

Note from the Attorney General's Office:

1923 Op. Att'y Gen. No. 23-0326 was overruled by
1957 Op. Att'y Gen. No. 57-1148.

vision in Ohio for your acceptance of a bond in lieu of the deposit. Under the circumstances, we are inclined to the opinion that you will be justified in asking such a showing under the statute as will satisfy you, as such Superintendent, that all liabilities and obligations which said deposit has been made to secure have been extinguished, and if still in doubt you will be justified in asking the further protection of a decision by a court of competent jurisdiction so finding and authorizing the release of the securities mentioned.

Respectfully,
C. C. CRABBE,
Attorney General.

326.

UNDER SECTION 6602-6 G. C. COUNTY COMMISSIONERS MAY CONTRACT FOR CONSTRUCTION OF SEWERAGE AND DISPOSAL PLANT WITHOUT ADVERTISING FOR SEALED PROPOSALS AS PROVIDED IN SECTION 6602-5 G. C.

SYLLABUS:

Under the provisions of section 6602-6 of the General Code, the county commissioners may enter into a contract for the construction of a sewerage and disposal plant without advertising for sealed proposals for the construction of such plant as provided for in section 6602-5 of the General Code.

COLUMBUS, OHIO, May 9, 1923.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your statement of facts and request for an opinion, as follows:

"In the course of our examination of the different sanitary sewer districts in the county of Montgomery, procedure has been called to our attention as follows:

"(a) Petition by the property owners for improvement in accordance with the provision of section 6602-6 G. C. Consent of the property owners that the lots and lands shall be assessed and they waive the publication of all resolutions and legal notices as provided under section 6602-6.

"(b) Property owners waive option to pay assessment in cash.

"(c) Resolution by County Commissioners establishing sewer system district in accordance with 6602-6 G. C., employing sanitary engineer and directing him to prepare plans, estimates of cost of construction, and an estimate of the assessment, the same to be submitted to the Board, subject to the inspection of the property owners.

"(d) Resolution by the County Commissioners stating that the petition was received from all the owners of the lots and lands in the district requesting installation of a sanitary sewer or water system. That the owners have examined the estimate of cost and assessments as made by the engineer and they have no objection thereto and that they waive

their option to pay same in cash. That the Commissioners proceed with said improvement in accordance with the plans and that they issue the bonds of said county for the purpose of paying the costs of such improvements and in anticipation of the collections of special assessments against the said property as provided by law.

"(e) Bond resolution passed by the Board.

"(f) Assessment resolution passed by the Board to levy special assessment for the improvement."

"In view of the provisions of section 6602-6 G. C.

"(a) Can contracts be let by the County Commissioners without advertising in the manner as provided in section 6602-5 G. C.?

"(b) Can bids be solicited by the property owners or the sanitary engineer and the contract awarded by the County Commissioners without advertising for such bids?"

Your propositions involve certain sections of an Act originally passed May 31, 1911, 102 O. L. 482, and amended April 17, 1913, 103 O. L. 734; March 29, 1917, 107 O. L. 444; April 15, 1919, 108 O. L., Pt. 1, 368.

The same, as it was amended in 107 and 108 Ohio Laws, now appears as a part of the chapter of the General Code entitled "County Sewers and Water Supply Systems." The purpose and intent of the Act was to authorize the board of county commissioners of the several counties of the state to provide for the construction of sewers outside of municipalities and to provide for the payment of the cost and expense thereof.

Section 6602-1 of the General Code, among other things, provides that the boards of county commissioners of the several counties of this state may, by resolution, lay out, establish and maintain one or more sewer districts in their respective counties, outside of incorporated municipalities. They may employ a competent sanitary engineer and may make, publish and enforce rules and regulations for the construction, maintenance, protection and use of sewers and sewer improvements in their respective counties.

Section 6602-2 of the General Code, among other things, provides for the preparation and approval of a general plan, the preparation and approval of detailed plans, specifications and estimates of costs, which shall be carefully preserved, either in the office of the county commissioners or county sanitary engineer, and shall be open to inspection of all persons interested in such improvements. This section also provides for a resolution of necessity, and it should be noted that this resolution shall state the place where the plans, specifications and estimates of cost may be examined, and that the same shall be published once a week for two consecutive weeks in a newspaper published and of general circulation within the county.

Section 6602-3 of the General Code provides that after the expiration of ten days from the completion of the publication of the resolution of necessity, the board shall determine whether they will proceed with the construction of the improvement; if they decide to proceed, they shall adopt what is to be known in the statute as the "Improvement Resolution."

Section 6602-4 of the General Code, among other things, authorizes the raising of funds with which to pay the cost of constructing, maintaining, repairing and operating the improvement.

Section 6602-5 of the General Code reads as follows:

"After the adoption of the resolution providing for the issuance of bonds, as herein provided, the board of county commissioners shall enter into a written contract with the lowest and best bidder for the construction of such improvement or improvements, after advertising for sealed proposals for such construction not less than two nor more than four consecutive weeks in a newspaper published and of general circulation within the county. The bids shall be opened at 10 o'clock a. m., on the last day for filing the same, by the board of county commissioners and publicly read. Each bid shall contain the full name of each person or company interested in the same, and shall be accompanied by a bond or certified check on some solvent bank within the county, conditioned that if the bid is accepted, a contract will be entered into and its performance properly secured, as shall be stated in the advertisements and proposals. In each bid the price of labor and materials shall be separately stated. Such board may reject any and all bids. The contract shall be between the board of county commissioners and the bidder, and the board shall pay the contract price in cash. When there is reason to believe that there is collusion or combination among the bidders, the bids of those concerned therein shall be rejected. Whenever it becomes necessary, in the opinion of such board, in the prosecution of any such work or improvements, to make alterations or modifications in such contract, such alteration or modifications shall only be made by such board by resolution, and such resolution shall be of no effect until the prices to be paid for work or material or both, caused by such alteration or modifications, shall have been agreed upon in writing, and signed by the contractor and said board, and no contractor for any such work shall be allowed to recover anything for additional work or materials required by any alterations or modifications nor for any other cause due to such alterations or modifications unless such contract is made as aforesaid, nor shall he in any event be allowed to recover for such work or materials, or other cause, more than the agreed price. The requirement of a certificate by the auditor, as provided for in section 5660 of the General Code, shall not apply to such a contract, and the money to be derived from the lawfully authorized bonds to be sold as hereinbefore provided shall for all purposes be deemed in the treasury and in the appropriate fund, after the passage of the resolution authorizing the issue of the bonds, and the amount of the bonds so authorized to be sold shall not thereafter be considered unappropriated until the county is fully discharged from such contract or contracts."

Section 6602-6 of the General Code reads:

"Whenever the owners of all of the lots and lands to be benefited by, and to be assessed for, any sewer improvement or sewage treatment works, herein provided for, 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 in this act provided, and shall waive the publication of all resolutions and legal notices provided for in this act, the board of county com-

missioners shall have prepared the necessary plans, specifications and estimates of cost of construction, maintenance and operation thereof, and when all of 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 estimated assessment as made by the county sanitary engineer, that they have no objection thereto, and that they waive their right of option to pay same in cash, then the board of county commissioners shall proceed, *as in this act 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 this act provided, *except that none of the publications herein provided for need be made*, nor any opportunity given for filing of objections to the improvement or to the assessment or for paying the same in cash, and the board of county commissioners shall forthwith proceed to authorize and issue bonds and to levy and collect the assessments herein authorized."

It will be interesting at this time to note that prior to the amendment of section 6602-6 of the General Code, as found in 107 O. L. at page 444, there was no provision in the enactment whereby the owners of all the lots and lands might initiate the proceedings for the construction of a sewer improvement, by petition or otherwise; that the whole legislative authority therefor was with the county commissioners; that the provisions for the filing of a petition and other activities on the part of the owners of all the lots and lands were first placed in the statute by said amendment and sectionally numbered 6602-6, as above quoted.

Before the county commissioners may take any affirmative action at the instance of the owners of all the lots and lands to be benefited by, and to be assessed for the improvement, such owners must (1) petition in writing, (2) consent that their lots and lands may be assessed, and (3) waive the publication of all resolutions and legal notices provided for in the act. When such owners petition, consent to be assessed and waive the publication of all resolutions and legal notices, the county commissioners shall have prepared the necessary plans, specifications and estimates of costs of construction, maintenance and operation, and an estimated assessment. After the preparation of the plans and estimates, and before the commissioners can take any further affirmative action, all the owners of the lots and lands to be benefited by and assessed for the proposed improvement must state in writing (1) that they have examined the estimated cost and estimated assessment and (2) that they have no objection thereto, and also, (3) that they waive their option to pay their assessment in cash. When such owners have stated in writing that they have examined the plans and estimated assessments, that they have no objection thereto, and that they waive their option to pay in cash, the county commissioners shall proceed as in the act provided to cause the improvement to be constructed and provision to be made for the payment of the cost, *except that none of the publications herein provided for need be made*, etc.

The effect of the various provisions, among other things, is to give the owners of all the lots and lands which are to be subjected to the payment of the cost of the improvement, and for whose benefit the same is to be constructed, the right and opportunity to inform themselves as to the exact nature and character of the proposed improvement, the detail plan thereof and the estimated total costs thereof, as well as the proposed assessment to be specially levied upon the lots and lands of each owner; and require that each owner formally state in writing that he has examined the estimated cost and estimated assessment as made by

the county sanitary engineer. In other words, each owner, up to the time when the exact nature and character of the proposed improvement, the detail plan thereof and the estimated cost thereof to each owner is, or may be, known to each owner, any one or more of such owners may defeat the proceedings by withholding the consenting and waiving provided for.

It is apparent, from a reading and study of the section, that the intent and purpose of the legislature in enacting the above quoted section, is to encourage the owner of lots and lands outside of municipalities to install sewerage and water systems, and to give the owners of all the lots and lands within the district, at their option, the right to initiate proceedings for the construction of sewers and sewer systems, and also to give them in a large measure, control over the proceedings; with a view, no doubt, that the owners of all the lots and lands might, in a small amount at least, reduce the incident expenses, and, more particularly, expedite and hasten the completion of the improvement, by putting it within the power of the owners of all the lots and lands, which are subjected to the payment therefor, and for whose benefit the improvement is to be made, by waiver, to forego the publication of all resolutions and legal notices.

The question is, when the owners of all the lots and lands file a petition and therein consent that their said lots and lands may be assessed to pay the cost of such improvement and the maintenance and operation thereof, *and shall waive the publication of all resolutions and legal notices provided for in the act*, may the commissioners dispense with the advertising for sealed proposals for the construction of the improvement as set out in section 6602-5?

When the legislature provided in this section that *the publications provided for need not be made*, was it contemplated and intended that the advertisement for sealed proposals for the construction need not be made?

The word "publication" refers back to the phrase, *all resolutions and legal notices*. The advertisement for sealed proposals is, without doubt, one of all the legal notices contemplated in the previous phrase.

In reaching this conclusion, I am not unmindful of the general rule of law that "a grant of power to a public officer or board must be strictly construed." (Sutherland, Sec. 562.)

However, an analysis of the statute discloses that the very liberal provisions of the enactment are brought into play by the voluntary and affirmative action of the owners of all the lots and lands subjected to the payment of the cost of the improvement, and for whose benefit it is to be constructed, and evidences the recognition by the legislature of the fact that the county has no proprietary interest in the improvement contemplated and that it belongs to the owners of the lots and lands by whom it is to be paid for and for whose benefit it is to be constructed. The commissioners simply act as a board before whom the necessary proceedings for the construction of the improvement may be had. (See case of Commissioners of Putnam County, et al., v. Krauss, et al., 53 O. S. 628.)

With the above rule of construction, we have other pertinent, well established rules of construction: "The plain words of a statute are decisive." Sutherland, Sec. 348; *Bank of U. S. v. McKenzie*, 2 Brock, 393.

"The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it." *Slingluff et al. v. Weaver et al.*, 66 O. S. 621.

The plain word of the statute in effect says that when all the owners shall waive the publication of all the resolutions and legal notices, none of such publications need be made; and these plain words certainly express the clear purpose and intent of the legislature in enacting said section 6602-6, as hereinbefore noted.

It should be kept in mind that the publications which need not be made are those provided for in the act, and only when they have been waived by the owners of all the lots and lands; that the publications which shall be waived by the owners of all the lots and lands are all resolutions and legal notices provided for in the act. It should also be kept in mind that all that shall be waived in connection with the receiving of bids and the letting of the contract is the advertising for sealed proposals; that it is within the judgment of each owner whether or not he execute this waiver, and if all the owners waive the publication it is within the discretion of the county commissioners to dispense with the advertising for sealed proposals, the provision of the statute being merely "that none of the publications herein provided for *need* be made," etc.

The provision of the statute relating to the contract for the improvement is, "the county commissioners shall enter into a written contract with the lowest and best bidder * * * after advertising for sealed proposals * * *. The bids shall be opened," etc.

Under the provisions hereinbefore noted there is nothing in connection with the receiving of bids and the awarding of and entering into the contract which may be waived or dispensed with other than the advertising for sealed proposals. The legislators, in providing for this somewhat unusual procedure in connection with awarding of contracts, no doubt had in mind the known fact that available contractors were usually known to the county commissioners and other officers and appointees, and considered that notification by other means than advertising, together with the interest of the owners therein and their assistance, would be sufficient to bring about the entering into of the contract at a suitable price. Whatever may have been the thought and reason of the legislators, it nevertheless remains that the purpose and intent of the legislature is clearly shown by plain words.

It follows from the foregoing discussion that both of your inquires should be answered in the affirmative.

Yours respectfully,

C. C. CRABBE,
Attorney General.

327.

APPROVAL—BONDS OF QUINCY CONSOLIDATED VILLAGE SCHOOL DISTRICT, LOGAN COUNTY, \$15,000.00, TO IMPROVE CERTAIN SCHOOL BUILDINGS.

COLUMBUS, OHIO, May 10, 1923.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.