

OPINION
45-76

November 3, 1945 (OPINION)

DRAINAGE

RE: Petition - Discontinuance

Your letter of October 31st to this office has been received.

With reference to section 61-2115, it is the opinion of this office that the petition of a majority of the landholders referred to in section 61-2115 for the discontinuance of proceedings for the establishment of the drain may be filed at any time prior to the completion of the drain. The landowners would hardly be fully informed as to the cost of the drain, and therefore, the desirability of discontinuing proceedings until after the hearing provided in section 61-2114 is had. Interested landowners at that meeting may find that the cost is going to exceed the benefits, and it would hardly be possible for the preparation and presentation of a petition to discontinue to be secured and filed at such hearing.

It is therefore our opinion that the landowners, being informed at this meeting of the probable cost, may then and after such hearing prepare and present the petition for discontinuance. It is our opinion that the separation of section 61-2115 from its original context as a part of section 61-2114 does not in any manner change its constructions.

With reference to the right of appeal, it is our opinion that the only appeal provided for by the statute is "from the order of the board establishing the drain." This rather clearly would not authorize an appeal from any other order. However, an appeal might lie from other orders of the board of drainage commissioners under the provisions of chapter 240 of the Laws of 1941, found in the Revised Code as chapter 28-32. Subsection 1 of section 2486, as amended by chapter 14 of the Laws of 1944 provides action by the board of county commissioners upon presentation of a petition signed by property owners liable for ten percent of the cost of repairs. Upon presentation of such petition to the commissioners, they call a meeting for hearing upon the petition. It is our opinion that the hearing provided by subsection 2 is for the purpose of discussing the proposed improvement and repairs and the probable cost and all other pertinent information referring to the proposed repair of the drain.

There is nothing in this subsection indicating that the board shall at such hearing determine the validity of the signature on the petition. They must have done that prior to the calling of the hearing. It is our opinion that at the meeting called under the provisions of subsection 1 and held under the provisions of subsection 2, and after all of the landowners present have learned the details of the proposition, "signers under such petition shall have the right to withdraw their names. Other owners of property within the drain district shall at that have the right to add their names to such petition, at the time of the hearing or within twenty days thereafter, if they so desire." The petition referred to in

subsection 2 clearly is the petition mentioned in subsection 1.

Under subsection 3, nothing can be done until 20 days after such hearing. This period clearly in our opinion is given to enable original signers of the petition to withdraw, and others to add their names, or for the preparation of an entirely new petition for the repair of the drain. If, after the 20 days, the original petition or the new petition contains the signatures of property owners owning property which is liable for 51 percent or more of the cost of such repairs or improvement, the board shall proceed with the repairs or improvement. If at the end of 20 days such original petition or many petition before the board does not contain the names of landowners liable for 51 percent of the improvements, then nothing further shall be done for at least one year.

It is not absolutely clear whether it is the intent of these subsections 1, 2, and 3, that the petition upon which the board finally acts is the original petition after the right to withdraw signatures or add signatures thereto has been exercised, as provided in subsection 2, or if it is the intent that an entirely new petition be presented. It is our opinion that if after 20 days from the date of hearing and after the right to withdraw or add signatures has been exercised the petition in its final form is signed by the necessary 51 percent, the board must go ahead with the repairs. Further, if an entirely new petition has been prepared and contains the necessary 51 percent signatures, then the board may go ahead, but if after the 20 days have elapsed there is no petition before the board signed by the necessary 51 percent, then all proceedings shall be abandoned for at least one year.

When Mr. Johnson gave me your letter of October thirty-first, he told me that Mr. Vernon Johnson of your city had called him regarding the matter contained in your letter, explaining that you were both interested in receiving our opinion in time so you would have it for a meeting on Tuesday. If I understood correctly, Mr. Vernon Johnson told the attorney general that you were not in accord with the opinions of Mr. Acker, written you on October ninth and October fifteenth. We have checked these again and this office is in full accord with these opinions.

You will note that in section 61-2110, providing for the petition for construction of a drain, that where the leading purpose of the proposed drain is to benefit the health, convenience and welfare of the people of any city or village, the petition shall be signed by citizens and not by the officers of the city or village. As stated in Mr. Acker's opinions, we can see no situation in which the township could be affected, and if it were, we cannot agree that the township officers could sign for the township.

NELS G. JOHNSON

Attorney General