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FAIRFIELD COUNTY PROSECUTING ATTORNEY

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OpinionsRequest@OhioAttorneyGeneral.gov

Honorable Dave Yost
Ohio Attorney General
c/o Opinions Section
30 East Broad Street
Columbus, Ohio 43215

Re: Request for Opinion

Dear Attorney General Yost:

Pursuant to Ohio Revised Code 109.14, this office respectfully requests a formal opinion on the following subject matter:

- 1) Can a board of county commissioners transform multiple existing drainage maintenance districts (DMD) created under Ohio Rev. Code 6137.04 into a single storm water utility under the process outlined in Ohio Rev. Code 6117.02 et seq.?
- 2) If the answer to the first question is “yes”, can the board of county commissioners use the assessments previously collected for those drainage maintenance districts for the general benefit of the storm water utility?
- 3) If the answer to the first question is “yes” and the answer to the second question is “no”, can the board of county commissioners use the assessments previously collected for a specific drainage maintenance district as an offset to the storm water utility assessment for the landowners previously benefited by that specific drainage maintenance district? For example, if a specific drainage maintenance district has \$90,000 in collected assessments in its fund, can that \$90,000 be applied to the owners in that district against their new storm water utility assessment?
- 4) If the answer to the first question is “yes” and the answers to the second *and* third questions are both “no”, in what lawful ways may the county dispose of the previously collected DMD funds?

- 5) If the answer to the first question is “yes”, would the adoption of a single storm water utility under Ohio Rev. Code 6117.02 et seq. supersede the drainage maintenance districts that are recorded on a final plat under Ohio Rev. Code 711.10?

Background

Pursuant to R.C. 6131.04, an owner of real property located in the unincorporated territory of a county can petition the board of county commissioners to construct a drainage improvement to benefit their real property. This is colloquially called a “single ditch petition” or “single county petition”. Upon the receipt of the petition, the board of county commissioners shall hold a viewing, hearing and give notice of the viewing and hearing to impacted property owners (R.C. 6131.07).

If the board of county commissioners decide that the drainage improvement is needed and is conducive to the public welfare, the board shall order the county engineer to prepare the necessary reports, cost estimate, and plans regarding the construction. The county engineer shall submit a report and project survey regarding the project. (R.C. 6131.12) If the single ditch petition is not appealed, the board of county commissioners shall order the county auditor to transfer funds of the county not otherwise appropriated to the appropriate drainage improvement fund in an amount that shall not exceed 25% of the county engineer’s preliminary cost estimate for the construction of the improvement. (Id.) The board of county commissioners shall determine the assessments for the drainage improvement at the final hearing and order the county engineer to receive bids for construction of the drainage improvement. (R.C. 6131.22). The maintenance fund shall not have an unencumbered balance greater than 20% of the permanent assessment base of the improvement. See *CCAO Commissioners Handbook*, Chapter 29: “Drainage and Ditches”, Section 3.18 “Assessments”, page 9 (https://ccao.org/aws/CCAO/asset_manager/get_file/713134?ver=3)

A drainage maintenance district is a group of drainage improvements that are grouped together due to the similarity of costs, topography, and soil types so that the improvements within the district present similar maintenance costs (R.C. 6137.04). There is one fund per drainage maintenance district.

Fairfield County has approximately 119 drainage maintenance districts in the unincorporated territory of the county. Under R.C. 6137.11, a board of county commissioners can increase or decrease the permanent assessment base for a DMD once every 6 years. With the cost of construction skyrocketing, assessments have had to increase dramatically to keep up with rising costs. In order to change the permanent assessment base, the County must hold a hearing for each DMD under R.C. 6137.112. What that means practically, is that the County must conduct 119 discrete hearings with thousands of property owners who will more than likely see a steep increase of their previously modest assessments with no relief in sight.

As a possible solution, the County is exploring whether it can create a stormwater utility under R.C. 6117.02, et seq., and transition its 119 drainage maintenance districts into 1 stormwater utility. The thought is that transforming into 1 stormwater utility might blunt some of the disproportionate impact of assessments that DMD property owners are currently experiencing. . If the 119 drainage maintenance districts can be converted into 1 stormwater utility, any changes to the single stormwater utility fund can be achieved through 1 hearing process under Ohio Rev. Code 6117.06 instead of the 119 hearings the County currently conducts. Further, as more property owners would be part of 1 single stormwater utility rather than 119 separate DMD, the pain of increasing construction costs would be borne by the many instead of the few.

However, in reviewing the Ohio Revised Code, I do not see specific statutory support for switching from single petition ditches and drainage management districts under Ohio Revised Code 6131 and 6137, respectively, to a storm water utility under Ohio Rev. 6117.02(D). As counties are creatures of statute, our office wanted to review these questions with the Attorney General to see if the County could do such a thing within its authority.

If the Attorney General opines that the County has the authority to convert its DMDs to a single storm water utility, the next question is whether the County can use the funds previously assessed by its multiple DMDs for the benefit of the stormwater utility. Under Ohio Rev. Code 6137.05(A), it provides that the maintenance fund for DMD shall be subject to use by a board of county commissioners for drainage improvements constructed under Chapters 940 (soil and water conservation districts), 6131, 6133 (joint petition ditch districts), and 6135. As there is no mention of Chapter 6117, I would like your office to opine whether those funds can be used by a storm water utility created under Ohio Rev. Code 6117.02 et seq.

If the Attorney General opines that DMD funds cannot be used or transferred to a storm water utility, we would like to see if that prohibition extends to using these funds for the benefit of the impacted owners against any initial assessments for the storm water utility. Under Ohio Rev. Code 6117.061, if a drainage maintenance improvement is constructed and assessed, a property owner can request a deferment of their assessment from the board of county commissioners. Since there is a deferment procedure in place for Chapter 6117, could the board of county commissioners apply the previously assessed DMD funds that owner paid against their new stormwater utility assessment? If the answers to the second and third questions are “no”, does the Attorney General have an opinion on how the collected DMD funds be disposed of instead?

As for the final question raised, assuming that the answer to the first question is “yes”, does the Attorney General have an opinion on the impact to a recorded final plat where a drainage maintenance improvement is recorded if a single storm water utility can be created under Chapter 6117? Is the recorded plat superseded by the legislative act of the board of county commissioners in creating a storm water utility?

Conclusion

We appreciate your attention to this matter and look forward to your response. If you have questions on this or need more information, please call Civil Division Chief Amy Brown Thompson at her direct extension of (740) 652-7585 or you can reach her via email at amy.brown-thompson@fairfieldcountyohio.gov.