

**OPINION NO. 82-005****Syllabus:**

1. A board of county commissioners may expend funds it receives through the Federal Community Development Program to construct a drainage improvement.
2. The cost factor in the cost-benefit analysis required by R.C. Chapter 6131 includes only those costs which are to be assessed against landowners pursuant to that Chapter.

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**To: Lee C. Falke, Montgomery County Prosecuting Attorney, Dayton, Ohio**  
**By: William J. Brown, Attorney General, March 1, 1982**

I have before me your request for my opinion in response to the "question of whether or not the cost factor in the cost versus benefit ratio [found in R.C. Chapter 6131] includes total costs of the project unreduced by any sums of money from a third source or [whether] total costs include only those costs which are to be assessed against the property owners living in the drainage area." Conversations between a member of my staff and your office have indicated that the funds in question are those distributed by the Department of Housing and Urban Development (H.U.D.) pursuant to the Community Development Program, 42 U.S.C. §§5301-5320.

Your letter describes the facts and circumstances surrounding a particular drainage improvement which prompted your request. However, it is my understanding, based on conversations between a member of my staff and your office, that the county no longer intends to construct that improvement. I will, therefore, for the purposes of this opinion, speak generally of the laws governing the use of federal funds and the construction of drainage improvements, rather than focusing on the particular factual situation presented by your letter.

In order to properly analyze the issues presented by your request, it is first necessary to examine the Community Development Program and the role of county government in the administration of that program. The Community Development Program was established by Congress in 1974<sup>1</sup> to aid in "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate

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<sup>1</sup>The statutes governing the Community Development Program have recently been amended as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 384.

income." 42 U.S.C. §5301(c). As a means of achieving this goal, Congress enacted several different methods for the distribution of Community Development funds to local government units. It is my understanding that Montgomery County receives its funds by means of an entitlement grant. My discussion will, therefore, focus on the statutes and regulations which govern the receipt of entitlement grants and will not address any other method of fund distribution.

Pursuant to 42 U.S.C. §5306, entitlement grants are made available to urban counties and metropolitan cities. The amount of each grant is determined by the use of a fixed formula. 42 U.S.C. §5306. Prior to the receipt of a grant, the grantee must prepare and submit to the Secretary of Housing and Urban Development "a final statement of community development objectives and projected use of funds." Pub. L. No. 97-35, §302(b), 95 Stat. 384. The funds made available to the local governmental unit may be spent on a broad range of projects, including drainage improvements. 42 U.S.C. §5305.<sup>2</sup> H.U.D. monitors the activities of grant recipients to ensure that funds are used in a proper and timely manner, and "may make appropriate adjustments in the amount of the annual grants." Pub. L. No. 97-35, §302(c)(1), 95 Stat. 384, 386. However, the actual operation of the program takes place at the local level. It is the county, not the federal government, which selects the projects to be undertaken and which manages the expenditures of Community Development funds on those projects.

It is my understanding that the Montgomery County Commissioners have established the Community Development Office which, under the control of the county commissioners, administers the Community Development Program. The funds received from H.U.D. are kept in an account separate from those holding any other county funds. H.U.D. funds are used to pay for projects selected by the Community Development Office and approved by the county commissioners. In some instances, the county pays only a portion of the cost of a project. In the event that such a partially funded project is a drainage improvement, a petition for the unfunded portion of the project is ordinarily filed with the board of county commissioners by a governmental unit, such as a township, pursuant to R.C. Chapter 6131.

Your request concerns the effect of the use of federal funds on the cost-benefit analysis contained in R.C. Chapter 6131. However, before I can proceed to address this specific concern, I must first resolve a preliminary issue which arises from certain language used in R.C. Chapter 6131. As the following paragraphs will indicate, there is some question as to whether, under Ohio law, federal funds can be used to finance drainage improvement projects of the type which fall within R.C. Chapter 6131.

Pursuant to R.C. Chapter 6131, any property owner may file a petition with the county commissioners requesting a necessary drainage improvement. R.C. 6131.04. "Owner" is defined in R.C. 6131.01(A) to include those empowered to act on behalf of various political subdivisions including boards of township trustees, mayors, and boards of education. Upon the receipt of such a petition, the county commissioners set a date for a preliminary hearing on the proposed improvement. R.C. 6131.07. The county engineer prepares a preliminary report on the cost and feasibility of the improvement. In addition, the county engineer must give his opinion "as to whether benefits from the project are likely to exceed the estimated cost." R.C. 6131.09. This opinion is considered by the county commissioners at a preliminary hearing. In order to find in favor of the improvement, the county

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<sup>2</sup>42 U.S.C. §5305(a)(2) lists "water and sewer facilities" in the category of eligible activities. 24 C.F.R. §570.201(c)(10) defines "water and sewer facilities" to include storm sewers. "Storm sewers" are defined by 24 C.F.R. §570.201(c)(10) as "sewers or other conduits, open or closed, or their appurtenances which collect, transport and dispose of storm waters, surface water, street wash, other wash and ground water or drainage into an existing water course. . . ."

commissioners must find that the estimated cost will not exceed the expected benefits from the construction. R.C. 6131.12. If such a favorable finding is made by the county commissioners, the county engineer is then required by R.C. 6131.14 to:

make the necessary survey for the proposed improvement. He shall make plans for structures, maps showing the location of the land proposed to be assessed, and profiles showing the cuttings and gradient of the improvement, and shall make an estimate of the cost of the construction of the improvement, which shall include actual construction cost, the cost of engineering, and the cost of notices, publication, and other incidental expenses. (Emphasis added.)

The estimate prepared by the county engineer pursuant to R.C. 6131.14 is then utilized by the county commissioners to make a final determination as to whether the benefits to be derived from the proposed improvement outweigh the costs connected with construction. R.C. 6131.21.

When the county commissioners have made the preliminary decision to go forward with the proposed drainage improvement project, the county engineer is required to determine the portion of the estimated cost which is to be assessed against public corporations, the state, and private landowners. R.C. 6131.15. "The total of these estimated assessments including the total estimated assessments allocated to public corporations and the state shall equal the estimated cost of the proposed improvement." R.C. 6131.15. This section specifically states who must be assessed and in what manner. More importantly, it requires that the total cost must be accounted for by these assessments. R.C. Chapter 6131 does not make allowance for the use of funds from outside sources, unlike statutes such as R.C. 1515.20-.24,<sup>3</sup> which specifically provide for the assessment of costs not otherwise funded. Thus, from a reading of R.C. Chapter 6131 alone, it is possible to argue that federal funds may not be used to pay for costs which are by statute required to be assessed against private landowners, public corporations and the state.

To base a conclusion solely on R.C. Chapter 6131 would, however, ignore the relevance of the Revised Code section governing the participation by a board of county commissioners in a federal program. That statute, R.C. 307.85, reads, in pertinent part, as follows:

(A) The board of county commissioners of any county may participate in, give financial assistance to, and cooperate with other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted by the congress of the United States, and for such purpose may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state.

Thus, pursuant to R.C. 307.85(A) a board of county commissioners may, in connection with the establishment and operation of any federal program, take any action and adopt any procedure which is not in conflict with the statutory or constitutional law of Ohio.

It is readily apparent from the above description of the Community Development Program that the Montgomery County board of commissioners is operating a federal program. Through the Community Development Office, the county commissioners determine the manner in which the funds from H.U.D. will be

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<sup>3</sup>R.C. 1515.24 states that "the board of county commissioners may levy upon the property within the project area an assessment. . .to pay the cost of construction of the improvement not otherwise funded. . ." (emphasis added).

spent, and then proceed with the necessary construction or improvement. It is true that H.U.D. does oversee the expenditure of community development funds. However, it is the board of county commissioners which is responsible for the actual administration of the program.

Because the Montgomery County board of commissioners is operating the Community Development Program, it may, pursuant to R.C. 307.85, "adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state" in connection with that program. The board of county commissioners may, therefore, expend community development funds on a drainage improvement if such action does not conflict with state law, or the state constitution. Ohio Const. art. VIII, §6 prohibits the use of public funds to benefit private individuals. A board of county commissioners, as a creature of statute, must act in conformance with the constitution and statutes of the state. It is clear, however, that a prohibition contained in a state constitution does not govern the expenditure of funds by the federal government. Since the funds in question are provided pursuant to federal law, it may be argued that art. VIII, §6 is not applicable in this instance. However, even if it is applicable, it does not operate to impede the proposed project, since a drainage project, although it may benefit individual landowners, is considered a public improvement. See Van Wert National Bank v. Roos, 134 Ohio St. 359, 17 N.E.2d 651 (1938); 1981 Op. Att'y Gen. No. 81-076. Consequently, the ban contained in art. VIII, §6 does not prevent a county from using federal funds for a drainage improvement. I am not aware of any other constitutional provision which is applicable in this instance. Therefore, the question becomes whether an expenditure of funds in the manner suggested by your letter would be in conflict with state law.

R.C. Chapter 6131 prescribes certain methods for the funding and construction of drainage improvements. However, it is my opinion that the construction of a drainage improvement through the use, in whole or in part, of community development funds, does not conflict with R.C. Chapter 6131. That Chapter provides a method by which a landowner may seek to have a drainage improvement constructed and to have the cost of such construction apportioned among the owners of the land which is benefited. The fact that this Chapter was meant to deal with drainage improvements the cost of which is to be assessed is apparent from the many safeguards which were enacted to protect those landowners subject to such assessment. See, e.g., R.C. 6131.25 to R.C. 6131.36 (appeal by landowner). See also R.C. 6131.15 (assessments must be made according to benefits); Laskey v. Hilty, 91 Ohio App. 136, 107 N.E.2d 899 (Lucas County 1951) (an assessment substantially in excess of benefits derived violates Ohio Const. art. I, §19; an assessment is constitutional only when based upon benefits accruing from the improvement). But, there is no indication that the General Assembly intended that the method prescribed by R.C. Chapter 6131 be exclusive. The very existence of R.C. 307.85, which permits counties to take advantage of the federal programs available to them, argues against the conclusion that R.C. Chapter 6131 sets forth the only method by which a county may undertake to improve its drainage systems. Of course, if a portion of the project is to be financed by means of assessments against public and private landowners, the procedures required by R.C. Chapter 6131 must be complied with for that portion. As the above discussion has indicated, the operation of the Community Development Program does not conflict with the constitution or statutes of Ohio. Therefore, I conclude that, under the authority of R.C. 307.85, a board of county commissioners may use funds it receives through the Community Development Program to construct a drainage improvement.

I may now proceed to address your question concerning the cost factor in the cost versus benefit ratio used in R.C. Chapter 6131. As the preceding paragraphs have demonstrated, R.C. Chapter 6131 applies only to those projects, or portions of projects, the cost of which is to be assessed against landowners. Thus, in a situation in which federal funds are to pay for the entire improvement and no assessments will be made, the cost-benefit ratio has no applicability. If, however, a portion of the cost of the project is to be assessed against landowners, then R.C. Chapter 6131 and the cost-benefit analysis contained therein would apply to the

portion of the improvement to be financed by assessments. Therefore, in specific answer to your question, the cost factor in the cost-benefit ratio found in R.C. Chapter 6131 includes only those costs which are to be assessed against the owners of land which is benefited by the improvement.

Therefore, it is my opinion, and you are advised, that:

1. A board of county commissioners may expend funds it receives through the Federal Community Development Program to construct a drainage improvement.
2. The cost factor in the cost-benefit analysis required by R.C. Chapter 6131 includes only those costs which are to be assessed against landowners pursuant to that Chapter.