

an act of *humanity*, and can be authorized only in cases where a condition has arisen that makes the further confinement of the convict *inhumane*. This, of course, restricts the discharge of workhouse convicts to few and exceptional cases."

Sections 4134 et seq., of the General Code, authorize officers vested by statute with authority to manage a workhouse, to establish rules and regulations under which prisoners may be allowed to go upon parole outside of its buildings and enclosures and they are to remain while on parole in the legal custody and under the control of the officers and subject at any time to be taken back within the enclosures of the institution.

A similar act with reference to the parole of prisoners of the Ohio Penitentiary was declared constitutional by the Supreme Court of Ohio in the case of *State ex rel. Attorney General vs. Peters*, reported in 43 O. S., page 629. The syllabus of this case is as follows:

"An act to amend an act entitled, "an act relating to the imprisonment of convicts in the Ohio Penitentiary, and the employment, government, and release of such convicts by the board of managers," passed March 24, 1884, passed May 4, 1885 (82 Ohio L. 236), authorizes the board of managers to establish rules and regulations under which certain prisoners then or thereafter under sentence, who had served the minimum term provided by law for the crime for which they were convicted, may be allowed to go upon parole outside of the buildings and inclosures, but to remain while on parole in the legal custody and under the control of the board, and subject at any time to be taken back within the inclosure of the institution, is not an interference with the executive or judicial powers conferred on these departments by the constitution of the state."

In view of the authorities cited, I am of the opinion that Section 6212-17, General Code, does not affect the authority under Sections 4133, et seq., given to an officer authorized by statute to manage a workhouse, to release or parole prisoners confined therein for failure to pay fines and costs imposed for a violation of the Crabbe Act.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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420.

#### COUNTY COMMISSIONERS—JURISDICTION TO IMPROVE DITCH WITHIN A MUNICIPALTY.

##### SYLLABUS:

*Upon the filing of a petition therefor by the mayor or council of a municipal corporation, county commissioners are vested with jurisdiction, under Sections 6442 et seq. of the General Code, to determine the necessity of a ditch improvement and to proceed therewith, if found necessary, notwithstanding the improvement is to be made wholly within the limits of the municipal corporation.*

COLUMBUS, OHIO, May 22, 1929.

HON. PAUL J. WORTMAN, *Prosecuting Attorney, Dayton, Ohio.*

DEAR SIR:—Your recent communication reads as follows:

“In the village of Miamisburg, this county, there is an open ditch or drain which the village council desires to tile and close.

The village has petitioned the county commissioners for this improvement. While the ditch extends beyond the village corporate limits, it is not proposed to improve the same outside of the village. The only parties to be benefited will be the village and abutting property holders within the village except that water from county roads drains into it and it would eliminate several bridges which the county must maintain and repair.

Considering Sections 6443 and 6463 of the General Code and also opinions of the Attorney General for 1927, at page 595, will you please advise this office as to whether or not the county commissioners have the authority to grant this petition and assume charge of this improvement which lies immediately within the village of Miamisburg?”

The opinion of my predecessor, to which you refer, contains a very comprehensive discussion of the relative power of boards of county commissioners and municipal authorities in connection with ditch improvements, part of which are situate within the limits of the municipality. Consideration is given to the sections of the General Code which you mention and further related sections of the laws relating to ditches.

The conclusions reached by my predecessor are disclosed in the syllabus of the opinion which is as follows:

“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.

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.”

While the exact question there under consideration differed from that which you now submit, I believe the discussion of the opinion, when carefully considered, is dispositive of the present problem. It is necessary, however, to give some consideration to the case of *Pleasant Hill vs. Commissioners*, 71 O. S., 133, the syllabus of which is as follows:

“Except as provided in Section 4483 or 4485 of Title 6, Chap. 1, Revised Statutes, county commissioners are without jurisdiction or authority to locate and construct a county ditch within the corporate limits of a municipality.”

I invite your attention particularly to the fact that while denying to the county commissioners the jurisdiction to locate and construct a county ditch within the corporate limits of a municipality, under the general ditch statutes as they then existed, the court recognized the existence of such jurisdiction where the steps prescribed by Section 4483 of the Revised Statutes, as then in force and effect were followed. By that section it was provided that the council of a municipality could, by resolution, authorize the mayor to present a petition to the county commissioners for the location and construction of a ditch, or the council might authorize the mayor to sign a

petition for a ditch to be presented by parties interested whose lands are without the limits of the corporation. For the purposes of this opinion, it is unnecessary to refer to or comment upon Section 4485 of the Revised Statutes which is also mentioned in the syllabus of the case above quoted.

The court, after commenting upon the fact that the municipal code clothed the municipalities as such, with full power and authority over drains, sewers and ditches within their respective municipal limits, says on page 139:

“We do not believe that it was the purpose or policy of the legislature to confer upon boards of county commissioners jurisdiction and authority to locate and construct a ditch or drain within a municipal corporation, except where such municipality shall petition for the same, as provided in Section 4483. \* \* \* ”

In the case before the court the petition had evidently been presented by an individual property owner, the facts not disclosing whether the petitioner's property was located within or without the corporate limits. The village itself, and many land owners objected to the proceeding, and the court's conclusion was that the county commissioners, by the petition in question, were not vested with jurisdiction to establish the ditch.

Under the facts stated in your request, it appears that the village itself has petitioned the county commissioners for the improvement. Accordingly, if there still exists authority for a petition by the municipality, then the language of the court heretofore referred to in the Pleasant Hill case is pertinent, and dispositive of your question.

Section 4483 of the Revised Statutes subsequently was codified as Section 6494 of the General Code. This particular section seems to have been eliminated in the recodification of the ditch laws in 110 O. L. Consequently, there exists no special section of the Code applicable to the filing of a petition for a ditch improvement by a municipal corporation. The subject is covered by the definition contained in Section 6442, of the Code, which provides in part as follows:

“The word ‘owner,’ as used in chapters 1, 2 and 8 of this title, shall be construed to include any owner of any right, title, estate, or interest in or to any real property, and shall be held to include persons, partnerships, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or council of a city or village, the trustees of any state, county, or municipal public institution.”

The succeeding section grants authority to the board of county commissioners to find for the necessity of any particular ditch improvement “upon the filing of a petition as provided in this chapter by any owner of any land.”

Since the mayor or council of a city or village is in the preceding section defined as an “owner,” a petition by the municipal authorities is clearly authorized, at least where municipally owned property will be benefited by the proposed improvement, and confers jurisdiction upon the county commissioners to make the improvement, and in my opinion this jurisdiction is not affected by the fact that the ditch is located wholly within the boundaries of the municipal corporation. By so petitioning, the municipal authorities have effectually waived whatever exclusive authority may be vested in them by the municipal code, as far as the particular improvement is concerned.

Whether an individual lot owner in the municipality may, by filing a petition, confer upon the county commissioners jurisdiction to locate a ditch wholly within

the municipal limits in the absence of a petition therefor by, and against the wishes of, the municipal authorities presents an interesting question. The decision in the Pleasant Hill case, heretofore referred to, would apparently require a negative answer to this question. Since, however, in the case you present, the village has itself petitioned for the improvement, it is unnecessary to pass upon this question, and I express no definite opinion thereon.

It is not clear from your statement whether the facts you present are similar to those involved in the Pleasant Hill case. That is, I am not certain that the benefit of the improvement will be solely to lands lying within the municipality. In answering your question, however, I have assumed this to be true. If other property is benefited, then quite clearly the opinion of my predecessor to which you refer, is applicable.

In view of what has been said, I am of the opinion that, upon the filing of a petition therefor by the mayor or council of a municipal corporation, county commissioners are vested with jurisdiction, under Sections 6442 et seq. of the General Code, to determine the necessity of a ditch improvement and to proceed therewith, if found necessary, notwithstanding the improvement is to be made wholly within the limits of the municipal corporation.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

421.

APPROVAL, CONTRACT BETWEEN THE STATE OF OHIO AND GUSTAVE W. DRACH, INC., CINCINNATI, OHIO, FOR ARCHITECTURAL AND ENGINEERING SERVICES FOR POWER HOUSE AND CHIMNEY, INSTITUTION FOR FEEBLE-MINDED, APPLE CREEK, OHIO, AT AN EXPENDITURE OF \$3,300.00.

COLUMBUS, OHIO, May 22, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, and Gustave W. Drach, Inc., Cincinnati, Ohio. This contract covers architectural and engineering services in connection with power house and chimney, Institution for Feeble-Minded, Apple Creek, Ohio, and calls for an expenditure estimated at three thousand three hundred dollars (\$3,300.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a certificate from the Controlling Board, signed by the secretary thereof, that in accordance with Section 4 of House Bill No. 203, 88th General Assembly, said board has properly consented to and approved the expenditure of the moneys appropriated by the 88th General Assembly for the purpose covered by this contract.

You have further submitted a certificate of authorization from the Department of Public Welfare to enter into the contract.

Finding said contract in proper legal form, I have this day noted my approval