

**OPINION NO. 85-049**

**Syllabus:**

1. No assessment levied pursuant to R.C. 6137.03 for the maintenance of an improvement may be in an amount less than two dollars.

2. Pursuant to R.C. 6137.11 and R.C. 6137.03, so long as an owner continues to be a part of the permanent assessment base for maintenance of an improvement, an assessment must be levied against such owner for the maintenance of the improvement whenever the board of county commissioners finds that an assessment is needed to maintain a fund created under R.C. 6137.02.

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**To: John E. Meyers, Sandusky County Prosecuting Attorney, Fremont, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, August 15, 1985**

I have before me your request for my opinion in response to two questions regarding assessments for the maintenance of ditches. You first ask whether R.C. 6137.03 must be construed to mean that the minimum maintenance assessment which may be levied against an owner of land that is benefited by an improvement must be at least two dollars, although the proportionate share of the benefit such owner derives from the improvement would result in a maintenance assessment calculated to be an amount less than two dollars.

R.C. 6137.02 establishes funds for the maintenance of single county (R.C. Chapter 6131), joint county (R.C. Chapter 6133), and interstate improvements (R.C. Chapter 6135), by providing:

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 Chapter 6131. of the Revised Code. After August 23, 1957, a maintenance fund also shall be established and maintained by each joint board of county commissioners for the repair, upkeep, and permanent maintenance of each improvement constructed under Chapter 6133. of the Revised Code. A maintenance fund shall also be established for the repair, upkeep, and permanent maintenance of each improvement constructed under Chapter 6135. of the Revised Code if the necessary privilege to do so has been granted by the legislature of the other state. If the improvement affects only a single county of the state, the board of county commissioners of that county shall establish and maintain the fund. If two or more counties of the state are affected by the improvement, the joint board of county commissioners organized under Chapter 6135. of the Revised Code shall establish and maintain the fund. (Emphasis added.)

The moneys for the funds created under R.C. 6137.02<sup>2</sup> are derived from the assessments levied pursuant to R.C. 6137.03, which states:

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<sup>1</sup> Your letter of request refers specifically to the maintenance of ditches. I note that, for purposes of R.C. Chapter 6137, the definition of the term "improvement" is that which is set forth under R.C. 6131.01. R.C. 6137.01. Thus, an "improvement" may include, *inter alia*, the construction, reconditioning, or alteration of ditches, drains, watercourses and floodways, changes in the course, location, or terminus of a river, creek, or run; the removal of obstructions, debris, or drift from any ditch, drain, watercourse, floodway, river, creek, or run; and the vacating of any ditch or drain. See R.C. 6131.01(C). R.C. 6137.01 similarly provides that the terms "owner" and "benefit," as used in R.C. 6137.01-14, are defined under R.C. 6131.01. See R.C. 6131.01(A) and (F).

<sup>2</sup> Township ditches improved pursuant to petitions initiated under former R.C. 6139.01 prior to the repeal of such statute by Am. Sub. H.B. 268, 113th Gen. A. (1980) (eff. April 9, 1981) may also be maintained through a fund established pursuant to R.C. 6137.02. 1982 Op. Att'y Gen. No. 82-021.

The maintenance funds shall be maintained, as needed, by an assessment levied not more 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 or joint 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 percent 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, or by the joint board in the case of a joint county improvement, upon the substantial completion of an improvement and on or before the first day of July in each year thereafter. The assessment shall be certified by the clerk of the board to the county auditor in case of a single county improvement, and to the county auditor of each county interested in the case of a joint county improvement, and shall be placed by the auditor or auditors on the next succeeding tax duplicate to be collected and paid as other special assessments are collected and paid. (Emphasis added.)

Thus, R.C. 6137.03 provides that an assessment levied thereunder shall represent such a percentage of the estimated benefits of the improvement as is found adequate to effect the repair, upkeep, and permanent maintenance of each improvement constructed under R.C. Chapter 6131, 6133, or 6135, but that "[t]he minimum assessment shall be two dollars."

It is well established that, "[i]n statutory construction, the word . . . 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that . . . [it] receive a construction other than . . . [it's] ordinary usage." Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one). Furthermore, a board of county commissioners, as a creature of statute, may act only as statutorily authorized. State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraph one). The language of R.C. 6137.03 does not manifest any legislative intention that the term "shall," receive a permissive construction rather than its ordinary interpretation. I therefore conclude that no assessment levied pursuant to R.C. 6137.03 for the maintenance of an improvement may be for an amount less than two dollars.

In view of the foregoing conclusion, your letter of request also asks whether a board of county commissioners is prohibited from levying an assessment in the event that the estimated benefit accruing to the affected property owner is an amount less than two dollars. No provision of R.C. 6137.03 authorizes a board of county commissioners to exempt a benefited owner from the levy of a maintenance assessment merely because the estimated share of benefits accruing to such owner is very small. Rather, the statute requires that an assessment be levied against benefited owners in order to support the maintenance fund. An owner appears on the assessment schedule by virtue of R.C. 6137.11 which states that, "[t]he 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." Thus, any owner who benefited originally by the construction of an improvement, and was thereby placed on the schedule for the construction assessment, see, e.g., R.C. 6131.43, R.C. 6131.63, is automatically scheduled for a benefit assessment. The board of county commissioners may relieve an owner from the obligation to pay a benefit assessment only where statutorily authorized. See State ex rel. Shriver v. Board of Commissioners. I have, therefore, examined the surrounding provisions of R.C. Chapter 6137 in order to ascertain those circumstances in which an owner may be relieved from the duty to pay a benefit assessment.

R.C. 6137.11 provides for an increase or reduction in the assessment levied against a benefited owner under certain circumstances. Thus, R.C. 6137.11 permits

a board of county commissioners to consider "any recommendation by the county engineer and any application by an owner for...reduction of the permanent [maintenance] assessment base as it applies to any owner." However, R.C. 6137.11 further provides that "[a]ny such...reduction...shall be made for the purpose of correcting any inequity that has arisen due to [a]...decrease in the proportionate share of benefits accruing to the owner as the result of construction and maintenance of the improvement." Similarly, R.C. 6137.11 requires a board of county commissioners to review the permanent assessment base at six-year intervals, and permits an increase or reduction in the respective benefit apportionments, and thus the assessment amounts. Your letter does not, however, indicate any change in the benefit apportionment among owners of property in the permanent assessment base, and the provisions of R.C. 6137.11 do not authorize an exemption from the assessment schedule merely because the benefit apportionment attributable to an owner's property would result in a maintenance assessment of less than two dollars absent the provisions of R.C. 6137.03.

I have also noted that other statutes permit a reduction in the maintenance assessment levied against an owner either because of maintenance work which the owner proposes to undertake, R.C. 6137.08, or upon certification that the owner is following appropriate soil conservation and water control practices on agricultural land, R.C. 6137.09. However, the foregoing provisions do not authorize the removal of an owner from a maintenance assessment schedule, so long as such owner derives some benefit from the construction and maintenance of an improvement. Moreover, I have discovered no other statute which expressly or implicitly authorizes a benefited owner to be removed from the maintenance assessment schedule, and thereby exempted from the levy of a maintenance assessment, merely because the benefit apportionment is small and the maintenance assessment would otherwise be less than two dollars.

I have also examined the analysis provided by the Legislative Service Commission to the General Assembly during deliberations on Am. Sub. H.B. 268, 113th Gen. A. (1980) (eff. April 9, 1981), which enacted the language requiring a minimum maintenance assessment of two dollars. While a court will not view such analyses as determinative of legislative intent, they may nevertheless be considered as an aspect of the circumstances under which a statute was enacted. See Meeks v. Papadopoulos, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159, 162 (1980); State ex rel. Consolidation Coal Co. v. Industrial Commission, 62 Ohio St. 2d 147, 149, 404 N.E.2d 141, 143 (1980); 1982 Op. Att'y Gen. No. 82-022. The analysis of Am. Sub. H.B. 268 indicates that "[e]xisting law...stipulates that in any year where there is an unencumbered balance in a maintenance fund, equal to 20% of the appraised benefits, the annual maintenance assessment is to be omitted." The analysis further states that, "in place of...[the foregoing] provision, the bill requires that there be a minimum assessment of \$2 and stipulates that at no time can a maintenance fund have an unencumbered balance greater than 20% of the improvement's total construction costs." It thus appears that the legislature has deemed the minimum benefit attributable to an owner to be of sufficient value to generate a maintenance assessment in the sum of two dollars.

Based upon the foregoing, it is my opinion and you are advised as follows:

1. No assessment levied pursuant to R.C. 6137.03 for the maintenance of an improvement may be in an amount less than two dollars.
2. Pursuant to R.C. 6137.11 and R.C. 6137.03, so long as an owner continues to be a part of the permanent assessment base for maintenance of an improvement, an assessment must be levied against such owner for the maintenance of the improvement whenever the board of county commissioners finds that an assessment is needed to maintain a fund created under R.C. 6137.02.