

OPINION NO. 89-036

Syllabus:

Pursuant to R.C. 6131.59, when a county ditch has been established for seven or more years, a landowner may convert the portion of the ditch on his property into an irrigation system by periodically blocking the ends of the ditch and filling it with water, provided that such blockage has been approved as an improvement pursuant to R.C. 6131.04 or R.C.

6131.63. (1984 Op. Att'y Gen. No. 84-101, syllabus, paragraph five, approved and followed.)

To: Wilfrid G. Dues, Preble County Prosecuting Attorney, Exton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 16, 1989

I have before me your request for my opinion regarding a county ditch. Pursuant to your letter, the diagram attached thereto, and your conversation with a member of my staff, I understand that your question arises from the following facts. During periods of drought, an individual blocks each end of a twelve inch drainage tile passing through his property with temporary plugs. He then pumps water from his private wells into the blocked tile, causing water to fill the tile and back up into the lateral drain tiles on his property, thereby creating an underground irrigation system. The blocked tile is part of a county ditch established more than seven years ago pursuant to R.C. Chapter 6131, to drain a watershed area in the county which includes, but is not limited to, the property of the individual in question. The ditch tile passes under two public highways bordering the property and the landowner is able to block the tile where it opens into the side ditches of these highways. If the landowner should fail to remove the plugs in the event of rain, they would obstruct proper drainage through the county ditch and could result in water overflowing onto the public highways and adjacent lands. You wish to know if the landowner can lawfully convert a public county ditch into an irrigation system.

County ditches are governed generally by R.C. Chapter 6131.¹ R.C. 6131.59 states:

When an improvement consisting of a ditch, drain, or watercourse has been established and constructed or used for seven years or more, it shall be considered to be a public watercourse...but the same shall be subject to any improvement upon petition as provided in sections 6131.01 to 6131.64 of the Revised Code.

Pursuant to R.C. 6131.01(C)(3), the term "improvement" includes a "control gate...or other structure...for the storage or control of water." See also R.C. 6131.01(C)(1) ("['i]mprovement' includes...any change in the course, location, or terminus of any ditch, drain, watercourse..."). It is also apparent that irrigation is an acceptable goal of an improvement. See R.C. 6131.01(F)(3) (benefits from an improvement include "use of water for irrigation"); R.C. 6131.02 (irrigation included as basis for approval of improvement by board of county commissioners). Thus a plug intended to retain water in a county ditch for irrigation purposes is an improvement.

I have held that R.C. 6131.59 requires a landowner wishing to install an improvement in an established county ditch to utilize the procedures set out in R.C. 6131.01 to R.C. 6131.64. See 1984 Op. Att'y Gen. No. 84-101 (syllabus, paragraph five) ("[p]ursuant to R.C. 6131.59, in order to undertake an improvement to a portion

¹ I note that the maintenance of county ditches constructed under R.C. Chapter 6131 is governed by R.C. Chapter 6137. See 1984 Op. Att'y Gen. No. 84-101 at 2-344. You have indicated that the landowner in this case has undertaken the private maintenance of the portion of the ditch on his property in return for a reduction of his assessment. See R.C. 6137.08; R.C. 6137.09. Pursuant to R.C. 6137.08, "repair and maintenance work" encompasses tasks "such as clearing brush, removing silt or debris, repair of structure, or other work necessary to preserve the improvement." The work proposed by your landowner, however, consists of altering the ditch by the periodic opening and closing of its passage through his property and therefore is not governed by R.C. Chapter 6137. See Op. No. 84-101 at 2-349 ("alteration of an improvement [is] clearly different from mere measures undertaken to repair, maintain or preserve the existing improvement"). Therefore, the existence of a maintenance agreement pursuant to R.C. 6137.08 has no bearing on whether the landowner may block the ditch for irrigation purposes.

of a ditch that was established in accordance with R.C. 6131.63 more than seven years previously, an owner must file a petition as provided under R.C. 6131.04 through R.C. 6131.64..."). As I discussed in Op. No. 84-101, these sections of the Revised Code provide two methods by which an owner may request a proposed improvement. If the owner wishes the county to construct the improvement and to apportion the cost to all benefited landowners, the owner must file a petition pursuant to R.C. 6131.04. If the owner intends to assume all responsibility for the costs and maintenance of an improvement benefiting his own property, the owner must file pursuant to R.C. 6131.63.² See Op. No. 84-101 at 2-346 to 2-350 (discussing and contrasting the two methods).

I find nothing in either procedure that would per se prohibit an established drainage ditch from being used for irrigation as well. The concern that the two functions may be incompatible is inherent in your question. I note, in this regard, that one of the purposes of the approval procedures initiated by filing under R.C. 6131.04 or R.C. 6131.63 is to determine the feasibility and propriety of the proposal. I note in particular that subsequent to filing under either statute, it is the duty of the county engineer to determine the adequacy of the plans, specifications, construction and maintenance of the improvement. See R.C. 6131.09; R.C. 6131.14; R.C. 6131.46; R.C. 6131.63. Thus, under the facts you have presented, it would be a matter for the professional judgment of the county engineer whether the plans for insertion and removal of plugs in the owner's portion of the county ditch adequately preserve the drainage function of the ditch and protect adjacent lands and highways from water damage. Therefore, approval of the improvement, pursuant to either R.C. 6131.04 or R.C. 6131.63, would be contingent, in part, on such restrictions or limitations as the engineer might impose. I have neither the expertise nor the authority to render an opinion on this aspect of your question and I defer to the judgment of the county engineer. See generally *State ex rel. Copeland v. State Medical Board*, 107 Ohio St. 20, 140 N.E. 660 (1923) (if determination of facts is necessary on a matter assigned by statute to state medical board, the board must make the determination); 1984 Op. Att'y Gen. No. 84-067 at 2-217 to 2-218 (Attorney General is not authorized to exercise discretion that has been delegated by statute to another officer or entity).

Therefore, in response to your question, it is my opinion, and you are hereby advised that pursuant to R.C. 6131.59, when a county ditch has been established for seven or more years, a landowner may convert the portion of the ditch on his property into an irrigation system by periodically blocking the ends of the ditch and filling it with water, provided that such blockage has been approved as an improvement pursuant to R.C. 6131.04 or R.C. 6131.63. (1984 Op. Att'y Gen. No. 84-101, syllabus, paragraph five, approved and followed.)

² R.C. 6131.63 also provides that a group of owners may agree to assume responsibility for an improvement involving their several properties. Accordingly, the statute describes the necessary procedures in terms of such group involvement. It is clear, however, that a single landowner may seek approval under R.C. 6131.63 of an improvement benefiting his own land. R.C. 6131.63 ("when *one* or more landowners desire to join in the construction of an improvement that will benefit the land of the owners...") (emphasis added). R.C. 6131.63 also allows a landowner "to install tile by extending or adding to his own laterals" or "to expel water therefrom into an open ditch on his own land in the same watershed," without seeking prior approval. These exceptions, however, are not applicable to the facts you have described.