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SEWER DISTRICTS—BOARDS OF COUNTY COMMISSIONERS

1. BONDS ISSUED IN ANTICIPATION OF COLLECTION OF SPECIAL ASSESSMENTS FOR SEWER DISTRICT—§ 133.31 RC—SUCH BONDS ARE GENERAL OBLIGATION BONDS OF THE COUNTY.

2. BOARD OF COUNTY COMMISSIONERS NOT LIABLE FOR NEGLIGENCE IN CONSTRUCTION, OPERATION OR MAINTENANCE OF A SEWAGE TREATMENT PLANT—CHAPTER 6117., RC.

3. COUNTY MAY BE HELD LIABLE TO LOWER RIPARIAN OWNER IF OPERATION OF SEWAGE TREATMENT PLANT RESULTS IN UNLAWFUL APPROPRIATION OF LAND—ART. I, SEC. 19, OHIO CONSTITUTION.

4. BOARD OF COUNTY COMMISSIONERS MUST ADVERTISE FOR SEALED BIDS FOR THE CONSTRUCTION OF SUCH SEWERAGE AND WATER SUPPLY OR WATER WORKS SYSTEM NOTWITHSTANDING THAT THE OWNERS HAVE FILED WRITTEN WAIVER OF NOTICES—§§ 6117.27; 6117.28; 6103.10; 6103.11 RC—OPINION 326, OAG 1923, p. 258 OVERRULED.

SYLLABUS:

1. Where a board of county commissioners, acting pursuant to Chapters 6117., and 6103., Revised Code, establishes a sewer district and acquires or constructs a sewerage system and a water supply or water-works system for such district and further provides for the levying of assessments on lots and lands benefited by such systems, bonds issued as provided in Section 133.31, Revised Code, in anticipation of the collection of such special assessments are full general obligation bonds of the county.

2. A board of county commissioners is not liable in its official capacity for damages resulting from its negligence in the absence of a statute specifically imposing such liability and is, therefore, not liable for damages resulting from the negligent construction, operation or maintenance of a sewage treatment plant established pursuant to Chapter 6117., Revised Code.

3. By virtue of Section 19, Article I, Ohio Constitution, a county may be held liable to lower riparian owners who sustain damage as a direct result of the construction, maintenance or operation of a county operated sewage plant if the damages are such as to amount to an unlawful appropriation.

4. A board of county commissioners must advertise for sealed proposals as provided in Sections 6117.27 and 6103.10, Revised Code, for the construction of such a sewerage and water supply or water-works system, notwithstanding the fact that the owners of the lots and lands to be benefited by such systems have, pursuant to Sections 6117.28 and 6103.11, Revised Code, filed petitions and written waivers of the requirement of publication of resolutions and legal notices. Opinion No. 326, Opinions of the Attorney General for 1923, page 258, overruled.

Columbus, Ohio, October 11, 1957

Hon. Robert E. Cook, Prosecuting Attorney
Portage County, Ravenna, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Board of County Commissioners of Portage County are contemplating the creation of a sewer district and a water district, under provisions of Revised Code, Chapters 6117 and 6103, respectively, in one of the townships of Portage County, and the following legal questions have arisen:

"1. If bonds are issued by the County Commissioners for the construction of a water and/or sewer district, would said bonds be a general obligation of the whole county or would they be an obligation only against the property in the districts, as provided in Sections 6128 and 6103.11 of the Revised Code?

"2. Since the proposed sewage treatment plant will drain its effluent into a stream located nearby, is there any way that the County can be held liable by landowners down stream who might be flooded by the added water or whose portion of the stream might be contaminated by the effluent from said sewage plant?

"3. Is it necessary to advertise for bids for the construction of a sanitary sewage treatment plant and facilities and a water supply and distribution system under provisions of the Revised Code?"

Before turning to the specific questions presented in your inquiry, it should be noted that boards of county commissioners, acting pursuant to Chapters 6117., and 6103., Revised Code, may establish sewer districts and acquire or construct the sewerage system and water supply or water-works system deemed necessary for the preservation and promotion of public health and welfare. Such boards are further authorized by the pertinent sections of such chapters of the Revised Code to provide for the assessment of benefited property within the district.

The first question presented in your inquiry is, however, directed toward determining the extent of the obligation assumed by a county in issuing bonds to provide funds for the acquisition or construction of such improvements rather than toward determining the extent and scope of the special assessments which may be made against benefited property. Although Chapters 6103., and 6117., Revised Code, specifically empower boards of county commissioners to issue and sell the necessary bonds or certificates of indebtedness to finance the cost of such improvements, we must look to the Uniform Bond Law, Chapter 133., Revised Code, for the solution to this problem.

The language in your inquiry appears to me to refute any assumption that the board of county commissioners contemplates issuing revenue bonds pursuant to Section 133.06, Revised Code, which bonds would be secured only by a pledge of and a lien upon the revenues derived from the rates or charges established for the use of such facilities and the covenant of the county to maintain sufficient rates and charges. It seems clear that the bonds to be issued by this board of county commissioners are, rather, those issued pursuant to Section 133.31, Revised Code, in anticipation of the collection of special assessments. Section 133.31, Revised Code, closes with this language:

> "* * * Bonds or notes issued in anticipation of the levy of special assessments, of the collection thereof, shall be full general obligations of the issuing subdivision, and the full faith, credit, and revenues of such subdivision shall be pledged for the payment of the principal and interest of such bonds or notes."

Your second inquiry raises the question of the liability of a board of County Commissioners, in its official capacity, to respond in damages in the event lower riparian owners suffer damage as a result of the construction, maintenance or operation of such county sewage plant. By reason of the broad scope of your inquiry, it is necessary to approach the problem from several aspects.

It is fundamental that a board of County Commissioners is not liable in its official capacity to respond in damages for a cause of action grounded on negligence unless a specific liability is created by statute. Weiker v. Phillips, 103 Ohio St., 249, paragraph one of the syllabus. I find no statute specifically imposing upon a board of County Commissioners any liability grounded on the negligent construction, operation or maintenance of such a sewage treatment plant.

The only statute imposing any liability upon boards of County Commissioners is Section 305.12, Revised Code, which reads:

> "The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain, and defend all suits in law or in equity, involving an injury to any public, state, or county road, bridge, ditch, drain, or watercourse established by such board in its county, and for the prevention of injury thereto. The board shall be liable, in its official capacity, for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county, or any money or other property due the county. The money so recovered shall be paid into the county treasury, and the board shall take the county treasurer's receipt therefor and file it with the county auditor."

I am unable to conclude that operation of a county sewage treatment plant falls within the purview of this statute. Therefore, it is my opinion that a board of County Commissioners is not liable in its official capacity for damages resulting from the operation of such sewage plant when the cause of action is founded in negligence.

However, your attention is invited to Section 19, Article I, Ohio Constitution, which prohibits the taking of a private property for a public use without first having made compensation therefor or securing such compensation by a deposit of money. Section 6117.39, Revised Code, empowers boards of county commissioners to procure, by appropriation or otherwise, such real estate, right-of-way, easement or right as the board considers necessary for the construction, maintenance or operation of sewers or a sewage treatment or disposal plant. As this sewage treatment plant is as yet to be constructed, obviously there cannot, at this time, have been any unlawful appropriation of private property.

The Supreme Court of Ohio has had for consideration the question of whether certain public uses amounted to an appropriation of private property. The first paragraph of the syllabus in City of Norwood, vs. Sheen, 126 Ohio St., 482, reads as follows:

> "Any direct encroachment upon land, which subjects it to a public use that excludes or restricts the dominion and control of the owner over it, is a taking of his property, for which he is guaranteed a right of compensation by Section 19 of the Bill of Rights. (*Lake Erie & Western Rd. Co.* vs. *Commissioners of Hancock County*, 63 Ohio St., 23, approved and followed.)"

The following language is found in Steinle, vs. City of Cincinnati, 142 Ohio St., 550, at page 554:

> "In the *Sheen case* the rule was anounced that where a municipality deposits sewage from a sewer upon private property, such property is thereby subjected to a public use and a taking occurs within the meaning of Section 19, Article I of the Constitution of Ohio, for which damages may be claimed. See 18 American Jurisprudence, 759, Section 134.
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> "It will be observed that in connection with cases involving the appropriation of private property to a public use, Ohio has adopted the liberal view that 'any substantial interference with the elemental rights growing out of ownership of private property is considered a taking.' *Smith* v. *Erie Rd. Co.*, 134 Ohio St., 135, 142, 16 N. E. (2d), 310, 313, and the cases therein cited."

I am not unmindful of the fact that the *Sheen* case involved an action against a municipality, and I find no Ohio case where recovery was allowed against the county commissioners on the expropriation theory, but it is of great significance that nowhere in the course of the opinion in the Sheen case did the court discuss negligence or nuisance. Recovery was allowed solely on the basis of an unlawful expropriation. This fact, coupled with the language above quoted from the Steinle case impels me to the conclusion that recovery may be had by lower riparian owners who sustain damage as a direct result of the construction, maintenance or operation of a county operated sewage plant, if such damages are such as to amount to an unlawful appropriation.

In your request you have mentioned Sections 6128. and 6103.11, Revised Code. The reference to Section 6128., Revised Code, it is assumed, must have been intended to be to Section 6117.28, Revised Code, which provides for the procedure to be followed by a board of county commissioners in those instances in which the owners of all the lots and lands to be benefited by and assessed for such a sewer improvement or sewage treatment works for a sewer district petition in writing for the construction, maintenance and operation of such an improvement. Section 6103.11, Revised Code, makes substantially similar provision for the procedure to be followed in response to such a petition requesting the construction, maintenance, and operation of a water supply or waterworks system for such district. These sections provide, to the extent which is pertinent here, that when such petitions have been filed and the procedure set out therein is followed "none of the notices or publications

required by law need be made." The solution to your third question, then, appears to me to make it necessary to determine whether the advertising for sealed proposals for the construction of facilities is a "notice or publication" within the meaning of Sections 6103.11 and 6117.28, Revised Code. I cannot conclude that this is the correct interpretation of the pertinent statutes.

Section 6103.10, Revised Code, relating to the construction of a public water supply or water-works system for any sewer district, and Section 6117.27, Revised Code, relating to the construction of the sewerage system for the sewer district, direct the board of county commissioners, when bonds or certificates of indebtedness have been issued and sold, to enter into a written contract with the lowest and best bidder after advertising for sealed proposals. I look upon these sections as setting forth the procedure which must be followed by a board of county commissioners in securing bids or proposals, and not as providing for a "notice or publication" which is made unnecessary by reason of the petitions and waivers filed by the owners of the real property to be benefited and assessed for such benefit.

Examination of Sections 6103.11 and 6117.28, Revised Code, leads me to the conclusion that such property owners, by filing the required petitions waiving notice and publication of all resolutions and legal notices and the subsequent written statements that they have no objections to the estimated cost of and the tentative assessment for such improvement, waive only those notices and publications otherwise required by statute preliminary to the action of the board of county commissioners in incurring an indebtedness for such project. The actual procedure to be followed by such board in going forward with such construction is, it seems to me, something which cannot be varied or waived by any action of the owners of the real property to be served by such facilities and assessed therefor.

In reaching this conclusion I am not unmindful of Opinion No. 326, Opinions of the Attorney General for 1923, page 258, the syllabus of which reads:

> "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 in section 6602-5 of the General Code."

The author of that opinion, in interpreting the predecessors of Sections 6117.27 and 6117.28, Revised Code, looked upon the required advertisement for sealed bids as being one of the legal notices made unnecessary by reason of the waiver of the petitioning property owners. That opinion then concluded that bids must be received, although no advertisement for such bids was required, and that contracts must be awarded and entered into as otherwise provided by law; only the actual advertising could be waived.

In my view, however, such boards have no power to accept bids secured otherwise than in strict compliance with law. The General Assembly has prescribed one method only by which proposals for the construction of such sewerage systems and water supply systems may be secured. The familiar rule relating to the powers of a board of county commissioners is stated in this way in Elder vs. Smith, 103 Ohio St., 369, at page 370:

> "It has long been settled in this state that the board of county commissioners has such powers and jurisdiction, and only such, as are conferred by statute."

It is, therefore, my opinion and you are advised:

1. Where a board of county commissioners, acting pursuant to Chapters 6117., and 6103., Revised Code, establishes a sewer district and acquires or constructs a sewerage system and a water supply or water-works system for such district and further provides for the levying of assessments on lots and lands benefited by such systems, bonds issued as provided in Section 133.31, Revised Code, in anticipation of the collection of such special assessments are full general obligation bonds of the county.

2. A board of county commissioners is not liable in its official capacity for damages resulting from its negligence in the absence of a statute specifically imposing such liability and is, therefore, not liable for damages resulting from the negligent construction, operation or maintenance of a sewage treatment plant established pursuant to Chapter 6117., Revised Code.

3. By virtue of Section 19, Article I, Ohio Constitution, a county may be held liable to lower riparian owners who sustain damage as a result of the construction, maintenance or operation of a county operated sewage plant if the damages are such as to amount to an unlawful appropriation.

4. A board of county commissioners must advertise for sealed proposals as provided in Sections 6117.27 and 6103.10, Revised Code, for the construction of such a sewerage and water supply or water-works system, notwithstanding the fact that the owners of the lots and lands to be benefited by such systems have, pursuant to Sections 6117.28 and 6103.11, Revised Code, filed petitions and written waivers of the requirement of publication of resolutions and legal notices. Opinion No. 326, Opinions of the Attorney General for 1923, page 258, overruled.

Respectfully,
WILLIAM SAXBE
Attorney General