

June 29, 2018

The Honorable Dennis Watkins  
Trumbull County Prosecuting Attorney  
4th Floor Administration Building  
160 High Street N.W.  
Warren, Ohio 44481-1092

SYLLABUS:

2018-015

1. Pursuant to R.C. 6137.03, a board of county commissioners may defer levying maintenance assessments on benefited lands for the repair, upkeep, and permanent maintenance of a ditch constructed under R.C. 6131.63 until such time as maintenance or repairs become necessary.
2. Upon discovery that a ditch constructed under R.C. 6131.63 requires maintenance or repair, a board of county commissioners may levy maintenance assessments on the benefited lands that are part of the permanent maintenance assessment base pursuant to the assessment procedures under R.C. Chapter 6137.
3. If a ditch maintenance fund lacks sufficient moneys for emergency repairs to a ditch constructed pursuant to R.C. 6131.63, a board of county commissioners may use other available county moneys to pay for such emergency repairs and reimburse those moneys with revenue collected from maintenance assessments levied after the repairs are completed.
4. For the purpose of levying maintenance assessments on condominium property under R.C. Chapter 6137, each condominium unit and each unit owner's undivided interest in the common elements of the condominium property should be treated as separate parcels of property.



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OPINION NO. 2018-015

The Honorable Dennis Watkins  
Trumbull County Prosecuting Attorney  
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160 High Street N.W.  
Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

You have requested an opinion regarding maintenance assessment procedures for a single county ditch improvement constructed pursuant to R.C. 6131.63,<sup>1</sup> and maintenance assessments on condominium property. Specifically, you have raised the following questions:

1. If an agreement for a ditch is filed with the clerk of a board of county commissioners pursuant to R.C. 6131.63 and formally accepted and approved

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<sup>1</sup> The Ohio Revised Code defines “improvement,” at R.C. 6131.01, 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). A ditch constructed pursuant to R.C. 6131.63 is, therefore, an “improvement” under R.C. 6131.01(C)(1).

by the board, may the board defer levying a maintenance assessment (*i.e.*, for a period of ten or twenty years) until such time as maintenance or repair is actually necessary?<sup>2</sup>

2. If no initial maintenance assessment is made by the board upon the creation of a ditch, is the board permitted to address necessary maintenance or repair issues upon discovery that maintenance or repairs are needed through the assessment procedures set forth in R.C. 6131.63, R.C. 6137.01, et seq., or some other statute?
3. If emergency maintenance or repairs are needed for a ditch and sufficient funds in the ditch's maintenance fund do not exist, is the county permitted to make an emergency repair with other county moneys, and then seek reimbursement from the ditch's benefitted owners?
4. If a condominium is or becomes part of a drainage district, may each owner of a condominium unit, as shown by public records, be considered a separate owner for purposes of the aforementioned assessment processes?

R.C. Chapter 6131 details the procedures for constructing a single county ditch, which is a ditch that is located entirely within one county.<sup>3</sup> A single county ditch may be constructed through one of two statutory procedures. 1984 Op. Att'y Gen. No. 84-101, at 2-348. A ditch

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<sup>2</sup> A member of your office has explained that your questions pertain to ditches that have been constructed pursuant to R.C. 6131.63 by a subdivision developer for the benefit of a subdivision. The ditches are combined into a drainage maintenance district either at the time of construction or subsequent to the completion of the ditches for purposes of levying maintenance assessments. A "drainage maintenance district" is a geographical area in a county or counties in which multiple ditches are combined for the purpose of the repair, upkeep, and maintenance of the ditches within the maintenance district. *See* R.C. 6137.04. When a drainage maintenance district is established by a board of county commissioners, the county auditor keeps a single drainage maintenance fund for each such district. *Id.* In the example provided in your letter, no maintenance assessments were initially levied on the subdivision property because no repairs were immediately needed. For ease of discussion, we will refer to maintenance assessment procedures as they apply to a single *ditch* constructed pursuant to R.C. 6131.63. However, the conclusions reached in this opinion are equally applicable to a drainage maintenance *district* established pursuant to R.C. 6137.04 that is composed of ditches constructed under R.C. 6131.63.

<sup>3</sup> R.C. Chapter 6133 details the procedures for constructing a joint county ditch, which is a ditch that benefits land in two or more counties in Ohio. R.C. Chapter 6135 details the procedures for constructing an interstate county ditch, which is a ditch that benefits land in at least one Ohio county and a county of another state.

constructed under the first procedure is commonly referred to as a petitioned ditch. Under the petitioned ditch procedure, landowners file a petition with the clerk of the board of county commissioners to construct a ditch, after which the construction of the ditch, if approved by the board of county commissioners, is done under the supervision of the county engineer. *See* R.C. 6131.04; R.C. 6131.12; R.C. 6131.14-.15; R.C. 6131.20-.22; R.C. 6131.43; R.C. 6131.46. A ditch constructed under the second procedure, which is the focus of your questions, is commonly referred to as a mutual-agreement ditch.<sup>4</sup>

To construct a mutual-agreement ditch, landowners enter into a private agreement to construct a ditch that benefits<sup>5</sup> their land. The landowners agree to construct and pay for the

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<sup>4</sup> Insofar as you have asked about mutual-agreement ditches constructed pursuant to R.C. 6131.63, this opinion does not address maintenance assessments for ditches constructed pursuant to R.C. 6131.04 (petitioned ditches), R.C. Chapter 6133 (joint county ditches), or R.C. Chapter 6135 (interstate county ditches).

<sup>5</sup> The Ohio Revised Code defines “benefits,” at R.C. 6131.01, as follows:

(F) “Benefit” or “benefits” ... means advantages to land and owners, to public corporations as entities, and to the state resulting from drainage, conservation, control and management of water, and environmental, wildlife, and recreational improvements. Factors relevant to whether such advantages result include:

- (1) The watershed or entire land area drained or affected by the improvement;
- (2) The total volume of water draining into or through the improvement and the amount of water contributed by each land owner;
- (3) The use to be made of the improvement by any owner, public corporation, or the state.

“Benefit or “benefits” includes any or all of the following factors:

Elimination or reduction of damage from flood;

Removal of water conditions that jeopardize public health, safety, or welfare;

Increased value of land resulting from the improvement;

Use of water for irrigation, storage, regulation of stream flow, soil conservation, water supply, or any other purpose incidental thereto;

Providing an outlet for the accelerated runoff from artificial drainage whenever the stream, watercourse, channel, or ditch under improvement is called upon to discharge functions for which it was not designed by nature; it being the legislative intent that uplands that have been removed from their natural state by deforestation, cultivation, artificial drainage, urban development, or other manmade causes shall be considered as benefited by an improvement required to dispose of the accelerated flow of water from the uplands.

costs of constructing a ditch that adjoins their properties, rather than the county constructing and paying the costs to construct the ditch. R.C. 6131.63. Under this procedure, a professional engineer registered in Ohio approves the landowners' written agreement, schedules, and plan for the ditch. *Id.* The landowners then file the agreement, schedules, and plan with the clerk of the board of county commissioners. *Id.* The clerk forwards the documents to the county engineer, who reviews them and then prepares a schedule of proposed maintenance assessments for the ditch according to an estimate of benefits accruing to each owner. *Id.* In other words, the county engineer proposes maintenance assessments to be levied upon each parcel of real property subject to the agreement in proportion to the engineer's estimate of the benefit accruing to each parcel as a result of construction of the ditch. *See id.*; R.C. 6137.03 (maintenance assessments are "apportioned on the basis of the estimated benefits for construction of the improvement"); R.C. 6131.15 ("[e]ach tract of land and public corporation affected by an improvement ... shall be assessed in the proportion that each is benefited by the improvement, as 'benefit' and 'improvement' are defined in [R.C. 6131.01]").

After the engineer files a certificate of approval of the proposed ditch, the board of county commissioners holds a hearing on the proposed maintenance assessments, and may amend the proposed maintenance assessments before approving them. *See* R.C. 6131.63. Once the schedule of maintenance assessments has been approved by the board of county commissioners, "all further proceedings in connection with the maintenance of the improvement shall be in accordance with Chapter 6137 of the Revised Code." *See id.*

### **Deferring Maintenance Assessments until Maintenance is Necessary**

Your first question asks whether a board of county commissioners may defer levying maintenance assessments for a period of time until maintenance or repair of a mutual-agreement ditch is necessary, or whether the board is required to levy maintenance assessments on the benefited landowners of a ditch constructed pursuant to R.C. 6131.63 at the time the ditch is constructed. It is well established that a board of county commissioners is a creature of statute with only those powers granted to it by law, either expressly or by necessary implication. 2016 Op. Att'y Gen. No. 2016-016, at 2-157. To determine whether a board of county commissioners may defer levying maintenance assessments until such time as maintenance or repair of a mutual-agreement ditch is necessary, we must examine the statutory language that describes the process for levying maintenance assessments.

Maintenance of a ditch constructed under R.C. 6131.63 is conducted in accordance with R.C. Chapter 6137. R.C. 6131.63. "The board of county commissioners of each county shall establish and maintain a fund within each county for the repair, upkeep, and permanent maintenance of each improvement constructed under [R.C. Chapter 6131]." R.C. 6137.02. This fund is called a "maintenance fund." The cost of any necessary repairs or maintenance of a ditch may be paid from moneys credited to the maintenance fund that are collected for that ditch. *See* R.C. 6137.05. A maintenance fund contains revenues collected and credited to the fund through maintenance assessments that are levied on the real property of a ditch's benefited landowners.

R.C. 6137.03 states, in pertinent part:

The maintenance fund shall be maintained, *as needed*, by an assessment levied *not more often than once annually* upon the benefited owners, as defined in section 6131.01 of the Revised Code, apportioned on the basis of the estimated benefits for construction of the improvement. An assessment shall represent such a percentage of the estimated benefits as is estimated by the engineer and found adequate by the board ... to effect the purpose of section 6137.02 of the Revised Code, except that at no time shall a maintenance fund have an unencumbered balance greater than twenty per cent of all construction costs of the improvement. The minimum assessment shall be two dollars.

The maintenance assessment shall be made by the board of county commissioners in the case of a single county improvement ... upon the substantial completion of an improvement and on or before the first day of July in each year thereafter. (Emphasis added.)

On its face, R.C. 6137.03 is subject to two reasonable interpretations. Under the first interpretation, based on the use of the mandatory word “shall” in the second paragraph of the statute, a person might conclude that maintenance assessments shall be levied not more than once per year, but must be levied as soon as the ditch is substantially completed and on or before July 1 of each subsequent year. In addition, the maintenance assessment is based on a percentage of estimated benefits of the ditch, and is an amount that the board determines is necessary to perform repairs and maintenance, but cannot result in an unencumbered balance in the maintenance fund that exceeds twenty percent of the constructions costs of the ditch, and cannot be less than two dollars. This interpretation means that a board of county commissioners has discretion as to the amount of revenue to be generated by maintenance assessments, but not as to when or whether a maintenance assessment is levied.

Under the second interpretation, based on the use of the qualifier “as needed” in the first paragraph of the statute, a person might conclude that a board of county commissioners has discretion to determine in what years maintenance assessments shall be levied and the amount of revenue to be generated by the maintenance assessments necessary to maintain the maintenance fund. In other words, maintenance assessments may be levied as they become necessary to generate revenue sufficient to maintain and repair a ditch. If the board determines that maintenance assessments are necessary, the board shall levy assessments of at least two dollars and in proportion to the estimated benefits to each landowner, but the unencumbered balance of the maintenance fund shall not exceed twenty percent of the construction costs of the ditch. If a board of county commissioners determines that maintenance assessments are necessary, the assessments may be levied in the first year when the ditch is substantially completed. And, *if* levied in subsequent years, the assessments shall be levied on or before July 1.

“[A] statute is ambiguous when its language is subject to more than one reasonable interpretation.” *Family Med. Found., Inc. v. Bright*, 96 Ohio St. 3d 183, 2002-Ohio-4034, 772 N.E.2d 1177, at ¶ 8. If a statute is ambiguous, courts look to various factors to determine the

intent of the General Assembly, such as the statute's legislative history, as well as former statutory provisions, including laws upon the same or similar subjects. *See* R.C. 1.49; *Ohio Podiatric Med. Ass'n v. Taylor*, 2012-Ohio-2732, 972 N.E.2d 1065, at ¶ 19 (Franklin County). Because R.C. 6137.03 is subject to two reasonable interpretations, its language is ambiguous, and we must look to other factors to discern the intent of the General Assembly when it enacted the statute.

The first factor to consider is the language of R.C. 6137.03. “[W]ords in a statute do not exist in a vacuum. [A court] must presume that in enacting a statute, the General Assembly intended for the entire statute to be effective. R.C. 1.47(B). Thus, all words should have effect and no part should be disregarded.” *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶ 19; *see also* R.C. 1.47(B) (“[i]n enacting a statute, it is presumed that ... [t]he entire statute is intended to be effective”). In its first paragraph, R.C. 6137.03 states that a ditch maintenance fund is to be maintained, “*as needed*, by an assessment levied not more often than once annually upon the benefited owners.” (Emphasis added.) The General Assembly must have intended the words “as needed” to have some meaning. Use of the words “as needed” suggests that the General Assembly intended that a board of county commissioners need only levy maintenance assessments as those assessments become necessary to pay for repairs or maintenance to a ditch. *See Merriam-Webster’s Collegiate Dictionary* 829 (11th ed. 2005) (“needed” means “to be ... necessary” or “require[d]”). Moreover, the phrase “not more often than once annually” is further evidence that the General Assembly intended to allow a board of county commissioners to decide when to levy maintenance assessments, but imposed the requirement that the board may not levy such assessments more frequently than once per year.

R.C. 6137.03 also states that the unencumbered balance of a maintenance fund shall never exceed twenty percent of the construction costs of the ditch and that the minimum assessment on a benefited landowner shall be two dollars. If a board of county commissioners were required to make annual maintenance assessments of at least two dollars on each of the benefited landowners of a ditch regardless of whether such assessments are necessary, then eventually the maintenance fund would contain an unencumbered balance *greater* than twenty percent of the construction costs of the ditch, in contravention of R.C. 6137.03. In enacting a statute, it is presumed that the General Assembly intends “[a] result feasible of execution.” R.C. 1.47(D). If a board of county commissioners were required to make annual maintenance assessments immediately upon substantial completion of a ditch and each year thereafter, then, under the language of R.C. 6137.03, a board of county commissioners could not satisfy both the annual assessment requirement and the requirement that a maintenance fund’s unencumbered balance remain below twenty percent of the construction costs of the ditch. Thus, to give effect to all of the language in R.C. 6137.03, the statute must be understood to mean that a board of county commissioners has discretion to levy maintenance assessments as the board finds such assessments necessary to maintain the appropriate ditch maintenance fund.

The second factor to consider is the legislative history and former provisions of R.C. 6137.03. A court may look to legislative history and former statutory provisions to divine

legislative intent when a statute is found to be ambiguous. R.C. 1.49(C), (D); *see also Jacobson v. Kaforey*, 149 Ohio St. 3d 398, 2016-Ohio-8434, 75 N.E.3d 203, at ¶¶ 23-36, 52 (Kennedy, J., concurring in judgment). In addition, “[t]he General Assembly’s amendment to a section of the Revised Code is presumed to have been made to effect some purpose.” *Canton Malleable Iron Co. v. Porterfield*, 30 Ohio St. 2d 163, 175, 283 N.E.2d 434 (1972). The General Assembly amended R.C. 6137.03 in 1980 when it enacted Am. Sub. H.B. 268. Prior to the 1980 amendment, R.C. 6137.03 required a board of county commissioners to levy an annual maintenance assessment on benefited landowners, unless the assessment would cause the ditch maintenance fund to exceed twenty percent of the original construction costs of the ditch. Former R.C. 6137.03 stated:

The maintenance fund shall be maintained by an *annual assessment* upon the benefited owners, as defined in section 6131.01 of the Revised Code, apportioned on the basis of the appraisal of benefits for construction of the improvement. Such assessment shall represent a sum equal to one percent of said appraisal or such percentage as is estimated by the engineer and found adequate by the board or joint board to effect the purpose of section 6137.02 of the Revised Code; except 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.

1979-1980 Ohio Laws, Part I, 2337, 2391 (Am. Sub. H.B. 268, eff. Apr. 9, 1981) (emphasis added). The word “annual” preceding “assessment” was replaced by the phrase “as needed, by an assessment levied not more often than once annually.” *See id.*; R.C. 6137.03. Accordingly, the General Assembly removed the requirement that maintenance assessments be levied annually. Removal of the word “annual” from R.C. 6137.03 further indicates the General Assembly’s intent to grant a board of county commissioners wider discretion in levying maintenance assessments.

The Legislative Service Commission (LSC) analysis of Am. Sub. H.B. 268 also supports the conclusion that the second paragraph of R.C. 6137.03 must be read so as to give effect to the “as needed” qualifier in the first paragraph of the statute. Although a court is not bound by an analysis of the Legislative Service Commission, such an analysis may be used to confirm the meaning of a statute. *See Meeks v. Papadopoulos*, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159 (1980). Regarding the 1980 amendment to R.C. 6137.03, the LSC Analysis notes that “[t]he bill ... requires that the maintenance assessments, in years after the year of completion of the project, be made before July 1, instead of before March 1, as in present law. The bill deletes the requirement that the maintenance assessment be collected annually and requires that it be levied as needed but not more than once annually.” Ohio Legislative Service Comm’n, Analysis, Am. Sub. H.B. 268, at p. 13 (as reported by S. Agric., Conservation, and Env’t Comm.) (1980). *Accord id.* at 14 (“[a]lso, instead of being required to provide for ‘yearly’ clearing of brush and tree growth, removal of silt bars, spreading and leveling of soil banks, and preserving seeded or sod strips as in present law, the engineer is required to perform these duties, as well as various other phases of maintenance required by [R.C. 6137.05], when ‘necessary’”). Thus, the



legislative history of R.C. 6137.03 confirms that maintenance assessments are not required to be levied upon substantial completion of the ditch and each year thereafter, unless the board of county commissioners determines it is necessary to levy maintenance assessments at those times.

The final factor to consider is related statutory provisions in R.C. Chapters 6131 and 6137. For example, R.C. 6131.63 itself contemplates that a county engineer will propose a schedule of maintenance assessments for consideration by the board of county commissioners, after reviewing the agreement, plan, and maintenance assessment schedules provided to the engineer by the private landowners who have agreed to construct the ditch:

The county engineer shall ... prepare a schedule of proposed assessments for the maintenance of the improvement according to an estimate of benefits accruing to each owner and an estimate of maintenance costs including the engineer's costs in preparing the schedules. The board shall pay the engineer's costs out of the county general fund. The engineer shall file with the clerk of the board of county commissioners ... a report of his review together with such recommendations for change, amendment, or alteration of the agreement, plan, and schedules as he may determine to be necessary in the public interest.

After the schedule of maintenance assessments is approved by the board of county commissioners, the ditch may be constructed. *See* R.C. 6131.63.

Nothing in R.C. 6131.63 requires the levying of maintenance assessments at the time construction of a ditch is completed. The statute only requires the approval of a *schedule* of maintenance assessments, which may or may not include the immediate levying of maintenance assessments. *See Black's Law Dictionary* 1344 (6th ed. 1990) (defining "schedule" as "[a]ny list of planned events to take place on a regular basis"). That the county engineer is required to propose a schedule of maintenance assessments indicates that the timing and amount of maintenance assessments is determined, in part, by the expertise and judgment of the county engineer. No language in R.C. 6131.63 requires the county engineer to propose annual maintenance assessments. Indeed, prior to the 1980 amendment of R.C. 6131.63, a county engineer *was* required to propose "*annual* assessments for the maintenance of" a ditch. *See* 1979-1980 Ohio Laws, Part I, 2337, 2383 (Am. Sub. H.B. 268, eff. Apr. 9, 1981) (emphasis added). However, the General Assembly amended R.C. 6131.63 to remove that requirement. *See id.* R.C. 6131.63 now requires only that a county engineer propose a schedule of maintenance assessments, rather than annual assessments.

As another example, R.C. 6137.06 provides that a county engineer shall have general charge and supervision of all ditches constructed pursuant to R.C. 6131.63 located in his county. R.C. 6137.06 states that a county engineer shall make an annual inspection of all the ditches in his county and, before June 1 of each year, report to the board of county commissioners the condition of the ditches and his estimate of the probable cost of any repairs or maintenance of each ditch. Nothing in R.C. 6137.06 requires a county engineer to recommend annual maintenance or repairs to the ditches under his supervision. Rather, the statute anticipates that

the county engineer will use his professional judgment to evaluate the state of each ditch and determine the extent of any necessary repairs, suggesting that it is possible for maintenance assessments to be unnecessary for a particular ditch in a particular year. *Accord* R.C. 6137.05 (whenever a board of county commissioners “*has reason to believe [a ditch constructed pursuant to R.C. 6131.63 or other improvement] is in need of repair or maintenance*, it shall as a board, or by the county engineer, make an inspection of its condition and, if it finds the need to exist, it shall make an estimate of the cost of the necessary work and material required for the purpose”) (emphasis added).

Finally, the General Assembly removed a requirement in a previous version of R.C. 6137.06 that “[t]he cost of maintenance work during the first year after the improvement is provided for as part of the original construction cost.” 1979-1980 Ohio Laws, Part I, 2337, 2396 (Am. Sub. H.B. 268, eff., Apr. 9, 1981); *see also* Ohio Legislative Service Comm’n, Analysis, Am. Sub. H.B. 268, at p. 14 (as reported by S. Agric., Conservation, and Env’t Comm.) (1980) (“[t]he bill ... removes the existing provision that the cost of maintenance work during the first year be provided as part of the original construction cost”). *Compare* R.C. 6131.14 (with respect to petitioned ditches, “[t]he assessment of the improvement for maintenance for one year shall be added to the cost of construction in making the actual assessment and shall be credited to the maintenance fund of the district”). This means that maintenance work is not required to be included as part of the original construction costs of a mutual-agreement ditch, a further indication of the General Assembly’s intent to afford a board of county commissioners discretion to decide the timing of maintenance assessments.

Accordingly, we conclude that a board of county commissioners is not required to levy maintenance assessments on the benefited landowners of a ditch constructed under R.C. 6131.63 at the time the ditch is constructed or annually thereafter. The addition of the phrase “as needed” to R.C. 6137.03, the statute’s legislative history, and related statutory provisions in R.C. Chapters 6131 and 6137, lead to the conclusion that the General Assembly intended to give a board of county commissioners discretion to decide when to levy maintenance assessments, so long as they are not levied more frequently than once a year. Thus, a board of county commissioners may defer levying maintenance assessments on the benefited landowners of a ditch constructed pursuant to R.C. 6131.63 until such time as maintenance or repairs become necessary.

**Maintenance Assessment Procedures upon Discovery that Maintenance or Repairs are Needed for a Ditch Constructed Pursuant to R.C. 6131.63**

Your second question asks whether a board of county commissioners may use the maintenance assessment procedures set forth in R.C. Chapter 6137 upon discovery of needed maintenance or repairs to a ditch constructed under R.C. 6131.63, when maintenance assessments were not levied at the time the ditch was constructed.

After the initial approval of a mutual-agreement ditch by a board of county commissioners, all further action in relation to the maintenance of the ditch shall be in

accordance with R.C. Chapter 6137. R.C. 6131.63. Thus, mutual-agreement ditches constructed pursuant to R.C. 6131.63 are assessed in accordance with the procedures described in R.C. Chapter 6137, that is, by maintenance assessments whenever repairs or maintenance of the ditch becomes necessary. *See* R.C. 6137.02; R.C. 6137.03. In particular, R.C. 6137.03 states that a maintenance fund “shall be maintained, as needed, by an assessment levied not more often than once annually upon the benefited owners ... apportioned on the basis of the estimated benefits for construction of the improvement.” As discussed above, maintenance assessments are not required to be levied upon the completion of a ditch or each year thereafter. Accordingly, the procedures described in R.C. Chapter 6137 may be used to levy maintenance assessments upon the benefited landowners of a ditch constructed pursuant to R.C. 6131.63 upon discovery of needed repairs or maintenance.

One caveat bears mentioning: maintenance assessments may only be levied on those landowners who were part of the original schedule of assessments under R.C. 6131.63, *see* 1984 Op. Att’y Gen. No. 84-101 (syllabus, paragraph 4), unless new tracts of land have been added to the maintenance assessment base by the board of county commissioners in accordance with R.C. 6137.11. R.C. 6137.11 provides, in relevant part:

*The original schedule of benefit assessments upon owners for the construction of any improvement shall be maintained by the county auditor as the permanent base for maintenance assessments. The maintenance assessments shall be levied by the county auditor in such percentage of the permanent base as is authorized by the board of county commissioners.*

....

The board of county commissioners at any time may add to the schedule of benefited owners any other owner who in the judgment of the board is benefited by the operation and maintenance of the improvement as the result of new conditions that have arisen since the improvement was constructed. (Emphasis added.)

“[W]hen owners agree to join in the construction of an improvement that will benefit their land, only those owners participating in the agreement pay the costs of construction.” 1984 Op. Att’y Gen. No. 84-101, at 2-348. “Consequently, only those lands which were assessed for the costs of construction of an improvement undertaken pursuant to an agreement made in accordance with R.C. 6131.63 may be assessed for the costs of maintenance of such an improvement.” *Id.* (footnote omitted). Maintenance assessments are levied on parcels of land rather than personally against the owners of parcels of land. *See id.* at 2-348 n.2; R.C. 6131.43.

Accordingly, the maintenance assessment procedures described in R.C. Chapter 6137 may be used to levy maintenance assessments upon the benefited landowners of a ditch constructed pursuant to R.C. 6131.63 upon discovery of needed repairs or maintenance, provided

that a board of county commissioners levies maintenance assessments only on those parcels of property that are part of the permanent maintenance assessment base.<sup>6</sup>

**Funding for Emergency Repairs or Maintenance of a Ditch Constructed Pursuant to R.C. 6131.63**

Your third question essentially asks whether a board of county commissioners may levy maintenance assessments and use the revenue collected from the assessments to reimburse county moneys that were expended to pay for emergency repairs to a ditch constructed pursuant to R.C. 6131.63 because there were insufficient moneys in the maintenance fund at the time repairs were needed. We understand that county moneys in a particular fund other than the relevant ditch maintenance fund will first be expended to pay for emergency repairs. Then, maintenance assessments will be levied against the benefited landowners in order to reimburse the particular county fund from which the county moneys were expended. Implicit in your question is the issue of whether maintenance assessments may be levied to pay for repairs *after* the repairs are completed.

The only requirement imposed upon revenue collected from maintenance assessments is that the revenue be used for the repair, upkeep, and permanent maintenance of a ditch or other improvement. *See* R.C. 6137.02 (“[t]he board of county commissioners of each county shall establish and maintain a fund within each county for the repair, upkeep, and permanent maintenance of each improvement constructed under [R.C. Chapter 6131]”); R.C. 6137.03 (“[a]n assessment shall represent such a percentage of the estimated benefits as is estimated by the engineer and found adequate by the board ... to effect the purpose of [R.C. 6137.02]”); R.C. 6137.05 (“[t]he maintenance fund ... shall be subject to use of the board of county commissioners ... for the necessary and proper repair or maintenance of any improvement constructed under [R.C. 6131.01 to R.C. 6131.64]”); *see also* 1992 Op. Att’y Gen. No. 92-049, at 2-203 (“payments from the maintenance fund are to be made only for the cost of the necessary work and material required for the particular improvement in question”). We see no restriction in the law that prohibits a board of county commissioners from using revenue from maintenance assessments to reimburse the costs of repairs after the repairs have already been completed, so long as the expenses that are reimbursed were incurred for the purpose of repairing or maintaining a ditch or other improvement.<sup>7</sup>

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<sup>6</sup> R.C. 6137.11 does not authorize a general increase in the permanent base for maintenance assessments to account for inflation. 2004 Op. Att’y Gen. No. 2004-035, at 2-320. However, R.C. 6137.112 does authorize a board of county commissioners, after levying six annual maintenance fund assessments, to adopt a new permanent base for maintenance assessments that is based on construction costs of the ditch if the ditch were constructed at the present time.

<sup>7</sup> For a joint county ditch or other joint county improvement, we note that the joint board of county commissioners must approve all expenses and maintenance assessments in accordance

A county that operates under the statutory form of county government is required to establish several funds in its treasury.<sup>8</sup> R.C. 5705.09. These funds include a bond retirement fund, special funds for each special levy, special bond funds for each bond issue, special funds for each class of revenues derived from a source other than the general property tax that the law requires to be issued for a particular purpose (*e.g.*, a ditch maintenance fund), and a general fund. *Id.* “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 Op. Att’y Gen. No. 2015-007, at 2-75; *see also* R.C. 5705.10(I). General fund moneys are received from various sources. 2013 Op. Att’y Gen. No. 2013-035, at 2-354. “Moneys in the county’s general fund may be used for any proper county purpose, unless the law requires them to be used for a specific purpose.” *Id.* at 2-354 to 2-355. “And, when the moneys are not required to be used for a particular purpose, the appropriation of such moneys is largely discretionary with the board of county commissioners.” *Id.* at 2-355. However, “the authority of the county commissioners to act in financial transactions must be clear and distinctly granted; any doubt must be resolved against the power to make the expenditure.” 1979 Op. Att’y Gen. No. 79-027, at 2-91. *Accord State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916) (“[t]he authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county”).

It is beyond the scope of an Attorney General opinion to review all the possible sources of county moneys that could be used to pay for repairs and maintenance of a ditch constructed pursuant to R.C. 6131.63 and then reimbursed through revenues collected from maintenance assessments. Accordingly, this opinion focuses on some of the primary sources of county moneys that might be expended for repairs and maintenance and then reimbursed through maintenance assessments; this opinion does not contain an exhaustive list of all the possible sources of county moneys that could be used in such a manner. We can conceive of at least three sources of county moneys that may be used to pay for emergency repairs of a ditch constructed pursuant to R.C. 6131.63 and then reimbursed through maintenance assessments.

First, moneys in a county’s general fund may be used to pay for emergency repairs on a ditch constructed pursuant to R.C. 6131.63 and then reimbursed through maintenance

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with R.C. Chapters 6133 and 6137. *See* 2017 Op. Att’y Gen. No. 2017-044, at 2-426 to 2-427; *see also* R.C. Chapter 6133; R.C. 6137.05(B).

<sup>8</sup> Trumbull County has not acquired home rule powers by adopting a charter, *see* Ohio Const. art. X, §§ 3 and 4, and has not adopted an alternative form of county government, *see* Ohio Const. art. X § 1; R.C. Chapter 302. Accordingly, Trumbull County is governed by those provisions of law describing the statutory form of county government. *See generally* R.C. Chapters 305 and 307 (general powers and duties of a board of county commissioners); 2013 Op. Att’y Gen. No. 2013-035, at 2-354 n.1.

assessments. R.C. 6137.051 describes the process for maintaining and repairing ditches that were authorized for construction *prior to August 23, 1957*, the effective date of certain amendments to Ohio's ditch laws. *See generally* 1956-1957 Ohio Laws 577, 616 (Am. H.B. 220, eff. Aug. 23, 1957). A board of county commissioners is authorized, but not required, to establish a drainage repair fund for the purpose of paying for the necessary work and materials to repair any pre-August 23, 1957, ditch through maintenance assessments. *See* R.C. 6137.051. However,

[i]f the drainage repair fund for the improvement to be so repaired is inadequate for the repair, the board of county commissioners may make payment for the repair from the county general fund, *which sum so paid from the general fund shall be a charge against the appropriate drainage maintenance fund to be repaid to the general fund as soon as adequate funds are available in the drainage maintenance fund.*

*Id.* (emphasis added). Accordingly, in the case of ditches approved for construction prior to August 23, 1957, the General Assembly has expressly authorized a board of county commissioners to pay for maintenance and repairs of the ditch with general fund moneys, which are then reimbursed whenever adequate funds are available in the appropriate drainage maintenance fund.

For ditches approved for construction *after August 23, 1957*, general fund moneys may similarly be used to pay for repairs and then reimbursed through maintenance assessments. R.C. 6137.07 describes the procedure for purchasing and caring for equipment to be used in a county's drainage maintenance program. The statute authorizes a board of county commissioners to "purchase such machinery, tools, conveyances, or other equipment for the repair and maintenance of drainage improvements under its jurisdiction as it considers necessary." R.C. 6137.07. Although R.C. 6137.07 anticipates that all expenditures "shall be paid out of the drainage maintenance fund or funds," *see id.*, the statute also provides that

[i]f the drainage maintenance fund *at any time* is inadequate for *such purchase or other expenditure*, the board of county commissioners is authorized to make the payment from the county general fund, *which sum so paid from the general fund shall be a charge against the drainage maintenance fund or funds to be repaid to the general fund as soon as adequate funds are available in the drainage maintenance fund or funds.*

*Id.* (emphasis added). As in the case of pre-August 23, 1957, ditches, the General Assembly has likewise authorized a board of county commissioners to pay for annual equipment purchases and other expenses with county general fund moneys and then seek reimbursement to the general fund whenever adequate moneys are available in the appropriate drainage maintenance fund or funds. The term "such purchase" in the above-quoted section of the statute refers to the authorization given to a board of county commissioners to "purchase such machinery, tools, conveyances, or other equipment for the repair and maintenance of drainage improvements under

its jurisdiction as it considers necessary.” The immediately succeeding phrase, “or other expenditure,” demonstrates that a board of county commissioners is not limited to making payments out of the county’s general fund only for equipment purchases; rather, the phrase evidences the General Assembly’s intent to allow a board of county commissioners to use general fund moneys to pay for any unexpected expense that arises regarding a ditch for which there are insufficient moneys in the appropriate maintenance fund. *See Black’s Law Dictionary* 577 (6th ed. 1990) (defining “expenditure” as “[s]pending or payment of money; the act of expending, disbursing, or laying out of money; payment”). Finally, use of the phrase “at any time” indicates the General Assembly’s intent that maintenance assessments may be levied *after* repairs are completed to reimburse moneys expended from the county’s general fund.

Second, a board of county commissioners may expend moneys in the rotary fund established by the county auditor pursuant to R.C. 6137.06 and reimburse those moneys with maintenance assessments. The Revised Code provides as follows:

The auditor shall establish and maintain a rotary fund for the purchase of equipment, materials, and labor related to the general maintenance of watercourses under [R.C. Chapter 6137]. This fund shall be established and maintained by a proportionate withdrawal from the funds of each drainage improvement or each drainage maintenance district.

The engineer shall establish a rental rate for equipment purchased with this fund. This rate shall be used in charging the equipment, along with material and labor, to the drainage improvement upon which it is used in order to reimburse the rotary fund.

R.C. 6137.06. Although not defined in the Revised Code, a “rotary fund” is synonymous with a “revolving fund.” *See Webster’s Third New International Dictionary of the English Language* 1945 (unabridged ed. 1993) (“revolving” is an adjective used to describe something “that revolves *or rotates* or recurs”) (emphasis added). In turn, a “revolving fund” is “[a] fund whose moneys are continually expended and then replenished.” *Black’s Law Dictionary* 788 (10th ed. 2014); *see also Black’s Law Dictionary* 674 (6th ed. 1990) (a revolving fund “may also mean a fund, which, when reduced, is replenished by new funds from specified sources”). The above provision notes that the rotary fund is established by the county auditor for the “general maintenance of watercourses.” *See* R.C. 6137.06. Ditches constructed pursuant to R.C. 6131.63 are considered public watercourses upon completion. *See* R.C. 6131.63. Therefore, emergency repairs to ditches constructed pursuant to R.C. 6131.63 may be paid for by moneys in the rotary fund established pursuant to R.C. 6137.06. Thereafter, a board of county commissioners may levy maintenance assessments on the benefited landowners and reimburse the rotary fund when the maintenance assessments are collected and credited to the appropriate maintenance fund. The costs of emergency repairs may be reimbursed with revenue from maintenance assessments levied after the emergency repairs have been completed because the rotary fund will be repaid by a withdrawal from the appropriate maintenance fund.

Third, moneys in a county engineer's operating fund provided by the annual appropriation made by the board of county commissioners may be expended on emergency repairs of ditches constructed pursuant to R.C. 6131.63 and then reimbursed through maintenance assessments. We recognize that the use of some moneys in the county engineer's operating fund may be restricted to some particular purpose or otherwise encumbered. *See, e.g.,* R.C. 315.12(A) (“[t]wo thirds of the cost of operation of the office of county engineer ... shall be paid out of the county's share of the fund derived from receipts from motor vehicle licenses, as distributed under [R.C. 4501.05], and from the county's share of the fund derived from the motor vehicle fuel tax as distributed under [R.C. 5735.27]”). However, emergency repairs to a ditch are conceivably expenses of the county engineer's office. *See* R.C. 6137.05(A); R.C. 6137.06; *see also* 1994 Op. Att'y Gen. No. 94-025, at 2-115 to 2-117. Consequently, available moneys in the county engineer's operating fund may be used to pay for the costs of those repairs and then reimbursed through maintenance assessments. After revenue from the maintenance assessments is collected and credited to the appropriate maintenance fund, moneys can then be transferred back to the engineer's operating fund through the procedure described in R.C. 5705.16.<sup>9</sup>

In sum, a board of county commissioners may expend county moneys to pay for emergency repairs to a ditch constructed pursuant to R.C. 6131.63 and then seek reimbursement through maintenance assessments by, at minimum, the following methods: (1) expending moneys from the county's general fund and then reimbursing the general fund whenever the appropriate maintenance fund contains adequate moneys; (2) expending moneys from the rotary fund established pursuant to R.C. 6137.06 and then reimbursing the rotary fund once maintenance assessments are collected and credited to the appropriate ditch maintenance fund; or (3) expending unencumbered moneys in the county engineer's operating fund and then reimbursing the engineer's fund after revenue from maintenance assessments is collected and credited to the appropriate maintenance fund through the procedures described in R.C. 5705.16.<sup>10</sup>

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<sup>9</sup> R.C. 5705.16 requires a board of county commissioners to obtain the approval of the Tax Commissioner to transfer moneys from a special fund like a ditch maintenance fund to the county's general fund. *See* R.C. 5705.14-.16.

<sup>10</sup> A board of county commissioners is also authorized to designate a portion of the county as a “drainage improvement district.” R.C. 6131.52. The board may levy a tax “for the construction and maintenance of the system of drainage improvements within the drainage improvement district.” *See id.*; *see also* R.C. 5705.19(X). Such a tax will only be levied on the real property in the district. R.C. 6131.52. Accordingly, if emergency repairs are paid for with such tax levy revenue, it may be unnecessary for a board of county commissioners to impose maintenance assessments on the benefited landowners for the costs of the repairs.



### **Maintenance Assessments on Condominium Property**

Your final question asks whether individual condominium units may be considered separate parcels of property for assessment purposes under R.C. 6131.63 and R.C. Chapter 6137.

A condominium is a form of real property ownership under which an owner of a condominium unit has the right to exclusive possession of that unit and an undivided ownership interest with the other unit owners in the common elements of the condominium property. R.C. 5311.01(K). Generally, the term “‘condominium’ contemplates that the land will be held in common ownership and the ‘units’ will consist of the interior walls and air space.” 1971 Op. Att’y Gen. No. 71-031, at 2-100. Condominium property is formed by filing a declaration submitting the property to the condominium form with the county recorder and auditor. R.C. 5311.01(K); R.C. 5311.06. A condominium declaration is a contract between unit owners and the condominium association, *see Hoffman v. Maisons Lafayette Condo. Block A Owners’ Assn.*, 1st Dist. No. C-140091, 2014-Ohio-4645, 2014 Ohio App. LEXIS 4550, at ¶ 8, and contains items such as the legal description of the land on which the condominium property sits and a description of the common elements of the property. R.C. 5311.05.

A condominium unit is a part of the condominium property that is designated as a unit in the declaration. R.C. 5311.01(BB). A condominium unit can be residential, in which the designated part of the condominium property is devoted in whole or in part to use as a residential dwelling consisting of one or more rooms on one or more floors of a building. R.C. 5311.01(BB)(1); *see also* 1986 Op. Att’y Gen. No. 86-039, at 2-201 (“[t]he connotation of [R.C. 5311.01(BB)(1)] is ... that a unit is to consist of a portion of a building which is large enough to constitute one or more rooms of that building in which people may dwell, work, or otherwise occupy their time”). “A unit owner is entitled to the exclusive ownership and possession of the unit and to ownership of an undivided interest in the common elements as expressed in the declaration.” R.C. 5311.03(B).

The common elements of a condominium property are owned by the unit owners as tenants in common, with each owner having an undivided interest in the common elements of the property, which can include the roof of a building, basements, parking areas, and elevators, among other parts of the condominium property provided for in the declaration. *See* R.C. 5311.01(F); R.C. 5311.04; *see also* Thomas J. Sherman, *Anderson’s Ohio Residential Real Estate Manual*, Ch. 12, § 12.02 (2017) (“[t]he basic system of ownership in condominiums is that each owner has the full fee to her own unit in the same manner as the owner of a conventional single-family residence, but is a tenant in common with all the other unit owners in the rest of the property”). A unit owner’s undivided interest in the common elements of the condominium property creates a tenancy in common with all other unit owners, whereby each unit owner is entitled to equal use and possession of the common elements of the property. *See Black’s Law Dictionary* 1506 (8th ed. 2004).

The Ohio Revised Code provides that each condominium unit, as well as the undivided interests in the common elements of a condominium property, shall be taxed and assessed as separate parcels of property:

Each unit of a condominium property and the undivided interest in the common elements appurtenant to it is deemed a separate parcel for all purposes of taxation and assessment of real property, and no other unit or other part of the condominium property shall be charged with the payment of those taxes and assessments.

R.C. 5311.11. Thus, for all taxation and assessment purposes, an individual condominium unit shall be considered a separate parcel of property. *See Columbus City Sch. Bd. of Educ. v. Franklin Cnty. Bd. of Revision*, 148 Ohio St. 3d 700, 2016-Ohio-8375, 72 N.E.3d 637, at ¶¶ 4, 13-14 (a condominium property of 16 units cannot be treated as a single economic unit for tax-valuation purposes “because the law mandates separate treatment of condominium parcels”) (quoting R.C. 5311.11); *see also Dublin City Sch. Bd. of Educ. v. Franklin Cnty. Bd. of Revision*, 139 Ohio St. 3d 212, 2014-Ohio-1940, 11 N.E.3d 222, at ¶ 16 (“[t]axing authorities must value condominium units as separate parcels, even when those units are contained in a single complex”) (citing R.C. 5311.11); Thomas J. Sherman, *Anderson’s Ohio Residential Real Estate Manual*, Ch. 12, § 12.02 (2017) (“[e]ach unit owner’s property is separately assessed for property taxation and assessments”). Moreover, “[e]ach unit of a condominium property, together with the undivided interest in the common elements appurtenant to it, is real property for all purposes and is real estate within the meaning of all provisions of the Revised Code.” R.C. 5311.03(A).

Once a ditch has been approved and constructed pursuant to R.C. 6131.63, maintenance assessments are levied in accordance with the procedures of R.C. Chapter 6137. *See* R.C. 6131.63. R.C. 5311.11 mandates that condominium units and the undivided interests of a condominium property be treated as separate parcels “for *all* purposes of taxation and *assessment* of real property.” (Emphasis added.) Given the broad language of R.C. 5311.11, therefore, if a condominium property is part of the permanent maintenance assessment base of a ditch constructed pursuant to R.C. 6131.63, the units of that condominium property should be treated as individual parcels of property for the purpose of levying maintenance assessments under R.C. Chapter 6137. Pursuant to R.C. 5311.11, the undivided interests in the common elements of a condominium property should also be treated as separate parcels for maintenance assessment purposes.

For example, suppose a condominium property is composed of ten (10) residential building units, each of which is owned by a single owner. The residential buildings surround a parking lot, which has been declared to be a common element of the condominium property, with each condominium unit owner having an equal, undivided interest in the parking lot. The condominium property, including the individual condominium units and the parking lot, is part of the permanent maintenance assessment base for a ditch constructed under R.C. 6131.63. Maintenance is then performed on the ditch. The board of county commissioners determines that

the maintenance provides a \$500 benefit to a particular condominium unit. The board of county commissioners also determines that the maintenance of the ditch benefits the parking lot. If the benefit to the parking lot is \$1,000, then each of the ten owners of condominium units is assessed \$100 given each unit owner's equal, undivided interest in the parking lot, a common element of the condominium property. Maintenance assessments are then levied on the condominium unit as assessments are ordinarily levied under R.C. Chapter 6137. In total, the condominium unit owner is assessed \$600 (\$500 for the benefit to the owner's unit and \$100 for the benefit to the parking lot).

In sum, for the purpose of levying maintenance assessments on condominium property under R.C. Chapter 6137, each condominium unit should be treated as a separate parcel of property. In addition, each unit owner's undivided interest in the common elements of the condominium property should be treated as its own, separate parcel of property for the purpose of levying maintenance assessments under R.C. Chapter 6137.

### **Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised of the following:

1. Pursuant to R.C. 6137.03, a board of county commissioners may defer levying maintenance assessments on benefited lands for the repair, upkeep, and permanent maintenance of a ditch constructed under R.C. 6131.63 until such time as maintenance or repairs become necessary.
2. Upon discovery that a ditch constructed under R.C. 6131.63 requires maintenance or repair, a board of county commissioners may levy maintenance assessments on the benefited lands that are part of the permanent maintenance assessment base pursuant to the assessment procedures under R.C. Chapter 6137.
3. If a ditch maintenance fund lacks sufficient moneys for emergency repairs to a ditch constructed pursuant to R.C. 6131.63, a board of county commissioners may use other available county moneys to pay for such emergency repairs and reimburse those moneys with revenue collected from maintenance assessments levied after the repairs are completed.

4. For the purpose of levying maintenance assessments on condominium property under R.C. Chapter 6137, each condominium unit and each unit owner's undivided interest in the common elements of the condominium property should be treated as separate parcels of property.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General