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and a permanent operator's record fee . . . shall be so taxed by the court as a part of the costs against the defendant . . . and the permanent operator's record fee . . . shall be paid over to the commissioner . . ."

Therefore, it is my opinion that a certified abstract of the record and the permanent operator's record fee must be forwarded to the commissioner in all instances where there is a conviction of a violation of a state law regulating the operation of motor vehicles on public highways or of any city ordinance relating to moving traffic, but not in an instance where the conviction is for the violation of a city ordinance relating to non-moving traffic.

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OFFICIAL OPINION NO. 20

September 30, 1966

**STATUTES AND RECODIFICATION—Indiana Drainage Code—Duties of County Surveyor Concerning Construction and Maintenance of Drains.**

Opinion Requested by Hon. John W. Donaldson, State Representative.

I am in receipt of your recent request for an opinion regarding the provisions of the 1965 Drainage Code relating to the maintenance of drains.

The Drainage Code, Acts 1965, ch. 305, the same being Burns IND. STAT. ANN., §§ 27-2001 through 27-2606, is an ambitious and comprehensive piece of legislation. Unfortunately, certain specific applications of the Code, especially those pertaining to maintenance, are not always clear. Therefore, in order to answer your questions it will be necessary to construe the Act and, like the Indiana Supreme Court in

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*State v. Griffin*, 226 Ind. 279, at 284, 79 N.E. 2d 537, 540 (1948):

“ . . . in so doing we are bound by the rule that a statute must be reasonably and fairly interpreted so as to give it efficient operation, and to give effect if possible to the expressed intent of the legislature. It should not be wantonly narrowed, limited or emasculated and rendered ineffective, absurd or nugatory. If possible it should be allowed to perform its intended mission as shown by the existing evils intended to be remedied.”

Prior to consideration of your questions, it would be appropriate to determine what activities are to be considered maintenance. Section 102 of the Act, Burns § 27-2002, provides two definitions which may be helpful:

“(7) ‘improvement’ means (1) the construction of a new drain, and all work necessary and incidental thereto, (2) the reconstruction of a drain, and all work necessary and incidental thereto, or (3) periodic maintenance of a drain, and all work necessary and incidental thereto; . . .

“(9) ‘legal drain’ means an open ditch or a tiled ditch, as defined in this section, or a combination of the two, which the provisions of this act make subject to the jurisdiction and control of a county drainage board;”

There can be little confusion between what constitutes the “construction” of a drain and what constitutes the “maintenance” of a drain. There could, however, be some difficulty in distinguishing between “reconstruction” and “maintenance.” That confusion is eliminated by § 110 of the Act, Burns § 27-2010, which provides:

“(a) The surveyor shall classify all legal drains in the county as (1) drains in need of reconstruction, (2) drains in need of periodic maintenance, and (3) drains which should be vacated.

“(b) A legal drain is in need of reconstruction when it will not perform the function for which it was

designed 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. Such repairs or changes may be, but are not limited to, one (1) or a combination of the following :

“(1) converting, in whole or in part, an open ditch to a tiled ditch or a tiled ditch to an open ditch, or by adding an open ditch to a tiled ditch, or a tiled ditch to an open ditch ;

“(2) increasing the size of the tile ;

“(3) deepening or widening an open ditch ;

“(4) extending the length of a drain ;

“(5) changing the course of a drain ;

“(6) constructing drainage detention basins and drainage control dams ;

“(7) providing for erosion control and for grade stabilization structures ; or

“(8) making any major change to a drainage system that would be of public utility.

“(c) A legal drain is in need of periodic maintenance when, by periodically cleaning out, spraying, removing obstructions, and making minor repairs, the drain will perform the function for which it was designed and constructed and will be adequate to properly drain all lands affected thereby under existing conditions.”

“Maintenance,” then, refers to those activities necessary to keep an existing and functioning legal drain in a working condition.

It could also be pointed out that there is a difference between the funds established for construction and reconstruction and the funds established for maintenance. Section 701 of the Act, Burns § 27-2401, creates a general drain improvement fund in each county, which fund shall be used to pay the cost of construction or reconstruction of a legal drain. Section 702, Burns § 27-2402, creates a maintenance fund for each in-

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dividual legal drain. In other words, payment for construction and reconstruction is derived from one county-wide fund and payment for maintenance is derived from a separate fund established for the particular drain involved. The source of the two types of funds differs in that the general drain improvement fund can be augmented by appropriations from the general fund of the county or taxes levied by the county council for drainage purposes, and also by the sale of bonds.

Similarly, the method of levying assessments against owners of property benefited by drainage improvements differs between construction or reconstruction and maintenance. Sections 709 through 718 of the Act, Burns §§ 27-2409 through 27-2418, treat the assessment of benefited properties. In essence, these sections treat a construction or reconstruction as a single assessment which the property owner may pay immediately or may amortize over a period of years at six per cent interest, while the maintenance charge is treated as an annual assessment against the property.

Your questions may now be considered in the order asked.

Your first question was as follows:

"1. Section 407, Acts 1965, Chapter 305, indicates that the Drainage Board may pay for appropriate maintenance from the Maintenance Fund. No where in the Act does it define who is to do the actual maintenance work, or how it is to be done. Therefore, I would appreciate an official opinion upon the following question as to Section 407, to-wit:

"A. Who can do the maintenance work?

"B. Must all work be let by contract?

"C. If let by contract, can it be let by time and material or must it be by lump sum?

"D. Can the Drainage Board hire laborers to perform such maintenance work?

"E. Can the Drainage Board use County Highway labor to perform such work?"

For convenience, subquestion B, "Must all work be let by contract?", will be answered first.

There is no section of the Act which sets out which work must be done by contract. The procedure for letting a contract is set out in several sections, including Section 704, Burns § 27-2404, which provides, *inter alia*:

“When an improvement is established by the board and the work thereon is not stayed pursuant to the provisions of article eight of this act, or whenever the board determines that maintenance work shall be let by contract, the board may contract for the work to be done as a whole or in sections.”

The above language, like the many parts of the Act noted in the introductory passages, appears to distinguish between maintenance and construction or reconstruction. The above language seems to suggest that the decision as to whether maintenance should be done by the letting of a contract or otherwise rests entirely within the discretion of the Drainage Board.

A further interpretation might be advisable. The word “contract” as used in the statute refers to an agreement between parties, not the procedure by which such an agreement is reached. The Drainage Code provides two procedures for reaching the agreement of which the contract is evidence, one to be followed where the contract price is in a sum equal to or greater than two thousand dollars (\$2,000.00), the other to be followed when the contract price is of a lesser sum.

Therefore, the above quoted section must be interpreted as meaning that the Drainage Board either may cause the work to be done themselves or may contract with some outside agency to perform the work at a stipulated sum.

The preceding answer leads us into the question asked in subquestion A, “Who can do the maintenance work?”

If the Board decides that the maintenance work should be contracted to some outside agent, then the Board must receive bids on the work. The procedure to be followed in soliciting bids is set out in § 705 of the Act, Burns § 27-2405, and the following section provides that the contract is to be awarded to the lowest bidder.

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If the work is not to be let by contract, then the Board must cause the work to be done itself. It is my opinion that the Board causes such work to be done by the county surveyor. The surveyor is given the general power to superintend all maintenance work by § 109 of the Act, Burns § 27-2009. Further, two separate sections of the Act, §§ 602 and 702, Burns §§ 27-2302 and 27-2402, specifically authorize the surveyor to perform certain acts of maintenance without prior consultation with the Drainage Board. It is, therefore, perfectly reasonable to conclude that the Act contemplates that maintenance work not contracted out to private parties will be performed by the person whom the Act gives the duty to supervise maintenance and who is specifically authorized to perform certain acts of maintenance.

The answer to the above also answers subquestion D concerning the authority of the Drainage Board to hire laborers to perform maintenance work.

Section 106 of the Act, Burns § 27-2006, specifically authorizes the Drainage Board to employ an attorney to represent and advise the Board, and, in certain specified situations, to engage a registered engineer to assist the surveyor. No other specific authority to engage personnel is granted. Assuming the answer to subquestion A is correct, then no authority to hire laborers can be inferred from the Act.

The answer to subquestion E has more or less been determined by the preceding answers. The Drainage Board cannot themselves hire laborers, and they must work through the surveyor to maintain drains. This indicates that the Drainage Board cannot use county highway labor.

The remaining subquestion asks whether a contract must be let in a lump sum or whether it can be let by time and material. The answer to this question is specified in § 704 of the Act, Burns § 27-2404, set out above, which specifically provides:

“When an improvement is established by the board and the work thereon is not stayed pursuant to the provisions of article eight of this act, or whenever the board determines that maintenance work shall be let by

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contract, the board may contract for the work to be done as a whole or in sections.”

The answer to your first question may be summarized as follows:

A. Who can do the maintenance work?

The surveyor if no contract is let; the lowest qualified bidder if a contract is let.

B. Must all work be let by contract?

Maintenance work is let by contract only if the Board determines to do so.

C. If let by contract, can it be let by time and material or must it be by lump sum?

The contract can be let by time and material.

D. Can the Drainage Board hire laborers to perform such maintenance work?

No.

E. Can the Drainage Board use county highway labor to perform such work?

No.

Your second question reads as follows:

“2. Section 109 states that the County Surveyor shall be the technical authority and then further defines his responsibilities. In view of this Section, I submit the following question for an official opinion, to-wit:

“A. Can the County Surveyor hire laborers to perform maintenance work as referred to in Section 407, Acts 1965, Chapter 305?”

The Drainage Code imposes a number of duties upon the surveyor and several of such duties pertain to maintenance.

Section 109 of the Act, Burns § 27-2009, provides that he will be the technical authority on the maintenance of all legal drains and that he will superintend all maintenance work on all improvements.

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The county surveyor is also expressly given the duty to perform certain acts of maintenance in specific situations. Section 602 of the Act, Burns § 27-2302, provides, in part:

“When any legal drain is obstructed or damaged by logs, trees, brush, unauthorized structures, trash or debris, excavating or filling, pasturing livestock, or any other manner, the surveyor shall immediately remove such obstruction and repair such damage.”

Section 702 of the Act, Burns § 27-2402, provides, in part:

“Whenever the estimate for annual maintenance as made by the surveyor for any tile drain is not more than one hundred dollars [\$100] and such tile drain does not drain into a legal open drain, the board may exempt such tile drain from the provisions of this act requiring creation of a maintenance fund. Such expenses up to one hundred dollars [\$100] for such tile drain in each year shall be paid from the general drain improvement fund. The surveyor may proceed to make these minor repairs without advertising or letting a contract or contracts.”

In addition to the above specified duties imposed upon the surveyor, the answer to your first question indicates that the Act intends that all maintenance should be performed by the surveyor unless the Drainage Board should decide to enter a contract with some outside party to perform that maintenance.

It is a well established principle of statutory construction that the grant of power or the imposition of a duty implies the authority necessary to exercise that power or fulfill that duty. See *Newcomb v. City of Indianapolis*, 141 Ind. 451, 40 N.E. 919 (1895); *Hyland v. Rochelle*, 179 Ind. 671, 100 N.E. 842 (1913), and cases cited on page 678 therein and 100 N.E. at 845.

Since the Act imposes duties on the surveyor it must be interpreted as also granting the authority to hire persons to perform those duties.



Any person employed by the surveyor to perform maintenance work on the legal drains of the county must be paid from the maintenance funds of the drains maintained in accord with § 407, Burns § 27-2159, which provides, in part:

“The maintenance fund for each legal drain or unit created under the authority of this act shall be subject to the use of the board, or joint board, as the case may be, for the necessary or proper repair or maintenance of the particular drain or unit, and such repair or maintenance may be done whenever in the judgment of the board, upon the recommendation of the surveyor, the same is necessary. The payment for all such maintenance work shall be made out of the appropriate maintenance fund, . . .”

Your third question reads as follows:

“3. Section 704, Acts 1965, Chapter 305, states ‘. . . whenever the Board determines that maintenance work shall be let by contract. . . .’ and Section 708 says ‘. . . whenever the contract calls for a payment to be made to the contractor upon the completion of work, the surveyor shall inspect the work done and make written report. . . .’ I submit the following question for an official opinion under these two Sections, to-wit:

“A. Is the surveyor obligated to inspect and approve maintenance work done without a contract being let?

“B. Can the Board approve payments for maintenance work done other than by contract, without the approval of the surveyor?”

The answer to your third question is contained in the answers given to your earlier questions. Maintenance work may be done either by the surveyor or by some third party who has entered a contract to perform the work. There is no provision in the Drainage Code for work being done by a third party who has not entered into a contract with the Drainage Board, although the Code does set out certain procedures for entering a contract depending on whether the contract price is

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greater or lesser than two thousand dollars (\$2,000.00). It is doubtful that any law permits a public agency to have work performed without a contract being let, although many laws do provide for an informal procedure for letting contracts in certain specified instances.

All drainage work performed by a third party who has entered into a contract with the Drainage Board must be inspected and approved by the surveyor before payment is to be made. Section 707 of the Act, Burns § 27-2407, provides, in part:

“(a) The contract between the board and a successful bidder shall provide: . . .

“(2) that no claim for payment under the contract will be approved by the board until the work for which the claim is presented has been approved by the surveyor; . . .”

The following section specifies the procedure to be followed by the surveyor in indicating his approval of the work done. All maintenance work not let by contract is done by the surveyor himself and so inspection and approval are automatic.

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### OFFICIAL OPINION NO. 21

September 30, 1966

#### **STATUTES AND RECODIFICATION—COUNTY OFFICERS —Indiana Drainage Code—Duties of County Surveyors Concerning Minor Repairs.**

Opinion Requested by Mr. William J. Andrews, Acting Director, Department of Natural Resources.

I am in receipt of a letter from your predecessor containing several questions pertaining to the 1965 Indiana Drainage Code, Acts 1965, ch. 305, the same being Burns IND. STAT.