

**OPINION NO. 2004-035****Syllabus:**

At the six-year review of the permanent base for maintenance fund assessments required by R.C. 6137.11, the board of county commissioners has no authority to increase the original estimated construction cost of a ditch or other drainage improvement to the amount that the construction would cost at the time of review in order to account for inflation since the construction of the improvement.

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**To: Alison Boggs, Union County Prosecuting Attorney, Marysville, Ohio**  
**By: Jim Petro, Attorney General, October 19, 2004**

We have received your request for an opinion concerning assessments for a ditch maintenance fund. Your specific question is as follows:

Can a Board of County Commissioners, at the six year review of the permanent base for maintenance fund assessment required by R.C. 6137.11, increase the original estimated construction cost of a ditch to account for inflation, to the amount the ditch would cost to construct now, under the Board's authority pursuant to R.C. 6137.11 to review the permanent base for maintenance fund assessment and increase or decrease benefit apportionments to owners?

For the reasons discussed below, we conclude that a board of county commissioners does not have the authority pursuant to R.C. 6137.11 to increase the original estimated construction cost of a ditch or other drainage improvement in order to account for inflation.

**Background**

Your question has arisen with respect to ditches that were constructed during the 1960s and 1970s. The construction costs of these ditches were used to determine the permanent base for maintenance fund assessments levied pursuant to R.C. 6137.03 and R.C. 6137.11. Due to inflation, the costs of constructing these ditches today would be much

higher than they were originally. Further, the costs of maintaining these ditches have increased substantially over time. You have provided the following description of some current difficulties:

[A] county is only allowed, pursuant to R.C. 6137.03, to have an unencumbered balance in the annual maintenance assessment fund of twenty percent of all construction costs of the ditch improvement. Since the construction cost basis of the maintenance fund usually reflects the cost of the original construction of the ditch, the legal limitation of only being able to maintain an unencumbered balance in the annual maintenance assessment fund of twenty percent can result in inadequate amounts of money in the maintenance fund assessment account to maintain the ditch.

Because the rising cost of maintaining the ditches can exceed twenty percent of the cost of the original project, the county may not be able to maintain an adequate amount in the maintenance assessment fund to actually maintain the ditch or provide for repairs if the county is not able to adjust the cost of the construction of the ditch improvement for inflation.

The limitation also results in high yearly assessment rates for owners benefited by the ditch. And when those assessments are collected, collection can temporarily result in amounts in the maintenance assessment fund exceeding twenty percent of the original cost of the project, causing auditing problems.

One solution to this problem has been for counties to periodically adjust the permanent base (i.e., the original cost of construction) for maintenance fund assessment to account for inflation, to the amount the ditch would cost to construct presently, under their authority to review the permanent base for maintenance fund assessment and increase or decrease benefit apportionments to owners every six years pursuant to R.C. 6137.11.

We have been unable to locate any case law, statutory section or previous Attorney General Opinion addressing this particular issue and whether adjusting the permanent base construction cost basis is permitted at the six year review. We are, therefore, requesting an opinion from your office on this issue.

#### **Assessments for ditch maintenance fund**

In order to address your question, it is necessary to consider the manner in which a ditch maintenance fund is established and funded. The board of county commissioners is required to establish and maintain a fund for the repair, upkeep, and permanent mainte-

nance of each ditch or other drainage improvement<sup>1</sup> constructed under R.C. Chapter 6131, which governs single county ditches. R.C. 6137.02.<sup>2</sup>

When construction of an improvement under R.C. Chapter 6131 is planned, the county engineer estimates the benefits that will accrue to various owners (both public bodies and private landowners)<sup>3</sup> and the assessments that each will be charged for construction.

<sup>1</sup>The improvements are projects relating to ditches and drainage, defined as follows:

(C) "Improvement" includes:

(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); *see* R.C. 6137.01. The reconstruction, reconditioning, widening, or deepening of a ditch, or the removal of obstructions such as debris and drift, thus constitutes an improvement to be paid through assessments based on benefits under R.C. Chapter 6131, rather than maintenance to be funded under R.C. Chapter 6137. *See* 1984 Op. Att'y Gen. No. 84-101 at 2-350; 1958 Op. Att'y Gen. No. 2511, p. 478 (syllabus, paragraph 3) ("[t]he question of whether a particular project relating to a county ditch or other drainage work amounts to a new improvement or is maintenance only is a question of fact for determination in the first instance by the board of county commissioners; but a project consisting of 'deepening' and 'widening' an existing drainage improvement is included in the definition of 'improvement' .... Such project should be accomplished as provided in [R.C. Chapter 6131] and a fund for its maintenance should thereafter be established as provided in [R.C. Chapter 6137]").

<sup>2</sup>A joint board of county commissioners has similar responsibility to establish a maintenance fund for an improvement constructed under R.C. Chapter 6133, which governs joint county ditches. A maintenance fund for an improvement constructed under R.C. Chapter 6135 (interstate county ditches) may be established and maintained by a joint or a single board of county commissioners, depending upon whether one or more counties are affected. R.C. 6137.02. For purposes of this opinion, we address only maintenance funds for single county improvements constructed under R.C. Chapter 6131.

<sup>3</sup>For purposes of R.C. Chapter 6137, "owner" has the following definition:

"Owner" means any owner of any right, title, estate, or interest in or to any real property and includes persons, partnerships, associations, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or legislative authority of a municipal corporation, the director of any department, office, or institution of the state, and the trustees of any state, county, or municipal public institution.

The total of the estimated assessments must equal the estimated cost of the proposed improvement. R.C. 6131.15. Each tract of land and public body affected by an improvement must be assessed in the proportion that each is benefited by the improvement. *Id.*; see R.C. 6131.01(F) (defining "benefit"). Following a hearing, the board of county commissioners decides whether to proceed with the improvement. R.C. 6131.21; see also R.C. 6131.16-.20. If the board decides to proceed, assessments are levied on the basis of benefits from the improvement. R.C. 6131.21-.23; R.C. 6131.43. The assessments actually levied are based upon the final cost as certified by the county engineer. R.C. 6131.43.

The board of county commissioners is then required by R.C. Chapter 6137 to establish a fund for the permanent maintenance of the improvement, and to secure moneys for the fund by assessing benefited owners, including both public and private entities. The maintenance fund receives moneys from an assessment levied not more than once a year upon the benefited owners, "apportioned on the basis of the estimated benefits for construction of the improvement." R.C. 6137.03. The assessment represents the percentage of the estimated benefits that is determined by the county engineer and found adequate by the board of county commissioners to provide for the repair, upkeep, and maintenance of the improvement, with the exception that "at no time shall a maintenance fund have an unencumbered balance greater than twenty per cent of all construction costs of the improvement." *Id.* The assessment is certified to the county auditor and placed on the next succeeding tax duplicate to be collected and paid as other special assessments are collected and paid. *Id.*

The assessments for maintenance are based upon the assessments of benefits allocated for the construction of the improvement. Pursuant to R.C. 6137.11, the "original schedule of benefit assessments upon owners" for the construction of an improvement is designated as the "permanent base for maintenance assessments." The maintenance assessments are levied "in such percentage of the permanent base as is authorized by the board of county commissioners." R.C. 6137.11.<sup>4</sup>

Certain modifications in the allocation of assessments among benefited owners are permitted under R.C. 6137.11. Annually, the board of county commissioners is required to consider any recommendation by the county engineer and any application by any owner "for increase or reduction of the permanent assessment base as it applies to any owner." R.C. 6137.11. Any increase or reduction of this sort "shall be made for the purpose of correcting any inequity that has arisen due to increase or decrease in the proportionate share of benefits accruing to the owner as the result of the construction and maintenance of the improvement." *Id.*<sup>5</sup>

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"Owner" also includes any public corporation and the director of any department, office, or institution of the state affected by an improvement but not owning any right, title, estate, or interest in or to any real property.

R.C. 6131.01(A); see R.C. 6137.01.

<sup>4</sup>As an alternative to the assessment procedure under R.C. 6137.11 based upon the permanent assessment base, the board of county commissioners may by resolution levy, upon benefited property, assessments "apportioned according to tax value," and use those assessments to obtain moneys for the ditch maintenance fund. R.C. 6137.111. Your question does not address this alternative and this opinion does not discuss it.

<sup>5</sup>See also R.C. 6137.08 (upon the owner's application, the county engineer's recommendation, and the board of county commissioners' approval, permitting a reduction in an owner's maintenance assessment due to work the owner performs); R.C. 6137.09 (providing for a

After six annual maintenance fund assessments, the board of county commissioners must "review the permanent base for maintenance fund assessment and may increase or decrease the respective benefit apportionments in accordance with changes in benefits that have occurred during the intervening six years." R.C. 6137.11. This review of the permanent base must be repeated every six years. *Id.*; see, e.g., *Hickey v. Joint Bd. of County Comm'rs*, No. S-91-35, 1992 Ohio App. LEXIS 2661 (Sandusky County May 29, 1992).

The board of county commissioners is permitted, at any time, to add to the schedule of benefited owners any other owner who is benefited by an improvement as the result of conditions that have arisen since the improvement was constructed. R.C. 6137.11.<sup>6</sup> Whenever an owner is added or the permanent base of maintenance assessments of an owner is changed, the board must afford a hearing and then certify to the county auditor the "revised permanent base," which shall become "the permanent base for maintenance assessments, except as changed from time to time with respect to individual owners." *Id.* An owner affected by an increase in the amounts assessed may appeal to the court of common pleas the question whether the assessment is levied according to benefits. R.C. 6137.11; see R.C. 6131.25-.36; *In re Appeal in the Morrison Single County Ditch No. 1330*, 20 Ohio St. 3d 13, 484 N.E.2d 699 (1985); *Hickey v. Joint Bd. of County Comm'rs*.

#### Adjustment for inflation

Your question is whether the language of R.C. 6137.11 providing for review of the permanent base at six-year intervals authorizes the board of commissioners, in order to account for inflation, to increase the original estimated construction cost of an improvement to the amount that construction would currently cost. We conclude that the language of R.C. 6137.11 does not authorize this action.

Under the provision in question, R.C. 6137.11 authorizes the board of county commissioners, at six-year intervals, to "review the permanent base for maintenance fund assessment" and "increase or decrease the respective benefit apportionments in accordance with changes in benefits that have occurred during the intervening six years." This language requires the board to review the permanent base for maintenance assessments (that is, the original schedule of benefit assessments) and permits the board to increase or decrease the "respective benefit apportionments" in accordance with changes in benefits that occurred during the preceding six years. R.C. 6137.11 (emphasis added). By the terms of R.C. 6137.11, the board is authorized to change the "apportionments" of benefits granted, respectively, to the various owners. Accordingly, if conditions have changed so that one owner is now receiving a proportionately greater benefit from the improvement than that owner had previously received, that owner will be charged a greater proportion of the total assessments. See 1985 Op. Att'y Gen. No. 85-049 at 2-179.

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reduction of not more than fifty percent of the annual maintenance assessment if an owner files a certificate of the board of supervisors of the soil conservation district certifying that the owner is following practices in the cultivation or management of agricultural land that will reduce the runoff of surface water and the erosion of sediment and silt into drainage channels).

<sup>6</sup>If an owner was not assessed for the construction of an improvement but now is receiving substantial benefit, or was assessed but now is receiving substantially greater benefits, the board of county commissioners may hold a hearing and impose an equitable amount as an equalization assessment. R.C. 6137.11.

The board of county commissioners is authorized to change the allocation of assessments made to particular owners and to add new owners to the schedule of benefited owners. However, it is not given authority to provide a general increase in the total value of the permanent base for maintenance assessments. That base equals the original schedule of benefit assessments, which, in turn, equals the original cost of the improvement. See R.C. 6131.15; R.C. 6131.22; R.C. 6131.43; R.C. 6137.11. The language of R.C. 6137.11 governing the six-year reviews authorizes only changes in amounts of the permanent base apportioned to particular owners. For example, it speaks of changes in “the permanent base of maintenance assessments of any owner.” R.C. 6137.11 (emphasis added). R.C. 6137.11 nowhere authorizes a general increase in the permanent base for maintenance assessments in order to allow for inflation.

The difficulty you have encountered results from the provisions of R.C. 6137.03 which state that “at no time shall a maintenance fund have an unencumbered balance greater than twenty per cent of all construction costs of the improvement.”<sup>7</sup> A ditch that was constructed in the 1960s or 1970s may have had such low construction costs by today’s standards that twenty percent is a meager amount, clearly insufficient to achieve adequate maintenance. While we recognize this difficulty, we cannot find this practical concern sufficient basis for reading “construction costs of the improvement,” as those words are used in R.C. 6137.03, to mean anything other than costs of the improvement when it was constructed. See generally *Bernardini v. Bd. of Educ.*, 58 Ohio St. 2d 1, 4, 387 N.E.2d 1222 (1979) (“a statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation”); *Police & Firemen’s Disability & Pension Fund v. City of Akron*, 149 Ohio App. 3d 497, 2002-Ohio-4863, 778 N.E.2d 497, ¶ 14 (Summit County 2002) (“[a] statute cannot be extended by construction to persons or things not falling within its terms, although they may appear to be within the reason and spirit of the statute”).

A board of county commissioners has only those powers granted by the General Assembly. *Geauga County Bd. of Comm’rs v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696 (1993).<sup>8</sup> Provisions of R.C. Chapter 6137 cannot be expanded to grant authority beyond that which they plainly express. See R.C. 1.42; 1984 Op. Att’y Gen. No.

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<sup>7</sup>The existing language of R.C. 6137.03 restricting the unencumbered balance of the maintenance fund to no more than twenty percent of all construction costs of the improvement became effective in 1981. See 1979-1980 Ohio Laws, Part I, 2337, 2391 (Am. Sub. H.B. 268, eff. Apr. 9, 1981). That legislation also replaced an annual assessment with an assessment “levied not more often than once annually,” and imposed a minimum assessment of two dollars. *Id.* The previous version of the statute had based the twenty percent determination upon “the appraisal of benefits for construction of the improvement,” stating that “in any year when a maintenance fund has an unencumbered balance equal to twenty per cent of said appraisal of benefits, the annual maintenance assessment shall be omitted.” *Id.*; see 1956-1957 Ohio Laws, 577, 608 (Am. H.B. 220, eff. Aug. 23, 1957); 1985 Op. Att’y Gen. No. 85-049 at 2-179. There is no indication of any intention by the General Assembly to provide for the modification of costs to allow for inflation. See Ohio Legislative Service Comm’n, *Summary of Enactments August, 1979—December, 1980*, at 424, 434, 113th Gen. A. (Am. Sub. H.B. 268).

<sup>8</sup>An exception applies to counties that acquire home rule powers pursuant to Ohio Const. art. X, § 1 or adopt a charter pursuant to Ohio Const. art. X, §§ 3 and 4. See *Geauga County Bd. of Comm’rs v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 583 n.2, 621 N.E.2d 696 (1993); 2004 Op. Att’y Gen. No. 2004-016 at 2-133 n.1; 2002 Op. Att’y Gen. No. 2002-031 at 2-206 n.1. This opinion does not consider counties that have taken action of this kind.

84-101. We conclude, therefore, that at the six-year review of the permanent base for maintenance fund assessments required by R.C. 6137.11, the board of county commissioners has no authority to increase the original estimated construction cost of a ditch or other drainage improvement to the amount that the construction would cost at the time of review in order to account for inflation since the construction of the improvement.

If a different result is desired, the remedy lies with the General Assembly. See generally *Bd. of Educ. v. Fulton County Budget Comm'n*, 41 Ohio St. 2d 147, 156, 324 N.E.2d 566 (1975) (“[t]he remedy desired by appellants ... must be obtained from the source of their problem—the General Assembly” (footnote omitted)); *State ex rel. Nimberger v. Bushnell*, 95 Ohio St. 203, 116 N.E. 464 (1917) (syllabus, paragraph 4) (“[w]hen the meaning of the language employed in a statute is clear, the fact that its application works an inconvenience or accomplishes a result not anticipated or desired should be taken cognizance of by the legislative body, for such consequence can be avoided only by a change of the law itself, which must be made by legislative enactment and not by judicial construction”).

### Conclusion

For the reasons discussed above, it is my opinion and you are advised, that at the six-year review of the permanent base for maintenance fund assessments required by R.C. 6137.11, the board of county commissioners has no authority to increase the original estimated construction cost of a ditch or other drainage improvement to the amount that the construction would cost at the time of review in order to account for inflation since the construction of the improvement.