

**OPINION NO. 76-080****Syllabus:**

1. The provisions of R.C. 6131.63 are exclusive, and therefore all owners who do not fall into one of the exceptions enumerated by that section must file with the clerk of the board of county commissioners all schedules, surveys and agreements, if any, related to the construction of an improvement.

2. If owners construct an improvement without filing the agreement, schedules and surveys, in accordance with R.C. 6131.63, said improvement may not be placed on permanent maintenance under R.C. Chapter 6137.

To: Thomas Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio  
By: William J. Brown, Attorney General, December 10, 1976

I have before me your request for my opinion concerning the placement of certain public improvements on permanent maintenance pursuant to R.C. Chapter 6137. Your request focuses on the following questions:

1. Are the provisions of R.C. 6131.63, regarding the establishment of public watercourses exclusive, or may private owners enter into some other type of agreement not outlined in the statute for the construction of an improvement and not file the agreement, schedules and survey with the clerk of the board of county commissioners?

2. If private landowners construct an improvement without so filing and without the county engineer's approval, as required by R.C. 6131.63, may it be placed on permanent maintenance under R.C. Chapter 6137 without the consent of the landowners involved?

Pursuant to conversations between this office and yours it is my understanding that private landowners have been constructing watercourses on their property without following the provisions of R.C. 6131.63. However, the county engineer has been supplying the plans used by these landowners as a public service. Since no provision has been made for placing these improvements on permanent maintenance under R.C. Chapter 6137, many of them have fallen into disrepair.

R.C. Chapter 6131 places in the board of county commissioners control over drainage as a county-wide project. A landowner invokes the jurisdiction of the board to approve construction of an improvement by filing a petition with the clerk of the board of county commissioners. See R.C. 6131.04.

R.C. 6131.63 provides an alternative to petitioning the board of county commissioners for the construction of an improvement. This section states, in part:

"Excepting when an owner whose land is used for agricultural purposes desires to install tile by extending or adding to his own laterals or desires to expel water therefrom into an open ditch on his own land in the same watershed, when one or more owners desire to join in the construction of an improvement which will benefit the land of the owners, and when such owners are willing to construct such improvement and pay the cost thereof, they may enter into a written agreement for the construction of such improvement, or they may enter into an agreement to construct such part of such improvement as a person mutually agreed upon ap- portions to each of them respectively. In such agreement such owners shall provide that the agreement and the survey and schedules of the proposed improvement shall be filed with the clerk of the board of county commissioners of the county in which such improvement is to be constructed." (Emphasis added.)

Under R.C. 6131.63, an individual owner whose land is used for agricultural purposes does not have to file the survey and schedules of proposed improvements with the clerk of the board of county commissioners if he merely wishes to extend or add to his own laterals or to expel water therefrom into an open ditch on his own land in the same watershed. If, however, one or more owners desire to join in the construction of an improvement and are willing to construct it and pay the cost thereof, they must enter into an agreement to do so. This agreement may take one of two forms: a written agreement for the construction of the improvement, or an agreement to construct such part of the improvement as a person mutually agreed upon apportions to each of them respectively. This agreement, the survey, and the schedules of the proposed improvement must be filed with the clerk of the board of county commissioners.

Thus, the statute exempts from filing requirements only the owner of land used for agricultural purposes who is adding to his laterals or expelling water into an open ditch on his own land. All others must file with the clerk of the board of county commissioners. This includes individual landowners who do not come within the exception set forth in R.C. 6131.63.

Aside from the provision for the establishment of a public watercourse by the agreement of private landowners, R.C. 6131.59 provides as follows for the recognition of certain other improvements as public watercourses after a statutorily prescribed period of time:

"When an improvement consisting of a ditch, drain, or watercourse has become the outlet of agricultural drainage, and has been established and constructed, or used, for seven years or more, it shall be deemed to be a public watercourse notwithstanding any error, defect, or irregularity in the location, establishment, or construction thereof, and the public shall have and possess in and to any such watercourse which has thus been constructed, or used, for seven years, the rights and privileges which relate to and pertain to natural watercourses, but the same shall be subject to any improvement upon petition as provided in sections 6131.01 to 6131.64, inclusive, of the Revised Code."

The answer to the first question then is that, beyond the exceptions in R.C. 6131.59 and 6131.63, the alternatives outlined in R.C. 6131.63 are the exclusive methods contemplated by the General Assembly for the establishment of public watercourses by agreement of private landowners.

With respect to the second question, R.C. 6131.63 provides that the clerk of the board of county commissioners shall refer the filed agreement, survey, and schedules to the county engineer for review. After the county engineer files a certificate of approval with the clerk, the board of county commissioners shall hold a hearing on proposed maintenance assessments. R.C. 6131.63 further states:

"Once the assessments have been approved all further proceedings in connection with the maintenance of the improvement shall be in accordance with Chapter 6137. of the Revised Code."

R.C. 6137.02 states, in part:

"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 the provisions of Chapter 6131. of the Revised Code."

R.C. 6137.05 states, in pertinent part:

"The maintenance fund created under authority of section 6137.01 of the Revised Code shall be subject to the use of the board of county commissioners, or joint board of county commissioners, as the case may be, for the necessary and proper repair or maintenance of any improvement constructed under provisions of sections 6131.01 to 6131.64, inclusive, . . . of the Revised Code."

It follows from a reading of the above statutory scheme that if private landowners do not comply with the provisions of R.C. 6131.63 in constructing an improvement, the improvement cannot be placed on permanent maintenance under R.C. Chapter 6137. This, of course, would not preclude a petition pursuant to R.C. 6131.04 which might ultimately result in the establishment of a public watercourse by action of the county. Similarly, R.C. 6131.62 authorizes a board of county commissioners to initiate proceedings for an improvement when county property is in need of drainage. The situation, which you have described, however, is an attempt to place a privately constructed improvement on permanent maintenance pursuant to R.C. Chapter 6137, without the consent of the landowners involved. Such action is not contemplated by R.C. 6137.05 because the private construction was not completed in accordance with R.C. 6131.63, nor was the improvement deemed a public watercourse pursuant to R.C. 6131.59.

In specific response to your questions it is my opinion, and you are so advised that:

1. The provisions of R.C. 6131.63 are exclusive, and therefore all owners who do not fall into one of the exceptions enumerated by that section must file with the clerk of the board of county commissioners all schedules, surveys and agreements, if any, related to the construction of an improvement.

2. If owners construct an improvement without filing the agreement, schedules and surveys, in accordance with R.C. 6131.63, said improvement may not be placed on permanent maintenance under R.C. Chapter 6137.