

OPINION NO. 93-063**Syllabus:**

1. Evergreen trees that are grown and cultivated for sale as Christmas trees constitute a crop for purposes of R.C. 6137.12. Therefore, if the performance of maintenance pursuant to R.C. 6137.12 results in damage to any such trees located beyond the permanently established sod or seeded strip, the owner of the trees is entitled to be paid market value for the damage.
2. When, pursuant to R.C. 6137.12, a county holds a permanent easement for maintenance of a drainage improvement, the landowner retains the right to use the land that is subject to the easement for any purpose that does not unreasonably interfere with the use of the easement. The landowner may, in accordance with R.C. 6137.12, grow crops or place fences, poles, or wire lines within that area. The county, however, has the right to secure the removal of any objects that unreasonably interfere with its use of the easement.
3. When, pursuant to R.C. 6137.12, a county holds a permanent easement for maintenance of a drainage improvement and has established a sod or seeded strip for purposes of erosion and sediment control, the landowner is not permitted to take action that interferes with the continued existence and usefulness of the sod or seeded strip, and the county may secure the removal of any objects that cause such interference.

To: John E. Meyers, Sandusky County Prosecuting Attorney, Fremont, Ohio
By: Lee Fisher, Attorney General, December 21, 1993

You have requested an opinion on several questions pertaining to the county's maintenance of ditches pursuant to R.C. 6137.12. Your questions relate to crops or other objects located near a ditch.

Ditch Construction and Maintenance

R.C. Chapter 6137 requires each county to establish and maintain a fund for the "repair, upkeep, and permanent maintenance" of certain drainage improvements.¹ R.C. 6137.02; *see*

¹ The term "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;

1982 Op. Att'y Gen. No. 82-021. Such maintenance may be done by contract or by force account under the supervision of the county engineer. R.C. 6137.05; *see* 1992 Op. Att'y Gen. No. 92-049. R.C. 6137.12 discusses the authority of persons making repairs to enter upon surrounding lands, as follows:

In the cleaning, repair, and other maintenance work on drainage improvements, the persons whose duty it is to perform the maintenance work may go upon the adjoining or abutting lands within the permanent easement necessary for proper operation of the required machinery, tools, motor vehicles, conveyances, or other equipment.

In the case of open ditches, the permanent easement so used shall be not more than twenty-five feet from the top of the bank, measured at right angles thereto, and wherever practical the area so used shall be on one side of the ditch only. When in his opinion an emergency situation exists at an open ditch needing maintenance, the county engineer may, with the approval of the board of county commissioners, temporarily extend the easement to not more than seventy-five feet from the top of the bank, measured at right angles thereto, in order to conduct the necessary maintenance work and alleviate the condition or conditions causing the emergency situation. The maximum width of permanent easement for closed ditches shall not exceed eighty feet centered on the center-line of the improvement. The permanent easement for all other improvements shall be as located and the width as specified by the county engineer. When the performance of maintenance requires the damage of existing crops beyond the permanently established sod or seeded strip, the owner of the crops shall be granted damages equal to market value, to be paid from the permanent maintenance fund established for the improvement. Under contract work, the county engineer may specify the right-of-way to be used within the permanent easement. Where the nature of the surface of the adjoining or abutting land does not prevent it, and there are growing crops on one side of the ditch but none upon the other, the right-of-way provided for shall be used on that side of the ditch on which there are no growing crops. In using the right-of-way, the persons performing maintenance shall, as far as possible, avoid damage to the owner of the adjoining or abutting lands.

If in the doing of this work it is necessary to damage or temporarily remove any fences, poles, or wire lines, the cost of repairing, removing, and replacing the fences, poles, and wire lines shall be included in the total cost of maintenance.

This section does not authorize passage across, along, or between railroad tracks until thirty days after notice has been mailed in accordance with section 6131.07 of the Revised Code. (Emphasis added.)

The "permanent easement" referred to in R.C. 6137.12 is the easement established when a drainage improvement is constructed. R.C. 6131.14 provides that, when an improvement is constructed pursuant to R.C. Chapter 6131, the county engineer must "file with the county

-
- (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.

recorder a property plat showing the general location of the improvement and a statement describing the width of permanent easement for maintenance as provided for in [R.C. 6137.12]."

The "sod or seeded strip" referred to in R.C. 6137.12 is part of a drainage improvement, included for purposes of erosion and sediment control. R.C. 6131.14 requires that, when an improvement is constructed pursuant to R.C. Chapter 6131:

[t]he specifications shall provide for spreading and leveling of spoil banks and shall provide for erosion and sediment control through the establishment of a sod or seeded strip not fewer than four feet nor more than fifteen feet wide, measured at right angles to the top of the ditch bank, on both sides of the ditch, except where suitable vegetative cover exists. The strip or other such controls shall be considered a part of the permanent improvement. Sod or seeded strips established and maintained in excess of four feet shall be compensated for by their removal from the taxable valuation of the property of which they are a part.

In the repair and maintenance of drainage improvements, the county engineer is required to preserve a sod or seeded strip, as provided in the case of new construction under R.C. 6131.14. R.C. 6137.06.

The sod or seeded strip is, thus, a part of a ditch improvement. It extends from four to fifteen feet on each side of a ditch bank, unless other suitable vegetative cover exists. R.C. 6131.14.

The permanent easement, in contrast, covers the area needed for repair and maintenance of the drainage improvement. R.C. 6131.14. In the case of an open ditch, the permanent easement extends for twenty-five feet or less from the top of the bank, as provided in a plat filed with the county recorder. If practical, the easement is on only one side of the ditch. R.C. 6137.12.

Christmas Trees as Crops

Your first question is whether Christmas trees planted as part of a Christmas tree farm constitute crops within the meaning of R.C. 6137.12. You ask, in particular, whether Christmas trees planted within twenty-five feet from the top of the bank of a ditch constitute crops that may be removed, if necessary, to perform maintenance on a ditch.

Pursuant to R.C. 6137.12, persons repairing or maintaining a ditch may use the land that is subject to the permanent easement; however, "[w]hen the performance of maintenance requires the damage of existing crops beyond the permanently established sod or seeded strip, the owner of the crops shall be granted damages equal to market value." R.C. 6137.12. It thus appears that any crops growing in the permanently established sod or seeded strip may be destroyed with no need for reimbursement. Any crops growing outside the sod or seeded strip may be damaged or removed, if necessary for maintenance, but the owner must be paid market value for the crops. R.C. 6137.12.

R.C. 6137.12 does not define the word "crop" for purposes of that provision. The word should, therefore, be given its ordinary meaning. See R.C. 1.42. "Crop" is defined generally to mean "the cultivated produce of the ground, while growing or when gathered." *The Random House Dictionary of the English Language* 345 (unabridged ed. 1973). Christmas trees raised for harvest clearly come within this provision. See also R.C. 5701.02(A) (for purposes of R.C. Title 57, defining "real property," "realty," and "land" to include "all growing crops, including deciduous and evergreen trees, plants, and shrubs"); *Besser v. Buckeye Pipe Line Co.*, 57 Ohio

App. 341, 13 N.E.2d 927 (Muskingum County 1937) (in granting a pipeline easement, the landowner reserved the right to cultivate the ground above the pipeline in any manner conforming to good husbandry).

In *Ohio Edison Co. v. Rotman*, No. CA-8119 (Ct. App. Stark County Sept. 17, 1990), the Fifth District Court of Appeals considered whether evergreen trees raised for sale as Christmas trees constituted a crop for purposes of easements and right-of-ways for electrical power lines and towers. The court stated conclusively that they did: "We find that as a matter of law, evergreens grown and cultivated for sale as Christmas trees are 'crops.'" *Ohio Edison Co. v. Rotman*, slip. op. at 4.

The conclusion that evergreens grown and cultivated for sale as Christmas trees are crops applies also to R.C. 6137.12. The trees in question were planted as part of a Christmas tree farm and thus constitute a "crop" as discussed above. Therefore, if the performance of maintenance on a drainage improvement pursuant to R.C. 6137.12 results in damage to any such trees located beyond the permanently established sod or seeded strip, the owner of the trees is entitled to be paid market value for the damage.

Restrictions Upon Use of the Permanent Easement

Your second question asks what authority the county has to regulate or prohibit the location of non-crop trees, buildings, or other permanent things within the permanent easement, and your third question asks what authority the county has to prohibit the placement of anything by a property owner within the sod or seeded strip of the ditch improvement. No statutory provision expressly authorizes the county to regulate or prohibit a landowner's use of the permanent easement or the sod or seeded strip. The duties and obligations of the county and the landowner are, however, defined by the general principles of law governing easements.

The county holds an easement for the particular purpose of maintaining a drainage improvement and, as a result, the county has a right to use the land for that purpose. The landowner retains all other rights in the property. *See, e.g., Phifer v. Cox*, 21 Ohio St. 248 (1871). The landowner's property rights must, however, be exercised in such a way as not to unreasonably interfere with the special use for which the easement was acquired. *See, e.g., Pomeroy v. Salt Co.*, 37 Ohio St. 520, 524 (1882) (the owner of land that is subject to an easement has the right to the use of the land "in any manner not inconsistent with" the easement); *Cincinnati, Hamilton & Dayton Railway Co. v. Wachter*, 70 Ohio St. 113, 118 (1904). *See generally Henson v. Stine*, 74 Ohio App. 221, 224, 57 N.E.2d 785, 787 (Summit County 1943) (if an easement is made by express grant, "its extent and limitation is ascertained by the language of the grant and the circumstances surrounding the transaction"; if made by implied grant, "it is limited to that which is found to be clearly intended or fairly presumed to be intended").

Provisions of statute require that a sod or seeded strip of a specified size be established and maintained along each drainage improvement, except where other suitable vegetative cover exists. *See* R.C. 6131.14, 6137.06. The sod or seeded strip is required for purposes of erosion and sediment control and is considered part of the drainage improvement. R.C. 6131.14. The sod or seeded strip must be kept intact and the landowner may not take action that interferes with its continued existence and usefulness for purposes of erosion and sediment control. If the placement of something within the sod or seeded strip would interfere with the county's use of that strip, then the placement of that object would exceed the landowner's remaining interest in the land, and the county would have a right to secure its removal.

R.C. 6137.12 offers guidance concerning the permitted use of the land that is part of the permanent easement but not part of the sod or seeded strip. First, because R.C. 6137.12 directs the county, when the performance of maintenance requires the damage of existing crops beyond the permanently established sod or seeded strip, to grant the landowner damages equal to the market value of the crops destroyed, it is reasonable to conclude that, in general, a landowner is permitted to grow crops, including Christmas trees, in that area. Second, because the same statute provides that if, as maintenance is performed, "it is necessary to damage or temporarily remove any fences, poles, or wire lines, the cost of repairing, removing, and replacing the fences, poles, and wire lines shall be included in the total cost of the maintenance," it also is reasonable to conclude that fences, poles, and wire lines may be permitted within the area of the permanent easement. R.C. 6137.12.

The Revised Code does not address whether a landowner may locate non-crop trees, buildings, or permanent objects other than fences, poles, or wire lines within the permanent easement. Under the principles generally applicable to easements, however, a landowner is permitted to use land within the permanent easement for any use except a use that unreasonably interferes with the county's exercise of its easement. Thus, a landowner may locate non-crop trees, buildings, or permanent objects other than fences, poles, or wire lines within the permanent easement only if such location does not unreasonably interfere with the county's exercise of its maintenance activities. See, e.g., *Hollosoy v. Gershkowitz*, 88 Ohio App. 198, 201, 98 N.E.2d 314, 316 (Summit County 1950) ("the process which creates an easement also fixes its extent").

Whether the location of a particular object within the permanent easement would unreasonably interfere with the county's exercise of its easement for maintenance of drainage improvements is a question of fact that cannot be determined by opinion of the Attorney General. See, e.g., *Cincinnati, Hamilton & Dayton Railway Co. v. Wachter; Roebuck v. Columbia Gas Transmission Corp.*, 57 Ohio App. 2d 217, 386 N.E.2d 1363 (Shelby County 1977) (evidence established that, for enjoyment of a pipeline easement, including the right to install, replace, repair, and remove pipes, it was necessary to have the right to maneuver equipment in the vicinity of the pipes, and damage to adjacent crops was contemplated). It appears likely, however, that in at least some circumstances the location of non-crop trees, buildings, or other permanent objects within the permanent easement would result in such unreasonable interference. In such circumstances, the county has a right to secure removal of the objects.

Moreover, notwithstanding the conclusions that Christmas trees are crops and that crops, fences, poles, and wire lines ordinarily are permitted within the permanent easement, it might be argued in particular circumstances that such land usages unreasonably interfere with the county's exercise of its easement and must be prohibited. If, for example, it is established that a particular drainage improvement is in need of regular maintenance every two years, and that fact is made known to the landowner, it might be unreasonable for the landowner to plant within the permanent easement needed for such maintenance a crop that will not mature sufficiently for sale within a two-year period. Similarly, even though fences, poles, and wire lines are not completely prohibited from the area of the permanent easement, there may be certain locations in which particular types of fences, poles, or wire lines constitute an unreasonable interference with the county's exercise of its easement. In the event that there is unreasonable interference with a county's easement for ditch maintenance, the county may take appropriate action to enforce its rights in the easement. See, e.g., *Roebuck v. Columbia Gas Transmission Corp.* (declaratory judgment); *Gray Drug Stores v. Foto Fair International, Inc.*, 32 Ohio App. 2d 71, 288 N.E.2d 341 (Hancock County 1971) (injunction); *East Ohio Gas Co. v. James Bros. Coal Co.*, 40 Ohio Op. 440, 85 N.E.2d 816 (C.P. Tuscarawas County 1948) (injunction), *appeal*

dismissed, 161 Ohio St. 316, 118 N.E.2d 643 (1954); *Young v. Spangler*, 2 Ohio Cir. Ct. 549, 552 (C.P. Defiance County 1887) (damages or removal of obstruction).

As noted earlier, no statutory provision expressly authorizes a county to regulate or prohibit a landowner's use of the permanent easement or the sod or seeded strip. Consequently, no statute expressly authorizes the county to adopt rules governing land usage within a permanent easement for drainage improvement maintenance. It may, however, be appropriate for a county to provide landowners with information indicating the usage that it anticipates making of the lands subject to such easements and the types of uses by landowners that, in the opinion of the county, would cause unreasonable interference with the county's activities.

Conclusion

It is, therefore, my opinion, and you are hereby advised as follows:

1. Evergreen trees that are grown and cultivated for sale as Christmas trees constitute a crop for purposes of R.C. 6137.12. Therefore, if the performance of maintenance pursuant to R.C. 6137.12 results in damage to any such trees located beyond the permanently established sod or seeded strip, the owner of the trees is entitled to be paid market value for the damage.
2. When, pursuant to R.C. 6137.12, a county holds a permanent easement for maintenance of a drainage improvement, the landowner retains the right to use the land that is subject to the easement for any purpose that does not unreasonably interfere with the use of the easement. The landowner may, in accordance with R.C. 6137.12, grow crops or place fences, poles, or wire lines within that area. The county, however, has the right to secure the removal of any objects that unreasonably interfere with its use of the easement.
3. When, pursuant to R.C. 6137.12, a county holds a permanent easement for maintenance of a drainage improvement and has established a sod or seeded strip for purposes of erosion and sediment control, the landowner is not permitted to take action that interferes with the continued existence and usefulness of the sod or seeded strip, and the county may secure the removal of any objects that cause such interference.