

February 20, 2025

The Honorable R. Kyle Witt
Fairfield County Prosecuting Attorney
239 West Main Street, Suite 101
Lancaster, Ohio 43130

SYLLABUS:

2025-002

1. A drainage maintenance fund established under the drainage petition laws may be applied only to the repair, upkeep, and permanent maintenance of drainage improvements that were constructed in accordance with R.C. Chapter 940, 6131, 6133, or 6135. The board of county commissioners may not use the collected assessments for any other purpose.
2. A board of county commissioners cannot convert multiple drainage maintenance districts created under R.C. 6137.04 into a single drainage fund assessed under R.C. 6117.02(D). Rather, the drainage fund and rates assessed under R.C. 6117.02 finance the maintenance of drainage facilities that are part of a county sewer district.



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OPINION NO. 2025-002

The Honorable R. Kyle Witt
Fairfield County Prosecuting Attorney
239 West Main Street, Suite 101
Lancaster, Ohio 43130

Dear Prosecutor Witt:

You have requested an opinion regarding the assessment of maintenance costs for stormwater drainage improvements. Based on the request, we have framed the questions as follows:

1. Can a board of county commissioners transform multiple existing drainage maintenance districts created under R.C. 6137.04 into a single drainage fund with rates assessed under R.C. 6117.02(D)?
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 drainage fund?

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 drainage rates and charges for the landowners previously benefited by that specific drainage maintenance district?
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 drainage maintenance funds?
5. If the answer to the first question is “yes,” would the adoption of a single drainage fund assessed under R.C. 6117.02 *et seq.* supersede the drainage maintenance districts that are recorded on a final plat under R.C. 711.10?

I

You have informed me that Fairfield County currently has more than one hundred drainage maintenance districts. A drainage maintenance district is a geographical area covering a combination of drainage improvements with similar characteristics, such as ditches, drains enclosed in tile, and other stormwater drainage improvements. *See* R.C. 6137.04.

A drainage maintenance district is created to provide a single fund for combined maintenance of its multiple drainage improvements. *Id.* The apportionment of maintenance assessments among benefiting property owners can only be adjusted once every six years, and each district has its own timeline for assessments to be re-evaluated based on when the district was established. R.C. 6137.11.

In recent years, the assessment fees for benefiting property owners have increased significantly due to construction industry costs. The county engineer and board of county commissioners have inquired about shifting to a single stormwater drainage fund and assessment (also known as a “stormwater utility”) to simplify administration and more evenly distribute the costs assessed to property owners. I commend their desire to improve efficiency and reduce the burden on assessed property owners; however, I can only opine whether the proposal is permissible under current law.

II

“As a creature of statute, a board of county commissioners has only the powers expressly conferred upon the board by statute or as may be implied for the purposes of facilitating the exercise of an express power.” *Perry Cty. Bd. of Commrs. v. Hocking Technical College*, 2023-Ohio-3439, ¶32 (5th Dist.); *see also* 2014 Ohio Atty.Gen.Ops. No. 2014-031,

Slip Op. at 1; 2-270. We must determine whether any law specifically authorizes the county commissioners to convert multiple drainage maintenance funds under R.C. 6137.04 to a single drainage fund under the sewer district provisions of R.C. 6117.02(D). If not, we consider whether such power is implied by necessity. And if there is no legal authority to do so, the remaining questions are moot.

Your questions refer to two statutes of primary importance: R.C. 6117.02 and 6137.04. Neither statute should be read in isolation. Rather, we must interpret each statute as part of a broader statutory scheme. *See, e.g., State ex rel. Repeal the Lorain Cty. Permissive Sales Tax Comm. v. Lorain Cty. Bd. of Elections*, 2017-Ohio-7648, ¶15. Therefore, I will begin with a general overview of the relevant drainage petition laws (primarily R.C. Chapters 6131 and 6137) and laws governing county sewer districts (R.C. Chapter 6117).

A. Drainage Petition Laws

Petition drainage improvements can include ditches, underground tile pipes, levees, changes in the course of waterways, and the removal of obstructions from waterways. *See* R.C. 6131.01(C). The costs of engineering, construction, and maintenance are assessed on benefiting parcels of land. *See, e.g.,* R.C. 6131.04(B)(4), 6131.15, and 6131.23. If one or more landowners are instead willing to construct and pay

the costs of the drainage improvement, they may file a written agreement, plan, and schedule for construction with the clerk of the board of county commissioners, subject to the county engineer's review and approval. R.C. 6131.63.

Drainage improvement petitions may also be filed with a soil and water conservation district or, if the project spans across county lines, with a joint board of county commissioners. *See* R.C. Ch. 940, 6133, and 6135. You have informed us that Fairfield County has but one joint county ditch, and the Licking County Engineer serves as lead county engineer in charge of its maintenance. *See* R.C. 6137.04(C)(3) and 6137.06(A).

When a drainage improvement is completed through the petition or mutual agreement process, the board of county commissioners must create a maintenance fund. R.C. 6137.02(A); *see also* R.C. 6131.63(H). If two or more counties of the state are affected by the improvement, the joint board of county commissioners must establish and maintain the fund. R.C. 6137.02(B) and 6137.04(C). Each fund's designated purpose is to provide "for the repair, upkeep, and permanent maintenance" of the drainage improvements. R.C. 6137.02(A) and 6137.05.

The General Assembly first adopted legislation to require permanent maintenance funds in 1957. The law requiring such funds applies only to improvements

constructed after its effective date of August 23, 1957. See Am.H.B. No. 220, 127 Ohio Laws 577; 1958 Ohio Atty.Gen.Ops. No. 2511, p. 478 (comparing the law before and after the 1957 effective date); and R.C. 6137.051 (prescribing maintenance of ditches constructed prior to August 23, 1957). The benefiting landowners are charged an assessment, not more than once annually. The assessments are “apportioned on the basis of the estimated benefits for all costs of the improvement,” R.C. 6137.03(A), and the statute denominates this as the “permanent base” for calculating assessments. See also R.C. 6137.11.

The unencumbered balance of the maintenance fund cannot exceed 20 percent of the permanent base for assessments. R.C. 6137.03 and 6137.11. Once every six years, the commissioners may adjust the benefit apportionments among the individual property owners after a public hearing on the proposed changes. R.C. 6137.11(C). A property owner affected by an increase in maintenance assessments may appeal to the court of common pleas if the property owner believes the assessment is not levied according to benefits. R.C. 6137.11(H); see, e.g., *Hickey v. Joint Bd. of Cty. Commrs.*, 1992 WL 113914 (6th Dist. May 29, 1992). At the time of the six-year review, the county commissioners may also direct the county engineer to estimate the current construction cost and vote to adjust the permanent assessment base to reflect that estimated cost. R.C. 6137.112.

If the county engineer so recommends, the board of county commissioners may combine separate improvements into a drainage maintenance district with a shared drainage maintenance fund. In doing so, the county engineer and commissioners must “consider similarity of costs, topography, and soil types so that improvements within the same district present substantially the same maintenance issues and costs.” R.C. 6137.04(A)(2). The board may also combine improvements of the same type “into one drainage maintenance fund so that ditches or drains that are enclosed in tile, or other improvements having similar maintenance costs, may be administered for maintenance under the same maintenance fund.” R.C. 6137.04(B).

Depending on the similarity of improvements, a drainage maintenance district may include all or any part of the county. R.C. 6137.04(A)(3). A district need not be limited to a single platted subdivision. *See generally* R.C. 711.10 and 711.101. When the law was first enacted, drainage improvements could only be combined into a district if they were within the same watershed. However, the General Assembly eliminated that requirement in 2020 Sub.H.B. 340 (effective March 24, 2021).

B. County Sewer Districts

R.C. Chapter 6117 authorizes a board of county commissioners to establish, maintain, and operate one or more sewer districts in the unincorporated areas of the county. *See* R.C. 6117.01(B). The board may operate sanitary and drainage facilities for the collection of sewage, other wastes, and waters originating in or entering the district. *Id.* They may also negotiate and enter contracts with other public agencies or persons to operate the facilities on behalf of the county. *Id.* We have been informed that Fairfield County has a sewer district, but solely for sanitary purposes. The sewer district currently does not include any drainage facilities.

When a board of county commissioners establishes a county sewer district, it becomes responsible for “a host of supervisory tasks.” 2013 Ohio Atty.Gen.Ops. No. 2013-014, at 2-135. This includes approval of a general plan of sewerage or drainage for the district, approval of specifications for sanitary and drainage facilities, and contracting with a county sanitary engineer to oversee the district. R.C. 6117.01(C) and (E) and 6117.06.

The county commissioners are responsible for setting reasonable rates and charges for the use of sewer district facilities. The board must set rates for both actual use and the availability for use of the sewer

district's sanitary facilities. R.C. 6117.02(A). The board must also establish reasonable charges for connecting to the sanitary sewer, which may be paid upfront or in installments. R.C. 6117.02(B); *see also* 2014 Ohio Atty.Gen.Ops. No. 2014-031, Slip Op. at 7; 2-275 to 2-276 (concluding that a county may not waive sanitary rates for properties that are capable of being served by a county sewer district).

Your concerns, however, do not relate to the mandatory rates for sanitary sewer services. The county engineer and board of county commissioners are concerned with funding the repair, upkeep, and permanent maintenance of stormwater drainage improvements. Under R.C. 6117.02(D), the board of county commissioners may set rates and charges, including connection fees and late payment penalties, for property owners who are served directly or indirectly by drainage facilities under the county's jurisdiction. The board "may change those rates and charges from time to time as it considers advisable." The board may also fix rates to pay the costs of compliance with federal regulations for storm water pollution control (Phase II of the NPDES Stormwater Program established under 40 C.F.R. 122). *Id.*

All money collected as drainage rates, charges, or penalties must be paid to the county treasurer and kept in a drainage fund to the credit of the sewer district. The drainage fund may only be spent for the

benefit of the sewer district's non-sanitary drainage component. R.C. 6117.02(D). Specifically, the law requires funds to be used first for the cost of management, maintenance, and operation of the drainage facilities, and second to the payment of outstanding debt "issued or incurred for the acquisition or construction of drainage facilities." *Id.* Any remaining surplus may be used to acquire or construct additional facilities.

III

Simply stated, R.C. 6137.04 describes a funding mechanism for drainage *improvements* constructed by petition or mutual agreement between landowners and the county, while R.C. 6117.02(D) provides a method of funding 'drainage *facilities*' that are part of a county sewer district. The definitions of those terms overlap but are not identical. For purposes of R.C. Chapters 6131 and 6137, a drainage "improvement" includes the following:

- (1) The location, construction, reconstruction, reconditioning, widening, deepening, straightening, altering, boxing, tiling, filling, walling, arching, or any change in the course, location, or terminus of any ditch, drain, watercourse, or floodway;

(2) The deepening, widening, or straightening or any other change in the course, location, or terminus of a river, creek, or run;

(3) A levee or any wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water;

(4) The removal of obstructions such as silt bars, log jams, debris, and drift from any ditch, drain, watercourse, floodway, river, creek, or run;

(5) The vacating of a ditch or drain.

R.C. 6131.01(C).

The term “drainage facilities,” as used in the sewer district law, includes all the improvements above, as well as “storm sewers, force mains, pumping stations, and facilities for the treatment, disposal, impoundment, retention, control, or storage of waters.” R.C. 6117.01(A)(3). The term also encompasses

necessary equipment and real estate associated with the improvement.

As the overlapping definitions indicate, a drainage facility under the sewer district laws may take the same physical form as an “improvement” under the drainage petition laws. *See* 2014 Ohio Atty.Gen.Ops. No. 2014-019, Slip Op. at 14; 2-165 (“[I]n some instances the duties that a county sanitary engineer may be required to perform for a county sewer district under R.C. Chapter 6117 may resemble duties a county engineer is required to perform pursuant to R.C. Chapters 6131, 6133, 6135, or 6137”). However, there is a critical difference: a drainage facility operates as part of a sewer district, an interconnected system of sanitary and drainage facilities operated either directly or by contract with the county. *See* R.C. 6117.01(B) and 6117.06.

Drainage improvements constructed under R.C. Chapter 6131, on the other hand, generally are not constructed or maintained according to a comprehensive plan for the county. They are constructed on an ad hoc basis when property owners file a petition or agreement to construct an improvement. *See* R.C. 6131.02, 6131.04, and 6131.63; *but see* R.C. 6131.03 (“Boards of county commissioners . . . may formulate, create, and construct a complete or co-ordinating system of water conservation and flood control, subject to the approval of the proper authority

of the state, with full power to maintain and carry the same forward”).

In cases involving a local government’s liability for flood damage, several courts have considered “whether a pipe, a culvert, a ditch, drainage tiles, or a retention basin is a ‘sewer system’ as contemplated by the immunity statute [R.C. Ch. 2744].” The “courts look to whether the pipe, etc., is part of a larger sewer system operated by the political subdivision.” *Schlegel v. Summit Cty.*, 2021-Ohio-3451, ¶22 (9th Dist.), *overruled in part on other grounds by Schlegel v. Summit Cty.*, 2024-Ohio-5678; *Engel v. Williams Cty.*, 2008-Ohio-3852, ¶17 (6th Dist.); *McQuown v. Coventry Twp.*, 2017-Ohio-7151, ¶24 (9th Dist.); and *Economus v. City of Independence*, 2020-Ohio-266, ¶30 (8th Dist.). Although these cases do not directly relate to the issue at hand, they reveal that a drainage improvement constructed or maintained by a county or any other political subdivision is not automatically part of a sewer system.

When a board of county commissioners establishes a sewer district, it may employ a county sanitary engineer to oversee the construction, maintenance, and operation of sanitary and drainage facilities. R.C. 6117.01(C). The county engineer may serve in this role but is not obligated to do so. *See* R.C. 6117.01(A)(4) and (C). In contrast, the county engineer *must* oversee construction and maintenance of drainage

improvements established by petition, unless the county contracts with a soil and water conservation district for that purpose. *See* R.C. 6131.14, 6137.03, 6137.05, 6137.06, and 6137.15; *see generally* 2014 Ohio Atty.Gen.Ops. No. 2014-019 (describing in detail the responsibilities of the county engineer and sanitary engineer for ditch maintenance).

Consider, too, the differences in funding mechanisms for maintenance: an assessment for maintenance of drainage improvements constructed by petition or mutual agreement is based on a percentage of estimated benefits as estimated by the county engineer, and the collected funds cannot exceed 20 percent of the construction cost. *See* R.C. 6137.03, 6137.04, and 6137.11. The drainage fund under the county sewer district law does not have the same limitations; the rates and charges apply more broadly to “any person or public agency owning or having possession or control of any properties that are connected with, capable of being served by, or otherwise served directly or indirectly by, drainage facilities.” R.C. 6117.02(D). There is no statutory limit to the drainage rates and charges that a county may collect, so long as the rates are reasonable. *Id.*; *see also* 2014 Ohio Atty.Gen.Ops. No. 2014-031 (concerning sanitary rates for a county sewer district).

Most important, the two categories of funds serve different purposes. On the one hand, the drainage

maintenance fund established under R.C. Chapter 6137 supports “the repair, upkeep, and permanent maintenance” of drainage improvements constructed after August 23, 1957, under the drainage petition laws (R.C. Chapter 940, 6131, 6133, or 6135). *See* R.C. 6137.02 and 6137.05. On the other hand, a drainage fund established under R.C. 6117.02(D) may only be spent for the benefit of a county sewer district and its drainage facilities. According to the general rule in R.C. 5705.10(I), “Money paid into any fund shall be used only for the purposes for which such fund is established.”

In short, there is no provision in law that would allow for conversion of drainage maintenance funds into a single drainage fund under the county sewer district law in R.C. 6117.02. The authority to do so cannot be implied when it runs contrary to the law’s express purposes.

IV

Because multiple drainage maintenance districts cannot be converted to a single drainage fund under R.C. 6117.02, the remaining questions are moot. Three of your questions relate to the use of previously collected assessments. “Moneys may be expended from the various funds in the county treasury only for the purpose for which the funds are created and in accordance with any restrictions on the use of the

moneys imposed by law.” 2015 Ohio Atty.Gen.Ops. No. 2015-007, Slip Op. at 4; 2-75. In this case, the previously collected assessments may only be used “for the repair, upkeep, and permanent maintenance” of the drainage improvements in those districts. *See* R.C. 6137.02 and 6137.05. Thus, the money cannot be transferred to any other fund.

The last question references platted subdivisions. R.C. 711.10 governs the platting of subdivisions in the county’s unincorporated territory. The law does not require a drainage maintenance district to be designated on a recorded plat, but the county or regional planning commission could adopt such a requirement as part of its general rules for approval. *See* R.C. 711.10(C) and 711.101; *see also* 2007 Ohio Atty.Gen.Ops. No. 2007-13 (regarding regulation of surface and subsurface drainage as part of a county’s zoning and plat approval process).

Fairfield County’s subdivision regulations include a rule that recorded plats note their inclusion in a drainage maintenance district, the landowners’ responsibility to pay assessments, and the grant of an easement to the county for maintenance purposes. *See* R.C. 6137.12 and 1993 Ohio Atty.Gen.Ops. No. 93-063 (regarding easements for drainage improvements). Because we have already determined that drainage maintenance districts cannot be converted to a sewer district drainage fund under R.C. 6117.02(D), the

question regarding what effect the proposed conversion would have on the recorded plats is moot.

I recognize that the current mechanism for funding maintenance of drainage improvements may not be ideal for Fairfield County or the property owners who foot the bill. Others may share your concern about rising costs and inefficiency under current law. If that is so, it is within the General Assembly's power to "modify the existing statutory provisions . . . through appropriate legislation." 1999 Ohio Atty.Gen.Ops. No. 99-044, at 2-278

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

1. A drainage maintenance fund established under the drainage petition laws may be applied only to the repair, upkeep, and permanent maintenance of drainage improvements that were constructed in accordance with R.C. Chapter 940, 6131, 6133, or 6135. The board of county commissioners may not use the collected assessments for any other purpose.
2. A board of county commissioners cannot convert multiple drainage maintenance districts created under R.C. 6137.04 into a single drainage fund assessed under R.C. 6117.02(D).

Rather, the drainage fund and rates assessed under R.C. 6117.02 finance the maintenance of drainage facilities that are part of a county sewer district.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping initial "D" and a long, sweeping tail on the "y".

DAVE YOST

Ohio Attorney General