[Cite as *Single Cty. Ditch Petition Known as Myers Ditch v. Morrow Cty. Bd. of Commrs.*, 2010-Ohio-3694.]

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF
SINGLE COUNTY DITCH PETITION
KNOWN AS MYERS DITCH

Plaintiffs-Appellants

-vs-

MORROW COUNTY BOARD OF
COMMISSIONERS, ET AL.

Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. Patricia A. Delaney, J.

Case No. 2009CA0012

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Morrow County Common Pleas Court, Case No. 2008CV00203
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	August 6, 2010

APPEARANCES:

For Defendants-Appellees

CHARLES S. HOWLAND
Morrow County Prosecutor
60 East High Street
Mt. Gilead, Ohio 43338

For Plaintiffs-Appellants

TERRY L. GERNERT
Kennedy, Purdy, Hoeffel & Gernert, LLC
P.O. Box 191
Bucyrus, Ohio 44820-0191

Hoffman, P.J.

{¶1} Plaintiffs-appellants Frank Coleman and Laura Coleman appeal the October 13, 2009 Judgment Entry of the Morrow County Court of Common Pleas in favor of Defendants-appellees the Morrow County Board of Commissioners, et al.

STATEMENT OF THE CASE

{¶2} On August 30, 2007, Edwin Ruhl filed the Myers Ditch Petition with Appellee the Morrow County Board of Commissioners (hereinafter "Board"). The landowners petitioned the Board to "locate, repair and maintain an open and tile ditch with crossovers." The ditch was originally dug in 1877, and the last official maintenance occurred in 1937, to clean the existing ditch and tile from silt deposits. The proposed improvement would replace the existing ditch. The ditch becomes an open ditch at Appellant's property.

{¶3} On December 10, 2007, the Board conducted an initial public hearing concerning the ditch petition. On March 11, 2008, the Board held the final hearing on the Myers Ditch Petition, and approved the petition on March 12, 2008.

{¶4} Appellants Frank and Laura Coleman filed an appeal of the Board's decision with the Morrow County Court of Common Pleas on April 1, 2008.

{¶5} Via Judgment Entry of October 13, 2009, the Morrow County Court of Common Pleas entered judgment in favor of the Board finding "by a preponderance of the evidence the Myers Ditch repairs are necessary and the benefits gained outweigh the $42,000 cost."

{¶6} Appellants now appeal, assigning as error:

{¶7} "I. THE COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT THE PRESENT DRAINAGE SYSTEM WAS INADEQUATE AND THEREFORE THE PETITIONED IMPROVEMENT WAS NECESSARY.

{¶8} "II. THE COURT ERRED AS A MATTER OF LAW IN DETERMINING THE BENEFITS CONFERRED BY THE IMPROVEMENT OUTWEIGH THE COST.

{¶9} "III. THE COURT ERRED AS A MATTER OF LAW IN FAILING TO DETERMINE THAT THE CONSTRUCTION PROJECT WAS THE BEST ROUTE, TERMINI, OR MODE OF CONSTRUCTION TO ACCOMPLISH THE PURPOSE OF THE IMPROVEMENT."

I, II, and III

{¶10} All three of Appellants' assigned errors raise common and interrelated issues; therefore, we will address the arguments together.

{¶11} Appellants maintain the existing ditch system is more than adequate, when properly maintained, to drain the watershed; therefore, the petitioned construction is unnecessary. Appellants cite the testimony of the Morrow County Engineer Randy Bush the tile is sufficient to provide adequate drainage, and the tile provided adequate drainage until it became plugged. Appellants conclude the cost of the construction far outweighs the minimal benefits generated by replacement of the ditch. Instead, Appellants maintain cleaning the tile would allow the existing drainage system to function properly.

{¶12} Ohio Revised Code Section 6131.30 provides:

{¶13} "(F) If the appeal is from a final order of the board finding in favor of the improvement and approving and confirming the assessments, and if the court finds that

the improvement is necessary and will be conducive to the public welfare and that the cost thereof will be less than the benefits, *the court shall hear all the matters appealed, shall correct and confirm the assessments according to benefits, and shall certify the findings to the clerk of the board of county commissioners*. The costs before the board shall be a part of the costs of the improvement, and the court shall adjudge the costs made on the appeal as it considers equitable." (Emphasis added.)

{¶14} In accordance with O.R.C. 6131.31, before the trial court finds for the improvement, the clerk of the court must notify all owners of land about to be assessed, named in the schedules of assessments and damages, by mail and publication.

{¶15} The court may find for the improvement if from the evidence adduced and the schedules filed it finds the improvement is necessary and will be conducive to the public welfare and that its cost will be less than the benefits to be derived from it. R.C. 6131.31(C).

{¶16} After the court finds for the improvement, and after the determination of questions relative to assessments, compensation, and damages, the court has a duty to order the clerk of the court to certify the transcript of the findings and judgments, together with all the original papers filed in the court, to the clerk of the board of county commissioners. Id.

{¶17} It is undisputed the trial court's October 2009 entry does not apportion costs and assessments. Once the assessment is determined, any party may contest any assessment for payment of the ditch via R.C. 6131.19 and 6131.22. As the hearing on damages and assessments has not occurred, there has been no final adjudication

pursuant to R.C. 6131.31. R.C. Section 6131.30 specifically requires the trial court to commence proceedings as to the assessments prior to entering final judgment.[1]

{¶18} Accordingly, the within appeal is dismissed for want of a final appealable order.

By: Hoffman, P.J.

Delaney, J. concurs,

Farmer, J. dissents

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

_____
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

[1] This Court has reviewed *Endley v. Aldrich* (1896), Cir. Ct. of Ohio, 8 Ohio C.D. 725. We find the statute referenced therein, Gen. Code Sect. 6450, is different than the statute governing the proceedings in this matter.

Farmer, J., dissents

{¶19} I respectfully dissent from the majority's opinion that appellant's appeal is not a final appealable order. I would find pursuant to R.C. 2505.02(A)(2), an appeal pursuant to R.C. 6131.30 is a special proceeding established by statute. Although, I concede the assessment determination has not been made, I would find, in the sake of judicial economy, that the issue raised sub judice is a final order.

{¶20} Based upon the standard of review in *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, I would find the record establishes that the improvement is necessary and conducive to the public welfare and the cost thereof will be less than the benefits derived.

{¶21} I would affirm the trial court's judgment.

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF SINGLE COUNTY DITCH PETITION KNOWN AS MYERS DITCH	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
MORROW COUNTY BOARD OF COMMISSIONERS, ET AL.	:	
Defendants-Appellees	:	Case No. 2009CA0012

For the reason stated in our accompanying Opinion, the within appeal is dismissed for want of a final appealable order. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY