

2778

1. HEALTH, STATE DEPARTMENT OF—TRUNK OR MAIN SEWER NECESSARY IN COUNTY FOR SANITARY PURPOSES — COUNTY COMMISSIONERS — AUTHORITY TO CONSTRUCT AND MAINTAIN SAME AT COUNTY EXPENSE—MAY REGULATE TAPPING AND PRESCRIBE CONDITIONS—SECTIONS 6596 THROUGH 6599 GC.
2. COUNTY COMMISSIONERS—HAVE AUTHORITY TO ESTABLISH SEWER DISTRICT AND CONSTRUCT SANITARY SEWER—COST—ASSESS ON SPECIALLY BENEFITED PROPERTY—SECTION 6602-1 ET SEQ., GC.
3. COUNTY COMMISSIONERS MAY CONTRACT WITH CITY HAVING SEWAGE DISPOSAL PLANT—TO CONNECT ANY SANITARY SEWER CONSTRUCTED OR TO BE CONSTRUCTED IN COUNTY WITH SEWER SYSTEM OF CITY—DISCHARGE SEWAGE INTO CITY'S SEWAGE DISPOSAL PLANT—TERMS OF PAYMENT AGREED UPON—SECTION 6602-10 ET SEQ., GC.

SYLLABUS:

1. Under the provisions of Sections 6596 to 6599, inclusive, of the General Code, when the state department of health (formerly the state board of health) finds that a trunk or main sewer is necessary in a county for sanitary purposes, the county commissioners have authority to construct and maintain the same at county expense, and to regulate the tapping thereof by persons desiring to use the same, and prescribe the conditions of such tapping.

2. Under the provisions of Section 6602-1 et seq. of the General Code, county commissioners have authority to establish a sewer district and construct therein a sanitary sewer, and assess the cost thereof on specially benefited property in such district.

3. Under the provisions of Section 6602-10 et seq. the county commissioners may contract with a city having a sewage disposal plant, to connect any sanitary sewer constructed or to be constructed by said county, with the sewer system of such city, and to discharge the sewage of said county sewer into the city's sewage disposal plant, upon such terms of payment as may be agreed upon.

Columbus, Ohio, July 2, 1953

Hon. Robert D. Schuck, Prosecuting Attorney
Hancock County, Findlay, Ohio

Dear Sir:

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

"Within Hancock County and adjoining the city of Findlay, but outside the corporate limits of Findlay, there is a platted territory covering approximately 54 acres on which there are now about 75 dwelling houses all of which are occupied. This built up area extends beyond the Findlay corporation limits approximately 3021 feet. As the sewage from all these dwellings is now handled through individual septic tanks, there is somewhat of a sanitary problem which will become worse as the population in this area increases.

"There are plans to build, within the year a factory which will employ 500 to 1,000 persons at the edge of this built up area and 3021 feet from the corporate limits of the City of Findlay. There is also some likelihood of the construction of additional dwellings adjoining and to the north of this built up area which will also be outside the corporate limits.

"Bearing these facts in mind, would you please give me your opinion on the following questions:

"1. Assuming the State Board of Health finds that a trunk or main sewer is necessary, may the Commissioners of Hancock County, pursuant to Sections 6596 to 6599, both inclusive, General Code, proceed to construct a trunk or main sanitary sewer which will serve this built up area outside the city of Findlay corporation limits, including the proposed factory? If the commissioners may so proceed, could the cost of such sewer be paid for out of the county general fund?

"2. If the Commissioners cannot legally proceed to build the sewer pursuant to Sections 6596 to 6599, both inclusive, General Code, may the County Commissioners proceed to build such sanitary sewer pursuant to Sections 6602-1 to 6602-9, both inclusive, General Code.

"3. If the Commissioners may legally proceed to build such sanitary sewer in accordance with either group of statutes mentioned, may the County Commissioners contract with the City of Findlay pursuant to Sections 6602-10 to 6602-14 both inclusive, General Code, for the connecting of such county sewer to the sewer of the City of Findlay at the corporate limits and

for the disposal of said sewage from the county by the City of Findlay?"

The statutes of Ohio appear to provide two methods of procedure whereby the county commissioners may supply a territory outside of a municipal corporation with sewage facilities. Sections 6596 to 6599, inclusive, of the General Code, authorize the county commissioners to provide a main or trunk sewer either within or without the limits of a municipality. It is to be noted that this authority is to be exercised only when the state board of health finds that such sewer is necessary for sanitary purposes.

Section 6596, General Code, reads as follows:

"When the state board of health finds that a trunk or main sewer is necessary in a county for sanitary purposes, the board of county commissioners of such county may cause surveys to be made thereof and plans and specifications thereof prepared. Upon approval by the state board of health of such plans and specifications, the commissioners may construct and maintain said trunk or main sewer or part thereof, within or without the limits of a municipal corporation, regulate the tapping thereof by lateral sewers and prescribe the conditions of such tapping."

Section 6597, General Code, reads as follows:

"The county commissioners may acquire, by purchase or appropriation proceedings, all real and personal property necessary for the proper construction and maintenance of such trunk or main sewer; and for such trunk or main sewer or part thereof may occupy any public road, street, avenue or alley."

Section 6598, General Code, authorizes the commissioners where necessary, to procure a right-of-way or easement for such trunk or main sewer by appropriation proceedings, and Section 6599, General Code, outlines the procedure therefor. The above sections comprise an Act found in 97 Ohio Laws, 533, and none of them has been changed since their enactment.

There is no specific provision in those sections for financing the cost of acquiring the land and constructing such trunk or main sewer. Accordingly, we must assume that the legislature expected the county commissioners to finance the same either by appropriation from the general fund or by the issuance of bonds. Section 5625-5, General Code, provides that out of the general fund of a subdivision there may be paid the cost of the acquisition or construction of any permanent improvements

except, in the case of counties, the construction or repair of roads or bridges.

Section 2293-2, General Code, authorizes all political subdivisions to issue bonds for the purpose of "acquiring or constructing any permanent improvement which such subdivision is authorized to acquire or construct." Manifestly a main or trunk sewer is included within that provision.

There is no provision in the statutes above quoted and referred to, which seems to contemplate any assessment of the cost of such trunk or main sewer on benefited property. It will be noted, however, that in Section 6596 supra, the commissioners are authorized to "regulate the tapping thereof by lateral sewers and prescribe the conditions of such tapping." This would appear to give the commissioners a wide discretion in fixing the charges for tapping and using the sewer, including the cost of sewage disposal, whenever any person or corporation desires to connect with it.

Section 6602-1 et seq., General Code, provide for the establishment by the county commissioners of sewer districts outside of incorporated municipalities, and for the assessment of the cost thereof upon specially benefited properties within the district established by them. If the cost is to be assessed upon property specially benefited, the procedure set out in Section 6602-2 et seq., General Code, will be followed. These sections provide for the preparation of tentative assessments, for notice to property owners of the same, for filing objections thereto, and for appeals to the probate court as to the necessity of the improvement and the tentative apportionment of the assessments.

Furthermore, it may be noted that special assessments on property are always to be kept within the special benefit conferred; otherwise they are subject to the action of a court of equity, enjoining their collection, in whole or in part, as an unlawful taking of private property in violation of the constitutional prohibition contained in Article I, Section 19. *Walsh v. Barron*, 61 Ohio St. 15; *Railroad v. Keith*, 67 Ohio St. 279; *Coal Co. v. Kozad*, 79 Ohio St. 348.

I note the case of *State ex rel. Bowman v. Commissioners*, 124 Ohio St., 174, where proceedings under Section 6602-1 et seq. of the General Code, were under consideration, and it was claimed that the commis-

sioners in laying out a sewer district and assessing the cost of a system of sewers, had included land that could not possibly be benefited. It was held:

“2. Systems for water supply and storm and sanitary sewers, to be established in thickly populated districts outside of municipalities, have a real and substantial relation to the public health and public welfare.

“6. It's a gross abuse of the exercise of that discretion to establish such a sewer system in a sparsely inhabited district or as a part and parcel of a plan to promote a private enterprise, or where there is no substantial menace to health; and where such abuse can be fairly made to appear, a court of equity may enjoin the construction, at any time before the issuance of negotiable obligations to provide the funds for same.”

This case, as will be noted, recognized the propriety of establishing such districts but pointed out the possibility of an abuse of discretion on the part of the commissioners. It does not in any degree prevent the conclusion that the commissioners have the power to lay out such district, and assess the costs upon benefited property, but only points to the necessity of being sure that the property to be assessed will be benefited in the amount of the assessment.

Section 6602-1 contains the following, among other provisions:

“The commissioners may fix reasonable rates or charges of rents to be paid to the county for the use of such sewer or sewage treatment or disposal works by every person, firm or corporation whose premises are served by a connection to such sewers or sewage treatment or disposal works, and may change such rates or charges from time to time as they may deem advisable. * * *”

This section further provides that moneys collected as rents for the use of such sewers and sewage treatment works in any such district, shall be used for the payment of the cost of management, maintenance and operation of the same, and any surplus of such income may be used for their enlargement or replacement and for the payment of interest or principal on any debt incurred for the construction of such sewer or disposal works.

Section 6602-10 et seq., General Code, make provision for a contract between the county commissioners of any county and the proper authorities of any city or village, to connect any sewer of such county

with the sewer of a city and for the disposal of sewage through the sewage treatment or disposal works belonging to such city. Section 6602-10, General Code, reads as follows:

“That the board of county commissioners of any county in this state or the council of any city or village may enter into a contract, upon such terms and conditions and for such period of time, as may be mutually agreed upon, with any other county, city or village, to prepare all necessary plans and estimates of cost, to connect any sewer or sewers of such county, city or village, with any sewer or sewers constructed, or to be constructed, by any other county, city or village, and to provide for the joint use by such contracting parties of such sewer or sewers and of any sewage treatment or disposal works of such county, city or village.” (Emphasis added.)

In order to indicate the direct manner in which a program such as you present, may be accomplished by this contract procedure, I have italicized the words which appear to me to cover the proposition. I think it is worthy of note that the language of the above section is broad enough to cover the connection of a county sewer built under the provisions of Section 6596 supra, as well as one which may have been built by the procedure outlined in Section 6602-1 supra, which contemplates the establishment of a sewer district. Section 6602-10, General Code, with its broad language, “to connect any sewer or sewers of such county,” seems to me to afford abundant authority to make this contract with reference to a sewer constructed by the county under the general authority contained in Section 6596. This appears to me the more evident in view of the fact that Section 6602-10 was passed long after the enactment of Section 6596 et seq., and the legislature in using the language it did must have known and contemplated that the county might desire to connect a main or trunk sewer which it had built at its own expense, with the sewage disposal works of a city. Section 6602-12 provides that a county so contracting may “provide for payment of the agreed compensation by the levy of taxes, special assessments or sewer rentals,” and may issue bonds in anticipation of such taxes and assessments.

Accordingly, it is my opinion and you are advised:

1. Under the provisions of Sections 6596 to 6599, inclusive, of the General Code, when the state department of health (formerly the state board of health) finds that a trunk or main sewer is necessary in a county

for sanitary purposes, the county commissioners have authority to construct and maintain the same at county expense, and to regulate the tapping thereof by persons desiring to use the same, and prescribe the conditions of such tapping.

2. Under the provisions of Section 6602-1 et seq., of the General Code, county commissioners have authority to establish a sewer district and construct therein a sanitary sewer, and assess the cost thereof on specially benefited property in such district.

3. Under the provisions of Section 6602-10 et seq. the county commissioners may contract with a city having a sewage disposal plant, to connect any sanitary sewer constructed or to be constructed by said county, with the sewer system of such city, and to discharge the sewage of said county sewer into the city's sewage disposal plant, upon such terms of payment as may be agreed upon.

Respectfully,

C. WILLIAM O'NEILL

Attorney General