

**OPINION NO. 81-076****Syllabus:**

The prevailing rates of wages as specified by the Ohio Department of Industrial Relations apply, pursuant to R.C. 4115.04, to a contractor who performs improvements to a petitioned single county ditch under a contract with the board of county commissioners pursuant to R.C. Chapter 6131.

**To: Lee E. Fry, Darke County Pros. Atty., Greenville, Ohio**  
**By: William J. Brown, Attorney General, December 4, 1981**

I have before me your request for my opinion in which you ask whether a contractor who performs improvements to a petitioned single county ditch under R.C. Chapter 6131 pursuant to a contract with a board of county commissioners must comply with the prevailing wage rate provisions of R.C. Chapter 4115. Because your question is one of general interest, I have elected to respond by means of a formal opinion.

R.C. Chapter 6131 deals with county ditches, and R.C. 6131.02 authorizes the county commissioners, upon receipt of a petition of one or more property owners, R.C. 6131.04, and upon finding that the improvement is necessary and will be conducive to the public welfare and that the cost will be less than the benefits, to contract to:

locate, construct, reconstruct, straighten, deepen, widen, alter, box, tile, fill, wall, dam, arch, change the course, location or terminus of, straighten, deepen, remove obstructions from, or widen any ditch, drain, watercourse, floodway, river, creek, or run, or construct any levee, wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for control of water, or vacate any ditch or drain. . . .

The sections which follow R.C. 6131.02 provide for the preparation of plans and specifications and the allocation of the cost of the improvement by means of assessments. The county engineer is mandated by R.C. 6131.15 to levy the assessments among private landowners, public corporations and any department, office, or institution of the state believed to be benefited by the proposed improvement according to the benefits to be received by each.

R.C. 6131.22 provides for the approval by the county commissioners of the estimated assessments and for the distribution of costs in the following manner:

That part of the assessment as is assessed for benefits to the general public because the improvement is conducive to the public welfare shall be paid by the public and shall be assessed against the county payable from the general fund. Such part of the assessment as is found to benefit state roads or highways shall be assessed against the state payable from motor vehicle revenues. Such part of the assessment as is found to benefit county roads or highways shall be assessed against the county payable from the motor vehicle revenues. Such part of the assessment as is found to benefit any public corporation or political subdivision of the state shall be assessed against the public corporation or political subdivision and shall be paid out of the general funds or motor vehicle revenues of the public corporation or political subdivision of the state, except as otherwise provided by law.

Under R.C. 6131.51, "[a]ll costs and expenses of improvements under sections

6131.01 to 6131.64 of the Revised Code, including contract prices of construction and the costs of locating the improvement, shall be paid from the general drainage improvement fund." The moneys in the general drainage improvement fund include, as per R.C. 6131.50, "taxes levied and collected for ditch and drainage purposes under county levies" and the "collections from all special assessments for benefits to property."

R.C. 4115.04, which provides for a determination of the prevailing rate of wages on public improvements, provides in part as follows:

Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have the department of industrial relations determine the prevailing rates of wages of mechanics and laborers in accordance with section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed. Such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. (Emphasis added.)

R.C. 4115.05 also relates to the determination of prevailing wage rates, and provides in part:

The prevailing rate of wages to be paid for a legal day's work, as prescribed in section 4115.04 of the Revised Code, to laborers, workmen, or mechanics upon public works shall not be less at any time during the life of a contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining agreements or understandings, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made, and collective bargaining agreements or understandings successor thereto.

. . . .

Every contract for a public work shall contain a provision that each laborer, workman, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section.

R.C. 4115.06 reads in part:

In all cases where any public authority fixes a prevailing rate of wages under section 4115.04 of the Revised Code, and the work is done by contract, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed. The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract.

See R.C. 4115.10; R.C. 4115.99(B).

R.C. 4115.03 reads in pertinent part as follows:

(B) "Construction" means any construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating, of any public improvement the total overall project cost of which is fairly estimated to be more than four thousand dollars and performed by other than full-time employees who have completed

their probationary periods in the classified service of a public authority.

R.C. 4115.03(D) defines "public improvement" to include:

[A]ll buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof.

Thus, the question becomes whether a contractor who performs improvements to a petitioned single county ditch under R.C. Chapter 8131 is conducting the "construction" of a "public improvement" within the meaning of R.C. Chapter 4115 so as to require the application of the prevailing wage rate provisions of R.C. Chapter 4115.

The term "construction" has been the subject of several opinions of the Attorney General. Among the activities found to be included within this term are: the reclamation of strip mines, 1979 Op. Att'y Gen. No. 79-046; the trimming and removal of trees along the streets and highways of a city, 1971 Op. Att'y Gen. No. 71-054; the removal of turbo-generators and related equipment from a municipal building, 1976 Op. Att'y Gen. No. 76-041; and the installation of computers, security systems, and similar equipment, 1977 Op. Att'y Gen. No. 77-076.

The term "construction" has been defined as "a major change in form of or physical change in the public improvement." 1979 Op. Att'y Gen. No. 79-046 at 2-148. This could include demolition for reconstruction or improvement purposes. In addition, I have previously stated that "improvement, enlargement, alteration or repair of an already existing 'public improvement' is as much 'construction' as is the original opening of a street or erection of a building." 1971 Op. Att'y Gen. No. 71-054 at 2-185 (removal of trees constitutes alteration or repair). Repair to an existing structure is thus encompassed by the definition while mere maintenance is not. The distinction is drawn in 1971 Op. Att'y Gen. No. 71-054 at 2-186, quoting 1939 Op. Att'y Gen. No. 1494 at 2-210: "[T]he doing of such acts as would preserve the improvement in its original condition and prevent it from becoming out of repair is maintenance; the returning of the improvement to its original condition after it has been permitted to become damaged constitute a repair."

In order that improvements to a petitioned single county ditch qualify as "construction," R.C. 4115.03(B) mandates that three criteria be met: (1) the work being done must qualify as "construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating"; (2) the work must be fairly estimated to cost more than four thousand dollars; and (3) the work must be performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.

The second and third criteria are factual determinations that are capable of easy ascertainment. Improvements to a petitioned single county ditch may be said to constitute "construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decorating" so as to fulfill the first criterion in that the board of county commissioners has authority, pursuant to R.C. 6131.02, to contract to perform the all-encompassing range of activities listed in that section.

A slightly more difficult question is posed by the consideration of whether a petitioned county ditch improvement constitutes a "public improvement" for purposes of R.C. Chapter 4115. "Public improvement," as defined by R.C. 4115.03(C), "includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works" either (1) "constructed by a public authority of the state or any political subdivision thereof,"

or (2) constructed "by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority."

Thus, a contract for improvement to a petitioned single county ditch under R.C. Chapter 6131 entered into by a board of county commissioners will be considered a contract for a "public improvement" if a board of county commissioners is considered a "public authority" on whose behalf the structure is constructed. "Public authority" is defined by R.C. 4115.03(A) as:

[A]ny officer, board, commission of the state, or any political subdivision of the state, authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor, or any institution supported in whole or in part by public funds and said sections apply to expenditures of such institutions made in whole or in part from public funds.

The board of county commissioners would constitute a "public authority" for purposes of R.C. Chapter 4115 since the board is a political subdivision of the state, authorized under R.C. 6131.02 to construct a ditch improvement and further authorized under R.C. 6131.41 to enter into a contract to perform such improvement.

I, therefore, find that a contract for improvements to a petitioned single county ditch under R.C. Chapter 6131 constitutes a contract for "construction" of a "public improvement" provided, of course, that the work is fairly estimated to be more than four thousand dollars and the work is performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority.

You have indicated that there is conflicting authority in early case law as to whether a petitioned single county ditch constitutes a "public improvement." An early Court of Appeals case, Gilmore v. Board of County Comm'rs, 17 Ohio App. 177 (Hocking County 1922), held that a contract for the construction of a ditch under G.C. 6443 (predecessor to R.C. Chapter 6131) was not a public contract in that in the execution of such a contract "the parties thereto have dealt with each other only in a private capacity, the contractors for themselves, and the [county] commissioners as the representatives of the landowners." Gilmore, 17 Ohio App. at 183. In the situation discussed in that case, only the assessed landowners were interested in the improvement, and the improvement when completed became their personal property. Therefore, the court reasoned that the contract was not for construction of a public improvement subject to the limitations that surround public improvements and contracts therefor, but could, rather, be dealt with under rules of equity applicable to private contracts.

However, the controlling case, and the most recent case of which I am aware which addressed this issue, is the Ohio Supreme Court case of Van Wert National Bank v. Roos, 134 Ohio St. 359, 17 N.E.2d 651 (1938). Although that case involved a joint county ditch improvement, rather than a single county ditch improvement of the sort with which you are concerned, the conclusions reached therein are applicable to your situation, since the relevant statutes are applicable to both types of ditch improvements. See R.C. 6133.03 ("[a] joint board of county commissioners may do all the things that a board of county commissioners may do in a single county improvement, and shall be governed by and be subject to [R.C. 6130.01 to 6131.64] relating to single county ditches insofar as applicable"). See generally State ex rel. Fritz v. Gongwer, 114 Ohio St. 642, 151 N.E. 752 (1926). It was argued

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<sup>1</sup>Although your question is phrased in terms of the application of R.C. Chapter 4115 to a contractor, I note that the board of county commissioners, as a "public authority," also has certain responsibilities under R.C. Chapter 4115. See R.C. 4115.04; R.C. 4115.08; R.C. 4115.09; R.C. 4115.99(A).

in the Van Wert case that, since about 98% of the cost of the ditch improvement was assessed against the private landowners benefited thereby and only 2% of the total cost was assessed against the counties, the improvement was not made at public expense and, therefore, was not a public improvement. As the court noted, however, under G.C. 6443, et seq. (now R.C. Chapter 6131, et seq.), the petition was addressed to the board of county commissioners, the assessments were made by public officers and collected by public officers, and the contract was let and supervised by public officers. Additionally, the court noted that the commissioners were required to establish a general ditch improvement fund, under G.C. 6492 (now R.C. 6131.50), into which the collections from all special assessments for benefits were to be paid and from which expenses for constructing and locating ditches were to be paid, pursuant to G.C. 6943 (now R.C. 6131.51). The court concluded that such fund constituted a public fund. The court further noted that, if at any time, under G.C. 6493 (now R.C. 6131.51), the expenditures exceeded the amount of the improvement fund, the deficiency could, by resolution of the board of county commissioners, be made up by a transfer of the amount of the deficiency from the general revenue funds in the county treasury to the general ditch improvement fund. The court stated:

The fact that the assessment made to reimburse the fund was to the extent of 98% of the cost of construction expended, does not render the improvement one at private expense. The test is not the amount of the assessment but whether the assessment funds out of which the cost of improvement is paid are public funds, and we so hold.

134 Ohio St. at 367, 17 N.E.2d at 655.

Thus, relying upon the Van Wert case and the specific inclusion of a ditch constructed on behalf of a public authority as a "public improvement" as per R.C. 4115.03, I find it clear that construction of a petitioned county ditch is a public improvement so as to require application of the prevailing wage laws of R.C. Chapter 4115.

In specific response to your question, it is my opinion, and you are advised, that the prevailing wages as specified by the Ohio Department of Industrial Relations apply, pursuant to R.C. 4115.04, to a contractor who performs improvements to a petitioned single county ditch under a contract with the board of county commissioners pursuant to R.C. Chapter 6131.