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1. DITCH—COUNTY COMMISSIONERS—NOT REQUIRED TO MAINTAIN OR REPAIR DITCHES—EXCEPTION, PROVISIONS OF SECTIONS 6691 ET SEQ., 6546 ET SEQ., G. C.
2. WHERE A DITCH PASSES THROUGH A MUNICIPALITY, ORIGIN AND TERMINATION OUTSIDE MUNICIPALITY, COUNTY COMMISSIONERS HAVE NO DUTY TO REPAIR OR MAINTAIN ANY PORTION OF DITCH UNTIL PETITION IS FILED WITH THEM SIGNED BY MAJORITY OF LAND OWNERS IN DRAINAGE AREA—SUBSEQUENT PROCEEDINGS REQUIRED TO ESTABLISH AND MAINTAIN FUND—SECTIONS 6546 TO 6553 G. C.
3. MUNICIPALITY—NO DUTY TO MAINTAIN OR REPAIR PORTION OF DITCH LYING WITHIN BOUNDARIES—HAS PERSUASIVE AUTHORITY TO ACT UPON DETERMINATION OF COUNCIL WHERE THERE IS AN EXISTENT NECESSITY.

## SYLLABUS:

1. County commissioners are not required to maintain or repair ditches, except as provided by Section 6691 et seq. and Section 6546 et seq. of the General Code of Ohio.

2. Where a ditch passes through a municipality, originating and terminating outside the municipality, the county commissioners have no duty to repair or maintain any portion of such ditch until there is filed with them a petition by a majority of

the landowners in the drainage area as provided by Sections 6546 to 6553, inclusive, of the General Code, and the subsequent proceedings therein required result in the establishment of a maintenance fund as required by said section of the General Code.

3. A municipality has no duty to maintain or repair that portion of a ditch lying within its boundaries but has permissive authority to do so upon the determination of council that the necessity thereof exists.

Columbus, Ohio, July 12, 1949

Hon. Glen W. Shellhaas, Prosecuting Attorney  
Logan County, Bellefontaine, Ohio

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

"I have been requested to ask your opinion on a problem involving a ditch which passes through the city of Bellefontaine, Ohio, and which originates and terminates outside of the municipal corporation.

"The ditch is known as Possum Run and was the subject of an opinion of Attorney General Edward C. Turner, rendered April 19, 1927. However, in as much as the statutes under which that opinion was written have been amended and changed, and in as much as the question involved is not identical with the question covered therein, your opinion is requested as to whether the duty to repair and maintain said ditch inside the municipal corporation is with the municipal corporation or the county commissioners."

The former Attorney General's opinion to which you refer in your letter is found in 1927 Opinions of the Attorney General at page 595. The questions discussed in that opinion by the then Attorney General were whether county commissioners have jurisdiction of such portion of a ditch passing through a municipality, which originates and terminates outside the limits of the municipality, as may lie within the boundaries of the municipality and if they have jurisdiction to construct, repair and improve such portion of such ditch, whether they may act upon the presentation of a petition by the mayor of the municipality. The conclusions reached in said opinion as indicated by the syllabus were as follows:

"1. County commissioners have jurisdiction to construct and improve ditches lying wholly within the county over their

entire course, whether or not such ditches in their course pass into or through a municipality.

"2. When a petition for a ditch improvement is presented to the county commissioners by the mayor of a city in accordance with the provisions of sections 6442 and 6443 and related sections of the General Code, the county commissioners are authorized to receive and act upon such petition."

In the body of the opinion, at page 598, it was stated :

"Whatever jurisdiction the municipality has over the ditch is current with that of the commissioners."

The question which you present is correlated to the questions involved in the 1927 opinion in that should either the county commissioners or the municipality lack jurisdiction over the ditch with respect to its repair and maintenance, clearly there could be no duty imposed upon the political subdivision lacking such jurisdiction.

In reviewing the statutes with reference to drainage laws as they existed at the time that opinion was written and as they have subsequently been amended and changed, I have come to the conclusion that such subsequent amendments and changes in no way affect the reasoning or conclusions reached in said opinion. It is to be noted further that the exact nature of the contemplated work to be done on the ditch is not revealed in the opinion and that the syllabus quoted above limits the opinion to construction and improvement of ditches as provided by Sections 6442 and 6443 and related sections of the General Code. Section 6443, General Code, is presently in substantially the identical form as it was in 1927, and reads in part as follows :

"The board of county commissioners, at a regular or called session, upon the filing of a petition as provided in this chapter by any owner of any land, when the commissioners find \* \* \*, may cause to be located, constructed, reconstructed \* \* \*."

It is observed from the foregoing section that nothing is contained therein with reference to repair or maintenance of such ditch. It appears that the legislature did not intend to include repair and maintenance of ditches in said section. The maintenance, repair, and upkeep of county and township ditches and drains has been provided for by Chapter 2a, Title III, Sections 6546 to 6553, inclusive, and Chapter 8, Title III, Sections 6691 to 6706, inclusive, of the General Code of Ohio.

Section 6546, General Code, provides that:

“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, heretofore and hereafter constructed for the purpose of drainage, which fund may be so established as hereinafter provided in this act.”

Section 6547, General Code, provides:

“When a majority of *landowners in a drainage area affected by a county or joint county ditch*, or which shall be affected by an incomplected ditch, shall petition for 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 6461 and 6462 of the General Code.”

(Emphasis added.)

It is to be noted that Section 6547, *supra*, requires the filing of a petition by a majority of the landowners in any drainage area before the jurisdiction of the county commissioners may be invoked for repair or maintenance of such ditches. In the absence of such petition no duty is imposed upon the county commissioners with respect to maintenance or repair of ditches under said sections of the General Code.

Section 6691, *et seq.* of the General Code provides the procedure for repairing and cleaning ditches, drains or watercourses located and constructed, in whole or in part, in any township or townships. These sections provide that the repair and cleaning is to be supervised by a ditch supervisor or the county surveyor (county engineer,) and provide for the apportionment of the work according to the benefits among the various landowners to be benefited; and upon failure of the landowners to perform the work, a method is provided whereby the ditch supervisor or county surveyor (county engineer) may perform the work. It appears reasonably clear from the provisions of these statutes that the authority conferred and procedures provided thereunder are limited in their application to ditches, drains or watercourses, or parts thereof, which may be located outside of municipalities, and would therefore not be applicable to the problem which you have presented.

While it is not the policy of this office to advise municipalities with respect to legal matters, the question presented here necessitates a brief discussion of the statutes relating to drainage which are applicable to municipalities. Sections 3655 and 3656, General Code, authorize a municipal council to cause the removal of all obstructions from all culverts or covered drains on private property, laid in any natural watercourse, creek, brook or branch where they obstruct the water naturally flowing therein, causing it to flow back or become stagnant, in any way prejudicial to the health, comfort or convenience of the citizens. These sections further provide that the council may direct the owner of the land on which the obstruction is located to remove the same, and upon his failure to do so to cause it to be done at the expense of the corporation, which expense may thereafter be recovered from such owner. The general intent of the sections is to provide a means of abating nuisances.

Section 3677, General Code, authorizes municipal corporations to appropriate property for the purpose, among other things, of constructing sewers, drains and ditches. Under this section and subsequent sections relating to the appropriation of property no duty is imposed upon the municipality to exercise the statutory grant of power. (*Hamilton v. Ashbrook*, 62 O. S. 511, 57 N. E. 239.) The power thus granted is purely permissive on the part of the municipality and dependent upon the determination of council.

By virtue of Section 3812, General Code, municipal corporations are given the power to levy special assessments upon specially benefited lands in the corporation for the purpose of draining, repairing or constructing sewers, drains, watercourses and other specified purposes. This section is contained in Chapter 5, Division 3 of Title XII. The entire chapter relates to special assessments and the procedures relative to the making of improvements by means of such assessments. Nothing is contained in said chapter imposing a duty upon the municipality to make any specific improvement but whether or not such improvement is made is left for council to determine.

I am not apprised of any other statutes conferring power upon municipalities relative to ditches or drains within their jurisdiction. From a review of the foregoing sections of the General Code it appears reasonably clear that a municipality would have the authority to maintain or repair a ditch within its limits but that such power is purely permissive and dependent upon the determination of the municipal council.

In view of the foregoing, it is my opinion :

(1) That county commissioners are not required to maintain or repair ditches, except as provided by Section 6691 et seq. and Section 6546 et seq. of the General Code of Ohio.

(2) That where a ditch originates and terminates outside the limits of a municipality and a portion thereof passes through the municipality, the county commissioners have no duty to repair or maintain any portion of such ditch until there is filed with them a petition by a majority of the landowners in the drainage area as provided by Sections 6546 to 6553, inclusive, General Code, and the subsequent proceedings therein required result in the establishment of a maintenance fund as required by said sections of the General Code.

(3) That a municipality has no duty to maintain or repair that portion of a ditch lying within its boundaries but has permissive authority to do so upon the determination of council that the necessity thereof exists.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.