

2504

WATER POLLUTION CONTROL BOARD—PROSECUTIONS, INITIATION OF PROCEEDINGS—§6111.07 R.C.—ATTORNEY GENERAL TO BRING ACTION UPON REQUEST OF BOARD—COUNTY COMMISSIONERS TO MAKE IMPROVEMENTS TO REMEDY UNSANITARY CONDITIONS WHEN FOUND BY DIRECTOR OF HEALTH, §6111.34 R.C.—SEWER OR SEWAGE TREATMENT WORKS; SUCH IMPROVEMENTS MAY BE ASSESSED UPON THE BENEFITED PROPERTY.

SYLLABUS:

1. Under the provision of Section 6111.07, Revised Code, the water pollution control board may institute proceedings for the prosecution of any person guilty of polluting any waters of the state, after such person has failed for more than sixty days to comply with the orders of such board to remedy such condition.
2. Upon request of such board, the Attorney General is authorized by Section 6111.07, Revised Code, to bring action against any person who is polluting any of the waters of the state by discharging sewage therein, for relief by injunction.
3. Section 6111.34, Revised Code, provides that when the director of health finds unsanitary conditions existing in any county and that it is necessary for the public health and welfare that sewer improvements or sewage treatment works be constructed, for any territory outside municipal corporations, he shall order the county commissioners to make such improvement, and such commissioners are required to construct or repair such sewers or treatment works, and may assess the cost thereof upon the property benefited.

Columbus, Ohio, August 8, 1958

Water Pollution Control Board,
Department of Health, Columbus, Ohio

Gentlemen:

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

“At the regular monthly meeting of the water pollution control board held May 13, 1958, action resulted in requesting you for a formal opinion as to the responsible entity or party for correcting pollution of waters of the state. The pollution in this particular case results from the ineffective control and operation of existing sewerage and sewage treatment works serving a subdivision the area of which is the same as Brentwood Lake Village Sewer District No. 24.

"Spitzer Management, Inc., the developers of this particular subdivision, requested the creation of a sewer district July 29, 1953. The county commissioners created Brentwood Lake Village Sewer District No. 24 by the adoption of a resolution on July 29, 1953. The board of county commissioners requested approval of detail plans for proposed sewerage and sewage treatment works and approval was granted by the Ohio department of health on August 12, 1953.

"Presently there is a valid permit (No. 1089.4) which was issued to the board of county commissioners, Lorain County, Brentwood Lake Village sewer district No. 24, with an expiration date of June 15, 1958. Ownership of the existing sewerage and sewage treatment works has not been accepted by the board of county commissioners. Spitzer Management, Inc., indicates it is without authority to correct existing short comings and therefore it is inadvisable to make necessary sewage treatment plant additions.

"The board is looking ahead to the need for taking enforcement action in the abatement of this pollution. It seems advisable to seek your opinion as to responsibility as requested above before any further action is taken in the matter."

At my request, the prosecuting attorney of Lorain County has furnished certain additional information. The last two paragraphs of his letter read:

"Lorain County does not at the present time officially have a sanitary engineer. A member of the county engineer's office does the work of one and acts in that capacity. Since the attempted construction of the sewer plant, the acting sanitary engineer has examined the proposed plant on several occasions and has refused to approve the installation as being a completed installation. The county commissioners have refused to accept the plant since it has not been constructed in conformity with the specifications and conditions imposed by the department of health.

"At the present time, there exists a sewage problem in this area and the property owners are desirous that a remedy be employed. It is the position of this office that the solution rests with the property owners and the developer by civil action for breach of warranty or contract and that unless and until the developer obtains that approval of the acting sanitary engineer of the installation, the county commissioners need not, nor should they, act in this matter."

Section 6602-1, *et seq.*, General Code, under which the proceedings in question were had, became Section 6117.01, *et seq.*, Revised Code. As such, these sections have undergone certain amendments, but not so as to

affect the application of the original law to the present situation. Said Section 6602-1, General Code, provided that in case the county commissioners determined to proceed thereunder to establish a sewer district, they "may acquire, construct, maintain and operate" sewers and sewage disposal plants; and further provided that such board "may employ a competent sanitary engineer."

Further on in the same section it is provided:

"* * * No sewers or sewage treatment works shall be constructed in any county outside of incorporated municipalities by any person, firm or corporation, until the plans and specifications for the same shall have been approved by the board of county commissioners, and any such construction shall be done under the supervision of the county sanitary engineer. * * *"

I do not consider that the fact that the county commissioners had not employed a sanitary engineer, as such, has any bearing on the problem submitted. The important fact is that the plans and specifications which the commissioners had prepared, and pursuant to which the "developer" presumably proceeded to construct the sewer system, were not satisfactorily carried out and the engineer who was used as "sanitary engineer" condemned the installation and the county commissioners refused to approve or accept them. In spite of this, the developer apparently went on selling his lots and the result is the pollution of a watercourse and the nuisance complained of.

I come then to the role of your board in such a situation. Your board is established and its powers and duties defined under the provisions of Chapter 6111., Revised Code, for the general purpose of preventing and causing the abatement of pollution of the waters of the state.

Section 6111.03, Revised Code, gives your board authority, among other things:

"(G) To issue, modify, or revoke orders, subject to section 6111.04 of the Revised Code, after a public hearing, (1) prohibiting or abating discharges of sewage, industrial waste, or other wastes into the waters of the state; (c) requiring the construction of new disposal systems or any parts thereof, or the modification, extension or alteration of existing disposal systems or any parts thereof, to prevent, control, or abate pollution. * * *

"(I) To issue, revoke, modify, or deny permits for the discharge of sewage, industrial waste, or other wastes into the waters of the state, and for the installation, modification, or operation of disposal systems or any parts thereof. * * *

“(J) To institute or cause to be instituted in the court of common pleas having jurisdiction, proceedings to compel compliance with such sections or with the orders of the board; * * *”

Section 6111.04, Revised Code, declares the pollution of any of the waters of the state to be a public nuisance, making an exception of certain industrial wastes.

Section 6111.05, Revised Code, provides for hearings of complaints of any act of pollution or failure to comply with orders of your board in reference thereto. By the provision of Section 6111.06, Revised Code, these proceedings may culminate in an order to the alleged violator to correct the situation complained of within sixty days.

Section 6111.07, Revised Code, authorizes prosecution of an offender who fails to comply with such order of your board, such prosecution to be carried on by the attorney general; and Section 6111.99, Revised Code, provides penalties for violation of said Section 6111.07.

Section 6111.08, Revised Code, undertakes to preserve all equitable remedies of the several parties concerned. It reads as follows:

“Sections 6111.01 to 6111.08, inclusive, of the Revised Code, do not abridge rights of action or remedies in equity or under the common law, nor do such sections, or any act done under such sections, estop the state, or any municipal corporation or person, as riparian owners or otherwise, in the exercise of their rights in equity or under the common law to suppress nuisances or to abate pollution.”

From this point on, the chapter appears to leave your board out of the picture, and confers certain powers and duties on the director of health. Section 6111.09, Revised Code, authorizes a complaint to be filed with the director with respect to sewage or other wastes being discharged into a stream, thereby creating a public nuisance.

Section 6111.10, Revised Code, provides that if the director of health finds that a watercourse is being so polluted, he shall give notice to the municipal corporation, institution, corporation or person responsible, of a hearing on such matter before the public health council.

The above procedure, beginning with Section 6111.10, *supra*, appears to lead not to prosecution but rather to equitable relief, culminating, as provided in Section 6111.26, Revised Code, in an appeal from an order of abatement of the director of health, to the Supreme Court. I do not con-

sider that your letter of inquiry calls for a detailed analysis of the procedure required or the ultimate relief to be obtained under Sections 6111.09, *et seq.*, Revised Code.

The duties devolving on your board and the remedies applicable are, as above indicated, those set forth in Sections 6111.01 to 6111.07, inclusive, Revised Code.

Coming now to the person or organization against whom relief, either civil or criminal, should be had in the present case, it appears that the primary fault lies with the developer, who had originally induced the county commissioners to establish the sewer district, and had proceeded, under favor of a permit granted by the director of health to the county commissioners, to install a sewerage system and a sewage treatment plant, which was not in accordance with the plans and specifications prepared by the commissioners and which was condemned by the acting sanitary engineer and disapproved by the commissioners, and which is responsible for the nuisance now complained of.

It may be added that while it appears that the persons who have purchased lots and have constructed homes thereon, relying on the representations of the developer as to the sewage facilities, are wholly innocent of any fault in so doing but are the victims of his negligent acts; yet they—and each member of their families—may be said to be technically guilty of contributing to the pollution of the stream. They may well be subject, therefore, to prosecution for disregard of an order made under Section 6111.07, *supra*; and it may be noted in this connection that under the provision of Section 6111.99, Revised Code, each day of such violation constitutes a separate offense.

In all the circumstances here presented, it appears to me the county commissioners should take the situation in hand and supplement the defective sewer disposal system with such additions as may be required to make it adequate under applicable legal standards of sanitation.

I find authority vested in the director of health by Section 6117.34, Revised Code, which if exercised, would certainly result in proceedings for the remedy of the nuisance which now exists. That section provides that on complaint by a board of health to the director of the existence of unsanitary conditions the director may take action as follows:

“* * * If upon investigation of such complaint the department finds that it is necessary for the public health and welfare that sewer improvements or sewage treatment or disposal works be

constructed, maintained, and operated for the service of any territory outside of municipal corporations in any county, said department shall notify the board of county commissioners of such county of its finding and shall proceed as provided in sections 6111.10 and 6111.11 of the Revised Code. The board shall obey such order and proceed as provided in sections 6117.01 to 6117.45, inclusive, of the Revised Code, to establish sewer districts, provide necessary funds, and construct such sewers or treatment works, *or maintain, repair, or operate the same*, as are required by such order and in such manner as is satisfactory to the department. *Any or all of the cost of such improvement or maintenance may be assessed upon the property benefited* as provided in sections 6117.01 to 6117.45, inclusive, of the Revised Code.” (Emphasis added)

This statute, in my opinion, is broad enough to include not only an original installation, but also the extension, completion or repair of a previously constructed sewer system or sewage disposal plant works.

Note particularly the provision in the last sentence of the section that any part or all of the cost of such improvement may be assessed on the benefited property.

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

1. Under the provision of Section 6111.07, Revised Code, the water pollution control board may institute proceedings for the prosecution of any person guilty of polluting any waters of the state, after such person has failed for more than sixty days to comply with the orders of such board to remedy such condition.

2. Upon request of such board, the Attorney General is authorized by Section 6111.07, Revised Code, to bring action against any person who is polluting any of the waters of the state by discharging sewage therein, for relief by injunction.

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Respectfully,
WILLIAM SAXBE
Attorney General