

OPINION 11

OFFICIAL OPINION NO. 11

August 15, 1975

Honorable Harry C. Thompson
Indiana State Senator
4725 Stringtown Road
Evansville, Indiana 47711

Dear Senator Thompson:

This is in response to your request for my official opinion on the following question:

“Under what circumstances may drainage detention basins and drainage control dams be built by county drainage boards, and do these boards have the power of eminent domain?”

ANALYSIS

The Indiana Drainage Code, Indiana Code of 1971, 19-4-1-1 *et seq.*, creates a drainage board in each Indiana county and sets forth procedures both for the construction of new drains and for the reconstruction, maintenance, or vacating of existing drains. Code section 19-4-1-10 requires the county surveyor, who is a member of the drainage board, to classify all existing legal drains in the county either as drains in need of reconstruction, drains in need of periodic maintenance, or drains which should be vacated and to submit this classification to the drainage board. The construction of drainage detention basins and drainage control dams, the subject of your request here, is one of the repairs expressly authorized by Code section 19-4-1-10 where the surveyor has classified a drain as being in need of reconstruction.

The criteria to be followed by the surveyor in making his initial classification as to whether an existing drain is in need of reconstruction are set out in Code section 19-4-1-10(b), which provides, in part, the following:

“A legal drain is in need of reconstruction when it will not perform the function for which it was de-

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signed and constructed, or when topographical or other changes have rendered the drain inadequate to properly drain the lands affected, without extensive repairs or changes being made thereto.”

If the board concurs with the surveyor that a specific drain is in need of reconstruction, the surveyor then must make the further determination as to what method of reconstruction should be used. Code section 19-4-3-1(a) provides, in part, the following:

“When the board has referred a legal drain to the surveyor for a reconstruction report the surveyor shall determine and set forth in his report the best and cheapest method of reconstructing the drain so that it will adequately drain all lands affected.”

Thus, the construction of drainage detention basins and drainage control dams is authorized when that is the cheapest and best method of adequately draining the affected lands.

In the event the drainage board adopts the surveyor’s recommendation to construct drainage detention basins and drainage control dams, the question arises as to what property interest the board has in the land on which these improvements are constructed. The Indiana Drainage Code does *not* grant the power of eminent domain to the drainage boards. It does, however, create a right-of-way on which these improvements can be constructed. Code section 19-4-6-1 provides, in part, the following:

“The surveyor, or the board, or any duly authorized representative of either the surveyor or the board, in the performance of any duty required or permitted under the provisions of this act [19-4-1-1—19-4-10-5], shall have the right of entry over and upon lands lying within seventy-five [75] feet of any legal drain, the seventy-five [75] feet to be measured at right angles to the center line of any legal tile ditch, and to be measured at right angles from the existing top edge of each bank of a legal open ditch as determined by the surveyor. Spoil bank spreading resulting from

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an improvement to a legal open ditch may extend beyond said seventy-five [75] foot right-of-way if in the opinion of the surveyor the same is necessary and provisions has been made in the engineers report therefor prior to the hearing thereon.”

Compensation for any damages which the landowner sustains as a result of the reconstruction and use made of the right-of-way is provided under Code section 19-4-3-2 which reads, in part, as follows:

“[T]he board shall: . . . (2) determine the amount of damages sustained by any owner as a result of the improvement, and shall prepare a schedule of damages containing the name and address of each owner determined to be damaged and a description of the owner’s land as shown by the surveyor’s report, the amount of each owner’s damages, and an explanation of the injury upon which the determination was based. The surveyor shall in his report add the damages to all lands as determined by the board to his estimated costs and expenses of the improvement and the result shall constitute the total estimated cost of the improvement.”

If the landowner does not agree with this assessment of damages, Code sections 19-4-3-6 and 19-4-8-1 *et seq.* authorize him to seek judicial review of the findings of the board.

Thus, under the Drainage Code, the land used for a drain remains the property of the original owner, and the statute presumes the benefits conferred on that land exceed any damages to it. It is true that the right-of-way provisions noted above, which require measuring from the drain tile or, in the case of an open ditch, from the ditch bank, seem to apply especially to methods of reconstruction other than the construction of drainage detention basins and drainage control dams. Nevertheless, the General Assembly plainly has not provided a separate procedure to be used where drainage detection basins and drainage control dams are to be constructed and has not granted to a drainage board the power of eminent domain.

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CONCLUSION

It is, therefore, my Official Opinion that under the Indiana Drainage Code a county drainage board may construct drainage detention basins and drainage control dams when that is the cheapest and best method of adequately draining affected lands. However, the Indiana General Assembly has *not* given the power of eminent domain to county drainage boards.