

WILLIAM SAXBE

Attorney General