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1. DRAINAGE LAWS—JURISDICTION, COUNTY COMMISSIONERS IN CONSTRUCTION OF IMPROVEMENT—ONLY INVOKED BY FILING OF PETITION FOR SUCH IMPROVEMENT.
2. WHERE NO SUCH PETITION FILED—COUNTY COMMISSIONERS LACK JURISDICTION—NO AUTHORITY TO INSTRUCT AND ORDER COUNTY ENGINEER TO MAKE SURVEYS, PLANS AND SPECIFICATIONS AND DO WORK OF LOWERING STREAM FLOW LINE UNDER COUNTY BRIDGE.

SYLLABUS:

1. County commissioners' jurisdiction in construction of improvement under drainage laws is invoked only by the filing of a petition for such improvement.
2. Where no such petition is filed, the said board lacks jurisdiction and is without authority to instruct and order the county engineer to make surveys, plans and specifications and do the work of lowering the stream flow line under a county bridge.

Columbus, Ohio, February 24, 1949

Hon. J. L. McDonald, Prosecuting Attorney
Columbiana County, Lisbon, Ohio

Dear Sir:

I have before me your communication requesting my opinion respecting the duties of the County Surveyor in connection with the construction of an improvement under the drainage laws of Ohio. Your communication reads as follows:

“Your opinion is respectfully requested as to the authority of the Board of County Commissioners to instruct and order the County Engineer to proceed with the work of lowering the stream flow line under certain county bridges to a grade in order to accommodate the drainage of water through drain tile and otherwise, from surrounding and upstream farm lands, the cost of such work to be paid from the county general and/or road and bridge fund, without any assessment to the owners of the lands benefited.

“In order to clearly present the question, the following facts are submitted :

“A group of land owners in Knox Township, Columbiana County, Ohio, on their own initiative and at their own expense hired a contractor to deepen and widen a water course through their lands, the purpose being to lower the flow line of the stream to afford greater drainage facilities. They were able to proceed with this project only up to the point of certain county bridges. At this point, it was found that the flow line grade under the bridges was then above that of the stream which they had deepened and widened. They then requested that the county lower the flow line under these bridges to the grade of the water course which had been deepened by them. It might be added at this point, that the group of land owners were encouraged and assisted in this project by both the County Agricultural Extension Agent and the Soil Conservation Agency of the United States Department of Agriculture.

“The County Engineer refused to take any action on the request, claiming that to lower the flow line under the bridges as requested would undermine the bridges, unless the foundations were rebuilt at great public expense, and that he was without authority to expend public funds where the public was not benefited, generally, and the bridge structures were not obstructing the flow of ordinary surface water from surrounding lands. The land owners then appealed to the County Commissioners who were sympathetic with the project and upon the theory that the County Commissioners were charged with the building and maintenance of county bridges, they adopted a Resolution, that the work of lowering the flow line grade under these bridges be proceeded with and instructed the Clerk to so notify the County Engineer. The County Engineer refuses to comply with the terms of the Resolution.

“It may be stated as a fact that the county bridges in question, as now constructed, do not obstruct the free flow of ordinary, natural surface water from the surrounding lands, although the sub-soil does not drain adequately for all agricultural purposes nor is there drainage from some isolated, natural swampy pockets.

“I have read the opinion of the Attorney General 1941 O. A. G. 3936, rendered June 30, 1941, and while that opinion throws some light on the answer to the above question, yet the facts are entirely different. I would, therefore, greatly appreciate the benefit of your opinion in this instance.”

Chapters 1, 2, 5, 6 and 8 of Title III, Part Second, Section 6442 et seq. of the General Code contain the drainage laws of Ohio. Section 6442 of the General Code reads in part as follows:

“* * * The word ‘improvement’, as used in chapters 1, 2, and 8 of this title, shall include the location, construction, reconstruction, widening, deepening, straightening, boxing, tiling, filling, walling, arching, or any change in the course or location of any ditch, drain, or watercourse, and shall include the deepening, widening, straightening, or any change in the course or location of a river, creek, or run; and shall include a levee, or any wall, embankment, jetty, breakwater, or other structure for the protection of lands from the overflow from any stream, lake or pond, or for the protection of any outlet; and shall include the vacating of a ditch, or drain.”

It is obvious that lowering the flow line under the bridges will involve the deepening of a ditch, drain or other watercourse and therefore the requested project referred to in your communication is the construction of an improvement within the meaning of the statutory definition.

Section 6443 reads 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 that the granting of the petition and the construction of the improvement is necessary for controlled drainage of any land, for irrigation, or to prevent the overflow of any land in the county, and further find that the construction of the improvement will be conducive to the public welfare, and further find that the cost of the proposed improvement will be less than the benefits conferred by the construction of the proposed improvement, may cause to be located, constructed, reconstructed, straightened, deepened, widened, boxed, tiled, filled, walled, dammed, or arched, any ditch, drain, or watercourse, or construct any levee, or straighten, deepen, or widen any river, creek, or run, or vacate any ditch, by proceedings as provided in chapters 1 and 2 of title III of the General Code of Ohio.”

It is also obvious from the reading of such section that the jurisdiction of the county commissioners to proceed with the construction of an improvement under the drainage laws of Ohio is initiated by the filing of a petition. From an exhaustive study of the annotated cases there appears

no implication that county commissioners have ever attempted to proceed with the construction of an improvement as defined in Section 6442, supra, other than upon the filing of a petition as provided for in Section 6443.

Section 6454 outlines the duties of the surveyor in connection with the construction of improvements under the drainage laws, and reads in part as follows:

“The auditor shall certify to the surveyor forthwith, a copy of the findings and orders of the commissioners in favor of an improvement. The surveyor shall cause to be made the necessary survey for the proposed improvement, as found by the commissioners * * *. He shall make an itemized bill of the costs and expenses incurred in the proper discharge of his duties aforesaid, and he shall file said maps, profiles, schedules, and reports with the auditor, upon completing the same.”

Section 6455 et seq. outline the procedure for the assessment of costs and need not be set forth or discussed in arriving at an answer to your question.

In the case of *Rambarger v. Curl, et al., Commissioners et al.*, 115 O. S. 81, in passing upon the county commissioners' powers to act after dismissing its proceedings on a petition for a ditch improvement, the court made the following statement on page 86:

“With reference, however, to the rescission of a finding against such improvement, a different conclusion must be reached, for the reason that the jurisdiction of the board of county commissioners in county ditch improvements can be invoked only by petition. The function of such petition is to invoke such jurisdiction, to furnish certain general information, and to assume responsibility for the payment of the expense of ascertaining, through the surveyor, more definite information. The petition, therefore, has performed its whole function when the board of county commissioners has found either for or against the proposed ditch improvement. If the finding be favorable to the petitioner, his obligation is terminated, and the improvement proceeds as a county enterprise. The jurisdiction of the board invoked by the petition continues, although the function of the petition has been performed.

“Where, however, the board of county commissioners finds against such improvement the quasi jurisdiction, assumed upon the filing of the petition for the purpose of determining whether

it will assume full jurisdiction to prosecute the improvement, is thereby terminated. The petition, having performed its function, has no further vitality, and the board of county commissioners thereafter has no more jurisdiction in the premises than if such petition had never been filed.

“We therefore reach the conclusion that the board of county commissioners in this case had jurisdiction to pass the resolution of January 12, 1922, dismissing the proceedings in the ‘Hayes County ditch,’ and that, having dismissed the proceedings, its jurisdiction with reference to that improvement terminated.”

In answering your question, it is not necessary for me to go into the question or the extent of the work, time, labor and expense which may be required of the surveyor to perform the duties requested of him. Suffice it to say that the value of same is whatever amount involves the expenditure of public funds. It appears that the work which the surveyor was requested to perform is involved in the construction of an improvement under the drainage laws of Ohio; that no petition has been filed with the county commissioners upon which to base their authority to proceed with work as outlined in Section 6454, above quoted.

Therefore, I am of the opinion that the county engineer not only acted within his rights by refusing to proceed as requested, but that he would have unlawfully expended public funds without authority if he had complied with the request.

Respectfully,

HERBERT S. DUFFY,
Attorney General.