

3-1-1971

## Revision of the Drainage Code

John R. Kowalczyk

Follow this and additional works at: [http://scholarship.law.nd.edu/new\\_dimensions\\_legislation](http://scholarship.law.nd.edu/new_dimensions_legislation)



Part of the [Law Commons](#)

---

### Recommended Citation

Kowalczyk, John R., "Revision of the Drainage Code" (1971). *New Dimensions in Legislation*. Paper 27.  
[http://scholarship.law.nd.edu/new\\_dimensions\\_legislation/27](http://scholarship.law.nd.edu/new_dimensions_legislation/27)

This Commentary is brought to you for free and open access by the Law School Journals at NDLScholarship. It has been accepted for inclusion in New Dimensions in Legislation by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## REVISION OF THE DRAINAGE CODE

JOHN R. KOWALCZYK  
INDIANA

A BILL FOR AN ACT to amend sections 801 and 803 of "The Indiana Drainage Code", approved March 11, 1965.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF INDIANA:

SECTION 1. Section 801 of the above entitled act is amended to read as follows: Sec. 801. (a) Any owner of land affected by a final order or determination of a drainage board shall be entitled to a judicial review thereof, as provided by this article, upon filing a petition in the circuit or superior court of the county wherein the board is located, or if a joint board in the county where the surveyor who is an ex officio member of the joint board was elected, upon setting out the order or determination complained of and alleging specifically wherein said order or determination is arbitrary, capricious, unlawful, or not supported by substantial evidence. (b) Whenever an owner of land shall file a petition for judicial review, such owner shall be required to furnish to the court a bond or equivalent security. Such bond or equivalent security shall in no case be less than ten percent (10%) of the total estimated cost of the improvement called for in the board order setting up such improvement, and such bond or equivalent security shall be payable as directed by the court so as to serve to protect all owners of affected lands against any monetary loss which may arise from flooding and/or increase in the cost of the improvement and during the pendency of the petition for judicial review. If, pursuant to other sections of this article the work on the improvement is not stayed, the court shall have the power to exempt the petitioning owner of land from the requirement for such bond or equivalent security.

SECTION 2. Section 803 of the above entitled act is amended to read as follows: Sec. 803. (a) Whenever a copy of the petition for judicial review is served on the board the appealing owner of land shall order from the board a certified copy of the transcript of the proceedings before the board, and such owner shall within twenty (20) days after such order pay the costs of preparing such transcript, and the board shall within twenty (20) days after receipt of notice that any person has filed a petition for review such order prepare a certified copy of the transcript of the proceedings before the board such transcript and file the same with the clerk of the court. An extension of time in which to file such transcript shall be granted by the court for good cause shown. (b) Such transcript of the proceedings before the board shall include (1) any and all transcripts, papers, and documents filed with and/or issued by the board, and (2) any and all testimony heard and exhibits used before the board; provided, however, if there are exhibits or articles

which are impractical to insert in the transcript, photographic copies thereof or other appropriate means may be employed to reveal the nature and description of the same. If, during the judicial review any difference arises as to whether the transcript truly discloses the proceedings before the board, the difference shall be submitted to and settled by the board and the transcript made to conform to the truth; and if anything material to either party is omitted from the transcript by error or accident, or is misstated therein, the board shall correct the omission or misstatement with or without an order of the court, and if necessary shall certify and file a supplemental transcript. (Amends Acts 1965, p.831; Burns §27-2501, 27-2503.)

\_\_\_\_\_ indicates proposed language      \*\*\*\*\* indicates deleted language

## COMMENT

JOHN R. KOWALCZYK

The Indiana Drainage Code became law in 1965, and placed much of the responsibility for drainage improvements and maintenance in the hands of the County Drainage Boards. The Code has been carefully constructed to protect the rights of the individual landowners from wanton expenditures of public funds by the Drainage Boards.

The Code provides that after a Drainage Board sends the County Surveyor out to collect surveys and price quotations for materials and labor costs, it then makes an estimate as to what expenditures are really needed in a particular proposed improvement. However, if any one landowner along the route of the proposed improvement doesn't feel like paying the amounts outlined, or objects to the extent of the improvement, he need only file a petition, and the courts must review the Drainage Board's decision. This sometimes results in a great loss of time, during which costs inevitably rise, and damaged conditions persist or become worsened.

Under the present provisions of the Code, such a complaining landowner has no responsibility for these increased costs and worsened conditions. Likewise, the County itself, in the form of the Drainage Board, must bear the costs of preparing a full transcript for the courts to review. It would seem that on these two counts the Code's provisions presently place upon the Drainage Board and therefore upon all the other landowners in the County the full financial burden of one landowner's gripe. This is an inequitable situation.

Sound principles of law provide that an appellant be willing to show his good faith on appeal by assuming initially to bear the costs of preparing a transcript of trial court proceedings. Likewise, an appellant in a case involving the spending of or payment of monies is made to put up a percentage of the total amount in question as a pre-trial bond. These two rules should be no different for one seeking judicial review of a decision of an administrative Board or Agency. Therefore, it is felt that the Indiana Drainage Code could be amended to place such burdens on the landowner applying for judicial review of Drainage Board decisions.

The purpose of such amendments is not to unconstitutionally deny a landowner judicial determination of his rights and allow ineffective control of the public purse strings. Rather, the purpose is to insure that landowners will not petition at whim for judicial review of Drainage Board actions, because they will realize that such courses of action are serious to the extent of the additional financial responsibilities.

With these above ideas in mind, the foregoing amendments to the Indiana Drainage Code are proposed. Part (a) of Section 801 is the present Section 801 of the Code. Part (b) of Section 801 is the proposed provisions for the posting of a bond. There are certain times when the judicial review does not halt actual construction work, and a provision for exemption from posting a bond in these cases is included in this part of the amendment.

Part (a) of Section 803 is the present Section 803 of the Code, except that presently this section states that the Drainage Board itself shall be responsible for the transcript and impliedly must pay the costs itself. Part (b) of Section 803 is included merely to make it quite apparent what is meant by a "complete transcript". The wording of this part of this section conforms substantially to the recently-adopted Indiana Supreme Court procedural rules, specifically Appellate Rules 7.2 (C) and 7.2 (E).

As of January 23, 1971, several states already include in their drainage laws specific provisions that the landowner appealing or petitioning for judicial review must put up a bond in some amount or other. These states are:

Alabama	Title 2, §270	Minnesota	Chapter 106.631
Colorado	Chapter 47-4-3	Mississippi	§4599
Florida	Chapter 156.16	Nebraska	Chapter 31-115
Georgia	Chapter 23-2515	North Carolina	Chapter 156-66
Illinois	Chapter 42 §2-3	North Dakota	Chapter 61-21-18
Iowa	455.94	Ohio	Chapter 6131-25
Kansas	Chapter 24-617	Oklahoma	Title 82 §335
Kentucky	Chapter 267.070	Tennessee	Title 70-1308
Michigan	Chapter 78b §11.1155	Vermont	Title 10 §512

Two states provide that no bond shall be required of any party appealing a drainage decision. These two states are:

Idaho	Chapter 49-2924
Washington	Chapter 85.06.130 and Chapter 85.32.180

One state provides that the state doesn't have to put up a drainage appeal bond:

Texas	Article 2276a
-------	---------------

All of the rest of the states make no specific provisions regarding drainage appeal bonds anywhere within their drainage laws. This does not mean such bonds are not automatically demanded by such states' rules of court procedure.

Only one state puts the burden of filing the transcript upon the appealing landowner, but even this state doesn't specifically provide in its drainage laws that such landowner must actually pay the costs of preparing this transcript:

Mississippi	§4599
-------------	-------

None of the other forty-nine states' drainage laws mention specifically who shall bear the burden of drainage transcript preparation costs. Again, this does not mean that these states' procedural court rules do not make such provisions.