

December 12, 2017

The Honorable Eva J. Yarger  
Van Wert County Prosecuting Attorney  
120 W. Main Street, Suite 100  
Van Wert, Ohio 45891

SYLLABUS:

2017-044

1. Neither a county engineer nor a board of county commissioners of one of several counties in which land is benefited or damaged by a joint county ditch constructed under R.C. Chapter 6133 may establish a ditch maintenance fund for the joint county ditch. R.C. 6137.02 confers the authority to establish a ditch maintenance fund for a joint county ditch upon a joint board of county commissioners, which consists of the members of the boards of county commissioners of the several counties in which land may be benefited or damaged by the joint county ditch.
2. A ditch maintenance fund for a joint county ditch may only be established by a joint board of county commissioners as set forth in R.C. 6137.02. All expenditures made from a ditch maintenance fund for a joint county ditch established under R.C. 6137.02 shall be made in compliance with the provisions in R.C. Chapter 6137. A joint board of county commissioners that did not establish a ditch maintenance fund for a joint county ditch pursuant to R.C. 6137.02 may not approve retroactively the establishment by one of the participating counties of a ditch maintenance fund for a joint county ditch, or approve any expenditure that has been made for the ditch's repair, upkeep, or permanent maintenance that did not comply with the provisions in R.C. Chapter 6137.



**MIKE DEWINE**

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December 12, 2017

OPINION NO. 2017-044

The Honorable Eva J. Yarger  
Van Wert County Prosecuting Attorney  
120 W. Main Street, Suite 100  
Van Wert, Ohio 45891

Dear Prosecutor Yarger:

We have received your request regarding the establishment and operation of a maintenance fund for a joint county ditch constructed under R.C. Chapter 6133. You advise that in 1978, an owner petitioned for the construction of a joint county ditch to be located in Van Wert and Putnam Counties. The ditch, referred to in your letter as the Kundert/Kortokrax Ditch, was constructed later that year. Proceedings relating to the construction and future maintenance of a joint county ditch are “conducted by a joint board of county commissioners consisting of the members of the boards of county commissioners of the several counties in which land may be benefited or damaged by the proposed [ditch].” R.C. 6133.02. The joint board of county commissioners for the Kundert/Kortokrax Ditch consists of the members of the Van Wert County Board of Commissioners and the Putnam County Board of Commissioners. *See* R.C. 6133.02; R.C. 6133.04.

R.C. 6137.02 states that “[a]fter August 23, 1957, a maintenance fund ... shall be established and maintained by each joint board of county commissioners for the repair, upkeep, and permanent maintenance of each [ditch] constructed under [R.C. Chapter 6133].” You advise that the joint board of county commissioners did not establish a maintenance fund for the repair, upkeep, and permanent maintenance of the Kundert/Kortokrax Ditch. In March 2016, a drainage technician employed by the office of the Putnam County Engineer sent a letter to owners affected by the Kundert/Kortokrax Ditch, informing them that the Van Wert County Engineer and certain owners had requested that the ditch be cleaned. The letter explains that “a fund will be generated to do the ditch cleaning as requested” and that “[a]ssessments for construction and extra monies to establish a permanent fund will be placed on you [*sic*] real estate taxes for the following year.”

Based on the foregoing, you ask (1) whether a county engineer or a board of county commissioners of one of the two counties in which land is benefited or damaged by a joint county ditch may establish a maintenance fund for the ditch without the participation or approval of the board of county commissioners of the other county in which land is benefited or damaged

by the ditch, and (2) whether a joint board of county commissioners may approve retroactively a ditch maintenance fund for a joint county ditch established by a county engineer or a board of county commissioners of one of the two counties in which land is benefited or damaged by the joint county ditch and any prior expenditures made therefrom for the ditch's repair, upkeep, or permanent maintenance.

### **Authority to Establish a Maintenance Fund for a Joint County Ditch**

Your first question asks whether a county engineer or a board of county commissioners of one of the two counties in which land is benefited or damaged by a joint county ditch may establish a maintenance fund for the ditch without the participation or approval of the board of county commissioners of the second county in which land is benefited or damaged by the ditch. A county engineer and a board of county commissioners are creatures of statute, and thus possess only those express or implied powers conferred upon them by the General Assembly. *See* 2004 Op. Att'y Gen. No. 2004-035, at 2-320 (“[a] board of county commissioners has only those powers granted by the General Assembly”); 1992 Op. Att'y Gen. No. 92-049, at 2-199 (“[t]he office of county engineer is a creature of statute, ... and, therefore, the authority of the county engineer is limited to that expressly granted by statute and the authority necessarily implied by that express grant”). Whether a county engineer or a board of county commissioners has the authority to establish a maintenance fund for a joint county ditch depends upon whether that authority is expressly or implicitly conferred upon the county engineer or board of county commissioners by statute.

The construction and maintenance of a joint county ditch is governed by provisions in R.C. Chapters 6131 (single county ditches), 6133 (joint county ditches), and 6137 (ditch maintenance fund).<sup>1</sup> Pursuant to R.C. 6131.04, any “owner,” as that term is defined in R.C. 6131.01(A),<sup>2</sup> may file a petition for the construction of an “improvement” that “is necessary, will

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<sup>1</sup> Although R.C. Chapter 6131 applies, on its face, to the construction and maintenance of single county ditches, R.C. 6133.03 provides that “[a] joint board of county commissioners may do all of 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. 6131.01-R.C. 6131.64], relating to single county ditches insofar as applicable.” R.C. 6133.03 also states that “[t]he proceedings in joint county improvements shall be the same as the proceedings in single county improvements except as modified in [R.C. 6133.02-R.C. 6133.11].”

<sup>2</sup> R.C. 6131.01(A) defines “owner” to mean:

[A]ny owner of any right, title, estate, or interest in or to any real property and includes persons, partnerships, associations, private corporations, public corporations, boards of township trustees, boards of education of school districts, the mayor or legislative authority of a municipal corporation, the director of any department, office, or institution of the state, and the trustees of any state, county,

benefit the petitioner, and will be conducive to the public welfare.” *See also* R.C. 6131.01(F) (defining “benefit” or “benefits”). The term, “improvement,” as used in R.C. Chapters 6131, 6133, and 6137, includes “[t]he location, construction, reconstruction, reconditioning, widening, deepening, straightening, altering, ... or any change in the ... location ... of any ditch,” R.C. 6131.01(C)(1), “[t]he removal of obstructions such as silt bars, log jams, debris, and drift from any ditch,” R.C. 6131.01(C)(4), and “[t]he vacating of a ditch,” R.C. 6131.01(C)(5). *See also* R.C. 6133.01 (“[a]s used in [R.C. 6133.01-.11, R.C. 6133.14, and R.C. 6133.15], ... ‘improvement’ [has] the meaning set forth in [R.C. 6131.01]”); R.C. 6137.01 (“[a]s used in [R.C. 6137.01-.14], ... ‘improvement[.]’ [has] the meaning set forth in [R.C. 6131.01]”). *But see* R.C. 6137.15 (extending the term “improvement” to include an improvement constructed under R.C. Chapter 6151).

Pursuant to R.C. 6133.02, an owner that files a petition for the construction of a joint county ditch (a ditch that “is proposed to be located in or benefits or damages land in two or more counties”) is required to file the petition “with the clerk of the board of county commissioners of the county in which the majority of the proposed [ditch] is located.” R.C. 6133.04 requires members of the boards of county commissioners of the counties in which land may be benefited or damaged by the proposed ditch to form a joint board of county commissioners. The joint board of county commissioners conducts the proceedings relating to the construction and maintenance of the joint county ditch. R.C. 6133.02.

A joint board of county commissioners may grant an owner’s petition for the construction of a joint county ditch and proceed with the ditch’s construction if the board finds that the construction of the ditch is necessary, conducive to the public welfare, and that the cost of the ditch “will be less than the benefits” conferred by its construction. R.C. 6131.12; *see also* R.C. 6131.02 (authority of a board of county commissioners to construct ditch improvements). The costs of constructing, locating, and maintaining a joint county ditch are paid “by the counties affected by such [ditch], in proportion to their total ditch assessments, or as otherwise apportioned by the joint board, for such improvement.” R.C. 6133.03. The counties pay these costs by assessing the costs to the parcels of land that will benefit from the ditch’s construction.<sup>3</sup> *See* R.C. 6131.04 (a petition filed under this provision “shall state that all costs of engineering, construction, and future maintenance will be assessed to the benefiting parcels of land”); R.C.

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or municipal public institution. “Owner” also includes any public corporation and the director of any department, office, or institution of the state affected by an improvement but not owning any right, title, estate, or interest in or to any real property.

<sup>3</sup> The cost of notices, plus other incidental expenses related to the filing of a petition under R.C. 6131.04 are paid, at least in part, by a bond submitted by the petitioner pursuant to R.C. 6131.06. R.C. 6131.06; R.C. 6131.09. If the petition is dismissed by the board and the petitioner does not appeal, the petitioner is required to pay all costs incurred in the proceedings. R.C. 6131.11.

6131.07 (requiring the clerk of a board of county commissioners to mail notice to owners that, among other things, “all costs of engineering, construction, and future maintenance will be assessed to the benefiting parcels of land”); R.C. 6131.15 (governing the manner in which the county engineer shall create a schedule of estimated assessments for each tract of land and each public corporation or state entity that will accrue benefits from the proposed ditch); R.C. 6131.22 (requiring a board of county commissioners to approve and confirm the assessments estimated by the county engineer); R.C. 6131.43 (upon the completion of a ditch’s construction, a “board of county commissioners shall order the county auditor to reduce pro rata the assessments confirmed by it by the difference between the estimated cost of the construction and the final cost as certified by the county engineer. The assessments so reduced ... shall be levied upon each parcel of land, each public corporation, and each [state entity] as stated in the schedules”).

The costs and expenses of locating and constructing a joint county ditch are paid from the general drainage improvement fund of the county in which the owner’s petition for the construction of the ditch was filed. R.C. 6131.12 (“[u]pon granting the petition, the board shall order the county auditor to transfer from the general revenue funds of the county ... to the general drainage improvement fund an amount not more than twenty-five per cent of the engineer’s preliminary estimate”); R.C. 6131.50 (“[t]he board of county commissioners of each county shall provide and establish the ‘general drainage improvement fund,’” which shall consist of, among other things, taxes levied and collected for ditch and drainage purposes under county levies and collections from special assessments for benefits to property); R.C. 6131.51 (“[a]ll costs and expenses of improvements under [R.C. 6131.01-.64] ... shall be paid from the general drainage improvement fund”); R.C. 6133.07 (“[a]ll warrants for the payment of costs of location and for costs of construction of a joint county improvement shall be drawn by the auditor of the county in which the petition is filed, on the treasurer of said county, payable out of the general ditch improvement fund of said county”). The county treasurers of the other counties affected by the joint county ditch collect assessments from owners in those counties and pay the collected assessments to the treasurer of the county in which the petition was filed. R.C. 6133.07.

The costs of the repair, upkeep, and permanent maintenance of a joint county ditch are paid from monies maintained in a ditch maintenance fund, the establishment of which is required by R.C. 6137.02. R.C. 6137.02 states, in part, “[a]fter August 23, 1957, a maintenance fund ... shall be established and maintained by each joint board of county commissioners for the repair, upkeep, and permanent maintenance of each improvement constructed under [R.C. Chapter 6133].” The maintenance fund is “maintained, as needed, by an assessment levied not more often than once annually upon the benefited owners, ... apportioned on the basis of the estimated benefits for construction of the improvement.” R.C. 6137.03. The maintenance fund is “subject to use of the ... joint board of county commissioners ... for the necessary and proper repair or maintenance of any improvement constructed under ... [R.C. 6133.01-.15].” R.C. 6137.05.

The authority to establish a ditch maintenance fund for a joint county ditch is conferred upon a joint board of county commissioners by the plain language of R.C. 6137.02. No statute in R.C. Chapters 6131, 6133, or 6137, or elsewhere in the Revised Code, confers upon a county engineer or a board of county commissioners of one of the several counties in which land is

benefited or damaged by a joint county ditch, the authority to establish a ditch maintenance fund for a joint county ditch. A county engineer is required to estimate “the probable amount of funds required to repair and maintain” a joint county ditch and to “approve all estimates that are paid from” a ditch maintenance fund. R.C. 6137.06. However, the authority to *establish* a ditch maintenance fund for a joint county ditch is clearly the sole responsibility of a joint board of county commissioners.<sup>4</sup> R.C. 6137.02; *see also* 2004 Op. Att’y Gen. No. 2004-035, at 2-317 n.2 (“[a] joint board of county commissioners has ... responsibility to establish a maintenance fund for an improvement constructed under R.C. Chapter 6133”).

Accordingly, we conclude that neither a county engineer nor a board of county commissioners of one of several counties in which land is benefited or damaged by a joint county ditch constructed under R.C. Chapter 6133 may establish a ditch maintenance fund for the joint county ditch. R.C. 6137.02 confers the authority to establish a ditch maintenance fund for a joint county ditch upon a joint board of county commissioners, which consists of the members of the boards of county commissioners of the several counties in which land may be benefited or damaged by the joint county ditch.

#### **Procedure for Establishing, Maintaining, and Making Expenditures From, a Ditch Maintenance Fund for a Joint County Ditch**

Your second question asks whether a joint board of county commissioners may approve retroactively a ditch maintenance fund for a joint county ditch that has been established by a county engineer or a board of county commissioners of one of the two counties in which land is benefited or damaged by the joint county ditch and any expenditures that have been made therefrom for the ditch’s repair, upkeep, or permanent maintenance. A joint board of county commissioners formed pursuant to the provisions in R.C. Chapter 6133 is a creature of statute that possesses only those express powers as are conferred by statute, or any powers necessarily implied thereby. *See* 1959 Op. Att’y Gen. No. 499, p. 253, at 256 (“a joint board of county commissioners as a mere creature of statute has only such power and jurisdiction as are expressly conferred by state [*sic*]”). Therefore, we look to the relevant statutes to determine whether a

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<sup>4</sup> In 1960 Op. Att’y Gen. No. 1148, p. 86, at 87 to 89, the Attorney General considered what was meant by the General Assembly in requiring a board of county commissioners to “establish” a ditch maintenance fund under R.C. 6137.02. The Attorney General relied upon the dictionary definitions of the terms, “establish” and “fund,” as well as the language in R.C. 6137.02 and R.C. 6137.03, to conclude that the requirement that a board of county commissioners establish a ditch maintenance fund for the repair, upkeep, and permanent maintenance of an improvement constructed under R.C. Chapter 6131, means that a board of county commissioners is required to create “an account under which the revenues of the county may be properly placed and appropriated” for the repair, upkeep, and permanent maintenance of the improvement. 1960 Op. Att’y Gen. No. 1148, p. 86, at 88. The Attorney General explained that “[t]he creation or ‘establishment’ of such funds amounts to nothing more than creating the appropriate bookkeeping system.” *Id.*

joint board of county commissioners may approve the establishment of a ditch maintenance fund for a joint county ditch and any expenditure made therefrom in the circumstances you describe.

The provisions in R.C. Chapter 6137 set forth specific procedures for the establishment, maintenance, and use of a ditch maintenance fund for a joint county ditch. A joint board of county commissioners is required by R.C. 6137.02 to establish and maintain a fund for a joint county ditch for its “repair, upkeep, and permanent maintenance.” A ditch maintenance fund established for a joint county ditch pursuant to R.C. 6137.02 “shall be subject to use of the ... joint board of county commissioners ... for the necessary and proper repair or maintenance” of the joint county ditch. R.C. 6137.05.

A ditch maintenance fund for a joint county ditch is “maintained, as needed, by an assessment levied ... upon the benefited owners, ... apportioned on the basis of the estimated benefits for construction of the improvement.” R.C. 6137.03; *see also* 1985 Op. Att’y Gen. No. 85-049, at 2-177 (“[t]he moneys for the funds created under R.C. 6137.02 are derived from the assessments levied pursuant to R.C. 6137.03” (footnote omitted)). The amount of the assessments are estimated by the county engineer, and, if found adequate by the joint board of county commissioners “to effect the purpose of” the ditch maintenance fund, are made by the joint board “upon the substantial completion of [a joint county ditch] and on or before the first day of July in each year thereafter.” R.C. 6137.03. The assessments are “certified by the clerk of the board ... to the county auditor of each county interested in” [a joint county ditch], and shall be placed by the ... auditors on the next succeeding tax duplicate to be collected and paid as other special assessments are collected and paid.” *Id.*; R.C. 6133.04 (“[t]he clerk of the board of county commissioners of the county in which the petition is filed shall act as clerk of the joint board”).

R.C. 6137.05 governs the ways in which disbursements may be made from a ditch maintenance fund for the repair, upkeep, or permanent maintenance of a joint county ditch. *See* 1992 Op. Att’y Gen. No. 92-049, at 2-202 (“[t]he purpose for the maintenance funds established by each county pursuant to R.C. 6137.02 is the repair, upkeep, and permanent maintenance of each improvement constructed under R.C. Chapter 6131 (single county ditches), R.C. Chapter 6133 (joint county ditches), and R.C. Chapter 6135 (interstate county ditches). The use of these funds is controlled by R.C. 6137.05”); 1982 Op. Att’y Gen. No. 82-021, at 2-65 (recognizing that R.C. 6137.05 sets forth the conditions under which a ditch maintenance fund may be used). Pursuant to R.C. 6137.05(A), whenever a joint board of county commissioners “has reason to believe the [joint county ditch] is in need of repair or maintenance, it shall as a board, or by the county engineer,” inspect the joint county ditch and “make an estimate of the cost of the necessary work and material required for” the repair or maintenance. The repair or maintenance may be done by force account, contract, or a combination of both. R.C. 6137.05; *see also* 1993 Op. Att’y Gen. No. 93-063, at 2-298 (maintenance for drainage improvements “may be done by contract or by force account under the supervision of the county engineer”). If the repair or maintenance of a joint county ditch is completed by force account, the joint board of county commissioners is required to “cause the proper work to be done ... under the supervision of the county engineer and certify the costs to the ... county auditors for payment from the maintenance

fund.”<sup>5</sup> R.C. 6137.05(A). If the repair or maintenance is completed by contract, the joint board of county commissioners “shall cause the engineer to prepare proper specifications, ... to advertise for bids thereon, ... and to let the contract for the required work and material to the lowest and best bidder, who, upon the performance of the work certified by the engineer, shall certify the same to the ... auditors for payment from the maintenance fund.” *Id.*; *see also* R.C. 6137.06 (“[R.C. 6131.01-.64] apply to the maintenance fund with respect to receiving bids, statements required in bids, letting contracts, competitive bidding, time allowed under contract, supervisions of contractor’s work, certification for payment, and other related matters”).

No statute in R.C. Chapter 6137 or in any other chapter in the Revised Code authorizes a joint board of county commissioners or any other public officer or body to establish, maintain, and make expenditures from a ditch maintenance fund other than by the procedures set forth above. In this instance, a ditch maintenance fund for a joint county ditch purportedly has been established by a county engineer or a board of county commissioners of one of the two counties in which land is benefited or damaged by the joint county ditch, and expenditures have been made therefrom for the ditch’s repair, upkeep, or permanent maintenance. As creatures of statute, a county engineer and a board of county commissioners are required to act “in strict conformity” with their statutory powers. *Wright v. Bayowski*, 78 Ohio L. Abs. 321, 152 N.E.2d 441 (App. Mahoning County 1957) (syllabus, paragraph 1). Actions taken by a county engineer or a board of county commissioners that exceed their statutory powers have no legal effect. *Cf. id.* (“[t]he board of zoning appeals is a creature of statute and accordingly must act in strict conformity with statutory provisions and where it fails to do so its acts are illegal and of no effect”); 1949 Op. Att’y Gen. No. 1212, p. 848, at 851 (“[s]ince the Department of Liquor Control, a creature of statute, has only the powers granted by statute, it must carry on its

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<sup>5</sup> R.C. 6137.05(B) provides that the cost of the repair or maintenance of a joint county ditch, whether by force account or contract,

shall be certified to the auditor of each of the counties into which the ditch extends and has lands subject to the maintenance fund assessment, and the certificate shall state the proportional part of the cost to be paid from the portion of the maintenance fund in the county, according to the original apportionment of benefits on the owners in the county subject to maintenance assessment. Upon the certificates being received, the auditors of the counties obligated shall immediately forward their several amounts or vouchers therefor to the auditor of the county having the majority of the improvement through whose office, from the aggregate payments of all the counties interested, the payment for the work and material ... shall be paid.

*See also* R.C. 6137.06 (“[t]he county auditor, before he issues his warrant for any moneys expended by the county for repair or maintenance of” a joint county ditch, “shall require of the county engineer the assignment of the expense to the [joint county ditch] in connection with which the expense was incurred”).



functions in accordance with those statutes. In this situation, it did not comply with the statutes in granting a permit. Therefore, its act of issuing such a permit to this person was of no force or effect"); 1946 Op. Att'y Gen. No. 873, p. 272, at 273 to 274 (“[t]he principle that a board of education is purely a creature of the statute and has only such powers as the law has seen fit to give it is so familiar that it does not seem necessary to elaborate it. If a contract made by a board of education is to be characterized as illegal and void merely for lack of legislative authority to make it, ... how much more emphatically may we characterize as illegal a contract which is made in open defiance of a clear prohibition contained in the law”).

In response to your first question, we concluded that neither a county engineer nor a board of county commissioners of one of the two counties in which land is benefited or damaged by a joint county ditch has the authority to establish a ditch maintenance fund for a joint county ditch. Therefore, the establishment of a ditch maintenance fund for a joint county ditch by a county engineer or a board of county commissioners of one of the two counties in which land is benefited or damaged by the joint county ditch is not authorized by statute. No provision in R.C. Chapter 6137 or elsewhere in the Revised Code authorizes a joint board of county commissioners to approve retroactively a county engineer's or board of county commissioners' purported establishment of a ditch maintenance fund for a joint county ditch. Rather, R.C. 6137.02 requires a ditch maintenance fund for a joint county ditch to be established by a joint board of county commissioners.

R.C. Chapter 6137 sets forth the proper procedures for establishing, maintaining, and making expenditures from a ditch maintenance fund for the repair, upkeep, and permanent maintenance of a joint county ditch. A joint board of county commissioners, a county engineer, and any other public entity or official with the authority to participate in the establishment, maintenance, or transfer of monies from a ditch maintenance fund for a joint county ditch, shall comply with these provisions. *See generally* 2004 Op. Att'y Gen. No. 2004-035, at 2-320 (“[p]rovisions of R.C. Chapter 6137 cannot be expanded to grant authority beyond that which they plainly express”).

Accordingly, we conclude that a ditch maintenance fund for a joint county ditch may only be established by a joint board of county commissioners as set forth in R.C. 6137.02. All expenditures made from a ditch maintenance fund for a joint county ditch established under R.C. 6137.02 shall be made in compliance with the provisions in R.C. Chapter 6137. A joint board of county commissioners that did not establish a ditch maintenance fund for a joint county ditch pursuant to R.C. 6137.02 may not approve retroactively the establishment by one of the participating counties of a ditch maintenance fund for a joint county ditch, or approve any expenditure that has been made for the ditch's repair, upkeep, or permanent maintenance that did not comply with the provisions in R.C. Chapter 6137.

### **Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. Neither a county engineer nor a board of county commissioners of one of several counties in which land is benefited or damaged by a joint county ditch constructed under R.C. Chapter 6133 may establish a ditch maintenance fund for the joint county ditch. R.C. 6137.02 confers the authority to establish a ditch maintenance fund for a joint county ditch upon a joint board of county commissioners, which consists of the members of the boards of county commissioners of the several counties in which land may be benefited or damaged by the joint county ditch.
2. A ditch maintenance fund for a joint county ditch may only be established by a joint board of county commissioners as set forth in R.C. 6137.02. All expenditures made from a ditch maintenance fund for a joint county ditch established under R.C. 6137.02 shall be made in compliance with the provisions in R.C. Chapter 6137. A joint board of county commissioners that did not establish a ditch maintenance fund for a joint county ditch pursuant to R.C. 6137.02 may not approve retroactively the establishment by one of the participating counties of a ditch maintenance fund for a joint county ditch, or approve any expenditure that has been made for the ditch's repair, upkeep, or permanent maintenance that did not comply with the provisions in R.C. Chapter 6137.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General