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DITCHES; DRAINAGE—SURFACE WATER; PUBLIC ROADS—CHAPTER 6131. R.C.—PETITION FOR IMPROVEMENT—ASSESSMENTS—§6131.22 R.C.—ASSESSMENT AGAINST GOVERNMENTAL UNITS—COUNTY AND TOWNSHIP TRUSTEES . . . MOTOR VEHICLE REVENUE.

SYLLABUS:

1. Where by reason of the drainage of lands in the unincorporated area of a county, surface water collects to the damage of public roads or private property or both, the county commissioners are authorized under the provisions of Chapter 6131., Revised Code, upon receipt of a petition from one or more property owners, to remedy such condition by the construction of ditches or drains, and they may assess the cost of such improvement on benefited property.

2. In making such assessment, the county commissioners are required by Section 6131.22, Revised Code, to determine and assess against the county that portion of the total which represents the benefits accruing to the general public as conducive to the general welfare, which amount is to be paid out of the general fund of the county; and are further required to determine and assess against the county that portion which is found to benefit county roads and highways, which portion is to be paid from the county's motor vehicle revenues. Such portion as the board finds to be of benefit to the roads or other property of the township should be assessed against the township, and paid out of its general fund or motor vehicle revenue.

3. The township trustees have no authority to construct drains or sewers to carry off surplus water except to the extent incidental to and necessary in the improvement of a township road.

Columbus, Ohio, September 23, 1958

Hon. Mathias H. Heck, Prosecuting Attorney  
Montgomery County, Dayton, Ohio

Dear Sir :

I have before me your request for my opinion reading as follows :

"I respectfully request your opinion on the questions set forth below which are based on the following factual situation :

"Subdivider A submitted his plans and drawings for John Doe Plat Subdivisions 1, 2, and 3 to the County Planning Board for approval. John Doe Plat Subdivision 1 and Subdivision 2 showed an open ditch running along the rear of the lots on the north side of said subdivisions. Without the knowledge of the County Engineer, who acts in an advisory capacity to the County Planning Commission, Subdivider A enclosed said open ditch with a 42" pipe. When Subdivider A submitted John Doe Plat Subdiviison 3 to the County Planning Commission the drawings showed an open ditch emptying into a 42" pipe which then runs under one street in Subdivision 3 and then outfalls into an open ditch on the east line of Subdivision 3.

"John Doe Plat Division 1 and Subdivision 2 were approved by the County Planning Commission and a City Planning Commission, being within three miles of the city's corporation limit. John Doe Subdivision 3 was approved by only the County Planning Commission because the City relinquished its right to approve plats within three miles of its jurisdiction.

"Subdivider A executed a contract for each of said subdivisions and to each contract a performance bond was attached. Subdivider A completed the streets, sewers and other improvements shown on John Doe Plat Subdivisions 1, 2, and 3. The Township Trustees accepted the streets in said subdivisions and the County Commissioners released Subdivider A from his performance bonds on each of his Subdivision contracts.

"The 42" pipe has now proven to be inadequate to handle the surface water which drains into said plats when there is a heavy rain. The water overflows the 42" pipe at the west end of John Doe Plat Subdivision 1 and runs down one of the township streets and overflows into yards adjacent to said street. This overflow of surface water causes severe damage to the township street.

"The County Engineer states that if Subdivider A had installed his open ditch the same problem would arise, only it would be in a different area of the plat. The County Engineer is of the

opinion that this flooding situation can only be rectified by either removing the 42" pipes and installing a large size one, or by installing an additional storm drainage pipe under two township roads in said subdivisions. Enclosed is a drawing by the County Engineer which exemplifies the above factual situation.

"Since the County Planning Commission approved the Subdividers Plats, plans and specifications, the question has arisen as to whether the County Commissioners are responsible for correcting the flooding conditions which exists because of the inadequate storm sewers.

"In 1934, the Attorney General of Ohio held that the County was not liable to replace inadequate ditch tiles which had conformed to county specifications. (See 1934 OAG 2340). Chapter 5559 R.C.O. provides for road and storm sewer improvements in a plat within three miles of a city having a planning commission which has approved the plat; however it would appear from Section 5559.01 R.C.O. that this chapter is applicable only where the streets and sewers in said plat have not been permanently improved. Chapter 6131 R.C.O. establishes a procedure by which the County Commissioners upon petition may make the necessary improvements to remove excess surface water and assess the costs against the owners benefits.

"The question has also arisen as to whether the township trustees have the implied authority under Section 5571.02 to correct the flooding condition because of the damage it is doing to the township streets.

"An opinion is requested:

"(1) As to whether the County Commissioners at the expense of the county have authority either to install additional storm sewers in said plat, or to replace the inadequate storm sewers in order to eliminate the flooding condition. If they do have such authority, what funds should be expended?

"(2) As to whether the Township Trustees have authority at the expense of the township either to install additional storm sewers in said plat or to replace the inadequate storm sewers. If they have such authority what township funds should be expended?

"(3) If your answer to questions 1 and 2 are in the negative should the County Commissioners follow the procedure set forth in Chapter 5559. R.C.O. or the procedure set forth by Chapter 6131. R.C.O. if a petition to correct the flooding condition is filed with them."

It appears that the subdivisions referred to in your communication were platted and filed pursuant to the provisions of Sections 711.09 and

711.10, Revised Code. These provisions, which confer large powers upon the city and regional or county planning commissions and upon both the legislative bodies of cities and counties, were enacted in 1953.

Section 711.09, Revised Code, relates to the powers of a city planning commission which has jurisdiction also for a distance of three miles outside the city. Section 711.10, *supra*, relates to the powers of a county or regional planning commission which has jurisdiction in the remaining area of the county.

Both sections authorize the planning commission to adopt general rules governing plats and subdivisions of land within their jurisdiction designed to secure the proper arrangement of streets or other highways in relation to existing highways and providing for the construction of such streets or other improvements. In both cases, compliance with such regulations or requirements is made a condition precedent to the approval of a proposed plat of a subdivision.

Section 711.101., Revised Code, goes further and authorizes the legislative authority of a municipality or the board of county commissioners to adopt rules and regulations providing for the construction of streets, water mains, storm sewers, sanitary sewers, and other facilities, according to prescribed standards, and making such installation a condition precedent to the sale or lease of lots in the subdivision, or the issuance of a building permit. This section provides that such legislative authority may provide that in lieu of actual construction or installation of such improvements, the same may be guaranteed by a performance bond or other guarantee or security under such conditions and time limitations as the legislative authority may determine.

It is evident from your letter that the plats in question were accepted by the planning commission, pursuant to such regulations, and your letter states that the subdivider executed a contract and gave a performance bond for each subdivision, and that he completed the improvements shown on the accepted plat, and that the county commissioners have released the subdivider from his performance bond on each of said subdivision contracts.

Accordingly, it would appear that we need not now be further concerned with the provisions of the law relating to the filing and approval of a subdivision plat. It may be noted too, that there is nothing in the statutes above referred to which would appear to contemplate any regulations in

regard to natural surface drainage of platted land or the existence or disturbance of ditches which may have taken care of such drainage.

Your inquiry, therefore, might suggest the necessity of a consideration of the right of the owner of land to change the natural drainage of his land in such a way as to inflict damage on the lands of neighboring owners, and upon the streets adjacent to such lands. It appears to me, however, that you have practically eliminated consideration of that question by your statement that even if the ditch had not been closed the water would have found its way onto the street, but at another location. You are, of course, not concerned with an invasion of private property rights, except to the extent that the law affords a remedy by public process.

This brings me to a consideration of the remedies which are available to the public authorities for alleviation of a condition such as you describe.

So far as the township trustees are concerned, I cannot find in the statutes that they have any power or authority in connection with the installation of sewers or drains. Section 5571.02, Revised Code, to which you direct my attention, does nothing but give the board of township trustees control of the township roads of its township and the duty of keeping them in good repair. Obviously, in performing this duty they would use such means as are within their power to see that the road is drained by the use of tile or ditches, but a situation which requires the installation of sewers would be entirely beyond the scope of their authority.

Dealing with the question of action by the county commissioners, you refer to Chapters 5559. and 6131., Revised Code. Chapter 5559., *supra*, is entitled "Platted Territory Road Improvement." Section 5559.02, Revised Code, reads as follows :

"The board of county commissioners may, as provided in sections 5559.03 to 5559.16, inclusive, of the Revised Code, improve by grading, draining, paving, *constructing storm sewers*, sidewalks, curbs, and gutters, any road, street, alley, or portion thereof lying within or bounded on both sides by any platted lands, and situated outside a municipal corporation." (Emphasis added)

The subsequent sections of this chapter outline the steps whereby any such road, street, or alley may be *improved* and provide for an assessment of the cost thereof upon the benefited properties. But that this chapter was not intended to cover general drainage problems, is evidenced by a provision of Section 5559.03, Revised Code, reading as follows :

“Only such storm sewers may be included in plans as are needed solely for the drainage of the street to be improved and of the lots and lands to be specially assessed for the improvement.  
\* \* \*”

Chapter 6131., Revised Code, deals primarily with county ditches, but the provisions of the chapter are designed for the removal and disposal of surplus water or control of drainage to prevent the overflow of any land in the county, and also for water conservation. The provisions of this chapter are broad enough to authorize such drainage either by ditches or enclosed drain pipes. In Section 6131.01, Revised Code, “Improvement” is defined as including:

“(1) The location, construction, reconstruction, reconditioning, widening, deepening, straightening, altering, *boxing, tiling, filling, walling, arching, or any change in the course, location or terminus of any ditch, drain, watercourse or floodway.*” (Emphasis added)

The same section defines “benefits” as including, *inter alia*, the following:

“(5) Providing an outlet for the accelerated run-off from artificial drainage whenever the stream, watercourse, channel, or ditch under improvement is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands which have been removed from their natural state by deforestation, cultivation, artificial drainage, *urban development or other man-made causes*, shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from said uplands.” (Emphasis added)

Section 6131.02, Revised Code, authorizes the county commissioners, upon receipt of a petition of one or more property owners, and a finding that the improvement will be conducive to the public welfare, and that the cost will be less than the benefits, to

“\* \* \* construct, reconstruct, straighten, deepen, widen, alter, box, tile, fill, wall, dam, or arch any ditch, drain, or watercourse, floodway, creek, run, or river, or change the course, location or terminus thereof. \* \* \*”

The sections which follow provide for the preparation of plans and specifications and the allocation of the assessment. Section 6131.15, Revised Code, provides for the preparation by the county engineer of a schedule of assessments to be levied against benefited property, including publicly owned property.

Section 6131.22, Revised Code, provides for the approval by the county commissioners of the estimated assessment and for the distribution of costs in the following language:

“That part of the assessment that is assessed for benefits to the general public because the improvement is conducive to the public welfare shall be paid by the public and shall be assessed against the county payable from the general fund. Such part of the assessment as is found to benefit state roads or highways shall be assessed against the state payable from motor vehicle revenues. Such part of the assessment as is found to benefit county roads or highways shall be assessed against the county payable from motor vehicle revenues. Such part of the assessment as is found to benefit any public corporation or political subdivision of the state shall be assessed against such public corporation or political subdivision and shall be paid out of the general funds or motor vehicle revenues of such public corporation or political subdivision of the state, except as otherwise provided by law.”

There is no provision in this chapter authorizing the county to assume any stipulated portion of the expense of such improvement, except that the commissioners, as above provided, shall determine that part of the assessment that is “conducive to the public welfare,” and the portion so determined shall be “assessed against the county, payable from the general fund.” Furthermore, it is provided that such part of the assessment as is found to benefit state roads or highways shall be assessed against the state, payable from motor vehicle revenues; and that such part of the assessment as is found to benefit county roads or highways shall be assessed “against the county, payable from motor vehicle revenues.”

It will be observed also that it is provided that “such part of the assessment as is found to benefit any \* \* \* political subdivision shall be assessed against such \* \* \* political subdivision and shall be paid out of the general funds or motor vehicle revenues of such \* \* \* political subdivision.” If, therefore, the improvement made by the county commissioners should be found by them to benefit township roads or other township property, a proper portion of the entire cost should be assessed against the township.

I note your reference to Opinion No. 2340, Opinions of Attorney General for 1934, p. 254. That opinion cannot have any bearing on the questions here under consideration, since it related only to the repair of a county ditch which had been constructed under the statutes then in force.

Accordingly, in specific answer to the questions submitted, it is my opinion, and you are advised:

1. Where by reason of the drainage of lands in the unincorporated area of a county, surface water collects to the damage of public roads or private property or both, the county commissioners are authorized under the provisions of Chapter 6131., Revised Code, upon receipt of a petition from one or more property owners, to remedy such condition by the construction of ditches or drains, and they may assess the cost of such improvement on benefited property.

2. In making such assessment, the county commissioners are required by Section 6131.22, Revised Code, to determine and assess against the county that portion of the total which represents the benefits accruing to the general public, as conducive to the general welfare, which amount is to be paid out of the general fund of the county; and are further required to determine and assess against the county that portion which is found to benefit county roads and highways, which portion is to be paid from the county's motor vehicle revenues. Such portion as the board finds to be of benefit to the roads or other property of the township should be assessed against the township, and paid out of its general fund or motor vehicle revenue.

3. The township trustees have no authority to construct drains or sewers to carry off surplus water except to the extent incidental to and necessary in the improvement of a township road.

Respectfully,

WILLIAM SAXBE

Attorney General