

June 29, 2018

The Honorable Gary L. Lammers  
Putnam County Prosecuting Attorney  
336 E. Main St., Suite B  
Ottawa, Ohio 45875

SYLLABUS:

2018-014

1. Under R.C. 6137.02, a separate ditch maintenance fund is not required for each single county ditch constructed pursuant to R.C. Chapter 6131; revenue from maintenance assessments associated with multiple ditches constructed pursuant to R.C. Chapter 6131 may be administered under a single ditch maintenance fund.
2. Under R.C. 6137.04, a separate ditch maintenance fund is required for each joint county ditch constructed pursuant to R.C. Chapter 6133.
3. For ditches approved for construction under R.C. Chapters 6131 or 6133 after August 23, 1957, a resolution adopted by a board of county commissioners or joint board of county commissioners approving the construction of the ditch is sufficient to establish a maintenance fund for the purpose of R.C. 6137.02.



June 29, 2018

OPINION NO. 2018-014

The Honorable Gary L. Lammers  
Putnam County Prosecuting Attorney  
336 E. Main St., Suite B  
Ottawa, Ohio 45875

Dear Prosecutor Lammers:

You have requested an opinion regarding the establishment of a maintenance fund for a ditch or other improvement that has been approved for construction under R.C. Chapter 6131 (single county ditches) or R.C. Chapter 6133 (joint county ditches) after August 23, 1957.<sup>1</sup>

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<sup>1</sup> The Revised Code defines “improvement,” at R.C. 6131.01, as follows:

(C) “Improvement” includes:

- (1) The location, construction, reconstruction, reconditioning, widening, deepening, straightening, altering, boxing, tiling, filling, walling, arching, or any change in the course, location, or terminus of any ditch, drain, watercourse, or floodway;
- (2) The deepening, widening, or straightening or any other change in the course, location, or terminus of a river, creek, or run;
- (3) A levee or any wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for the protection of lands from the overflow from any stream, lake, or pond, or for the protection of any outlet, or for the storage or control of water;
- (4) The removal of obstructions such as silt bars, log jams, debris, and drift from any ditch, drain, watercourse, floodway, river, creek, or run;
- (5) The vacating of a ditch or drain.

Under R.C. 6131.01(C)(1), the construction of a ditch is an “improvement.”

You have also asked about the establishment of a maintenance fund for a ditch or improvement constructed pursuant to R.C. Chapter 6135. R.C. Chapter 6135 governs the construction of interstate ditches, which are ditches that benefit landowners in at least one county

You have asked the following specific questions:

1. Whether a fund must be created for each individual ditch or improvement constructed pursuant to R.C. Chapters 6131 or 6133, or whether maintenance assessment moneys for multiple ditches or improvements may be administered from the same fund.
2. Whether, after August 23, 1957, a maintenance fund has been established pursuant to R.C. 6137.02 when a resolution authorizing the construction of a ditch is approved by a board of county commissioners or joint board of county commissioners, even if the resolution does not include language expressly creating a maintenance fund.<sup>2</sup>

**Use of a Single Ditch Maintenance Fund for the Deposit of Assessment Revenues Associated with Multiple Ditches**

In your first question, you ask whether multiple ditches constructed pursuant to R.C. Chapters 6131 or 6133 may be combined under a single maintenance fund for the purpose of levying maintenance assessments on the benefited owners of a particular ditch, or whether each ditch must

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in Ohio and a county of another state. Since Putnam County does not share a border with another state, the Putnam County Engineer, presumably, does not oversee any ditches constructed pursuant to R.C. Chapter 6135. Therefore, this opinion addresses maintenance and maintenance funds for ditches or improvements constructed under R.C. Chapters 6131 and 6133 only.

<sup>2</sup> In your letter, you ask whether a properly petitioned ditch shall “have maintenance” under R.C. 6137.02, whether or not there was any mention of the creation of a ditch maintenance fund in any resolution. We have re-phrased your question to reflect what we believe you mean by the term “have maintenance.” Namely, for the purpose of this opinion, we understand the term “have maintenance” to convey two meanings: (1) the creation of a maintenance fund under R.C. 6137.02 such that maintenance assessments may be levied on the benefited property owners of a petitioned ditch that has been approved for construction by a board of county commissioners or a joint board of county commissioners; and (2) the duties performed by a county engineer pursuant to R.C. 6137.06 to annually inspect the ditches in his county and recommend to the board of county commissioners any repair or maintenance needed for particular ditches and the costs thereof. A county engineer’s authority and responsibility to maintain the ditches in his county arise independently of the question of whether a maintenance fund has been established under R.C. 6137.02. *See* R.C. 6137.06 (“[t]he county engineer shall have general charge and supervision of the repair and maintenance of all county and joint county ditches, drains, watercourses, and other drainage improvements within his county constructed under [R.C. Chapter 6131, R.C. Chapter 6133, R.C. Chapter 6135, and R.C. 6137.051]”).

have its own separate fund into which maintenance assessment moneys are deposited and from which those moneys are expended.

R.C. 6137.02 provides, in relevant 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 [R.C. Chapter 6131]. *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 [R.C. Chapter 6133]. (Emphasis added.)

It is unclear from the plain language of R.C. 6137.02 whether a separate maintenance fund that corresponds to each ditch in the county is required, or whether R.C. 6137.02 may be satisfied with a single maintenance fund that corresponds to all, or multiple, ditches within the county.

R.C. 6137.04 offers insight into whether a ditch or improvement must have its own separate maintenance fund under R.C. 6137.02, or whether multiple ditches may be administered from the same maintenance fund. With respect to single county ditches constructed pursuant to R.C. Chapter 6131, R.C. 6137.04 states, in pertinent part:

The board of county commissioners, upon recommendation of the county engineer, is hereby authorized to *combine improvements* within the same watershed into a *drainage maintenance district*, in which the maintenance assessment shall be the same percentage of original cost for each improvement to be maintained. In grouping improvements into drainage maintenance districts, the county engineer and the board of commissioners shall consider uniformity of topography and soil types so that improvements within the same district represent substantially the same maintenance problem and can be kept in proper repair at cost sufficiently uniform as to constitute no substantial inequity for any owners to be included in a district maintenance program. The county auditor shall maintain *one drainage maintenance fund for each such district*. A maintenance district may include all or any part of a county.

The board of county commissioners, upon recommendation of the county engineer, *may combine improvements in accordance with the type of improvement into one drainage maintenance fund* so that ditches or drains that are enclosed in tile, or other improvements having similar maintenance costs, *may be administered for maintenance under the same maintenance fund*. (Emphasis added.)

Thus, under appropriate circumstances, a board of county commissioners may group single county ditches within the same watershed into a maintenance district that shall be administered from one maintenance fund for the entire district. In addition, a board of county commissioners may combine improvements constructed under R.C. Chapter 6131 that share similar maintenance costs into a single maintenance fund. Under R.C. 6137.04, for the purpose of maintaining ditches that have similar

maintenance costs, the county engineer may recommend to the board of county commissioners that those improvements be administered from a single ditch maintenance fund. The board of county commissioners may then place the recommended ditches into a single fund for the purpose of repair, upkeep, and permanent maintenance of those ditches.

R.C. 6137.04 should be read *in pari materia* with R.C. 6137.02 with respect to single county ditches. *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995 (1995) (“[a]ll statutes relating to the same general subject matter must be read *in pari materia*, and in construing these statutes *in pari materia*, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes”); *see also D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶ 20 (statutes relating to the same subject matter must be read together in an attempt to “arrive at a reasonable construction giving the proper force and effect, if possible, to each statute”). It is evident that R.C. 6137.02 does not require that each ditch constructed pursuant to R.C. Chapter 6131 have its own separate maintenance fund in light of the clear authorization under R.C. 6137.04 for a board of county commissioners to place single county ditches into a maintenance district to be administered from a single maintenance fund or otherwise combine multiple ditches into a single maintenance fund. If R.C. 6137.02 required each ditch to have its own separate maintenance fund, then the authority given to a board of county commissioners under R.C. 6137.04 to place multiple ditches into a maintenance district administered under a single fund or to combine improvements into a single maintenance fund would be without effect. To give effect to the language of both R.C. 6137.02 and R.C. 6137.04, the statutes should be read *in pari materia*. Therefore, comparing the language of the two statutes, the logical and reasonable reading is that R.C. 6137.02 requires each single county ditch to *be associated with a maintenance fund* but does not require each single county ditch to have its own separate fund.

With respect to a joint county ditch constructed pursuant to R.C. Chapter 6133, on the other hand, R.C. 6137.04 requires each joint county ditch to have its own separate maintenance fund, stating in pertinent part: “[i]n the case of each joint county ditch improvement, the county auditor of the county having the majority of the improvement *shall maintain a separate maintenance fund for the improvement.*” (Emphasis added.) Thus, unlike single county ditches constructed pursuant to R.C. Chapter 6131, joint county ditches constructed pursuant to R.C. Chapter 6133 shall be associated with their own separate maintenance funds. In other words, maintenance for joint county ditches may not be administered from a fund composed of multiple single or joint county ditches.<sup>3</sup>

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<sup>3</sup> A separate maintenance fund for each joint county ditch is a reasonable requirement given the method by which each respective county auditor accounts for the costs of such maintenance:

When the repair or maintenance is upon a joint county ditch improvement, the amount of the cost thereof 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

Accordingly, for the purpose of R.C. 6137.02, it is not necessary that each single county ditch or improvement constructed pursuant to R.C. Chapter 6131 have its own separate maintenance fund into which maintenance assessment revenues are deposited and from which those revenues are expended. Rather, so long as each ditch or improvement is *associated with a* maintenance fund, such as a drainage maintenance fund created under R.C. 6137.04, a board of county commissioners satisfies the requirement that a “fund” be established pursuant to R.C. 6137.02 for the repair, upkeep, and permanent maintenance of a single county ditch. For joint county ditches constructed pursuant to R.C. Chapter 6133, each joint county ditch shall have its own separate maintenance fund pursuant to R.C. 6137.04.

Having determined that the maintenance of multiple single county ditches may be administered under a single maintenance fund while maintenance for joint county ditches must be administered from a joint county ditch’s own separate fund, it is helpful to understand what constitutes a “fund” as that term is used in R.C. 6137.02 and R.C. 6137.04. No statute defines “fund” for the purpose of R.C. 6137.02 or R.C. 6137.04. Thus, we look to the ordinary definition of the term to determine its meaning for the purpose of R.C. 6137.02 and R.C. 6137.04. See *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St. 3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, at ¶ 13 (“[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used”) (quoting *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948)). “Fund” has been defined as “[a] generic term and all-embracing as compared with term ‘money,’ etc., which is specific[;] [a] sum of money or other liquid assets set apart for a specific purpose, or available for the payment of general debts, claims, or expenses.” *Black’s Law Dictionary* 673 (6th ed. 1990); see also *Webster’s Third New International Dictionary of the English Language* 921 (unabridged ed. 1993) (“fund” is defined as “a sum of money or other resources the principal or interest of which is set apart for a specific objective or activity”). *Accord In re Mares*, 82 P.2d 786, at

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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, whether by “force account” or contract, shall be paid. The location of the work required on a joint county improvement, whether in one county or another, or whether extending into two or more counties, shall not affect the obligation of contribution for any necessary work upon the improvement in any portion of its length wherever located, the improvement for maintenance purposes being considered a single unit.

R.C. 6137.05(B). Thus, each county auditor must keep an accurate record of the proportional cost of maintenance performed on a joint county ditch. If multiple joint county ditches could be combined into a single maintenance fund, then accurate recordkeeping of such proportional maintenance costs performed on an individual joint county ditch would be difficult.

788 (N.M. 1938) (a fund “is merely a name for a collection or an appropriation of money”) (citation omitted). *Compare* R.C. 131.01(O) (for purposes of “state accounting and budgeting,” “fund” is defined as “an independent fiscal and accounting entity with a self-balancing set of accounts recording cash or other resources, together with all related liabilities, obligations, reserves, and fund balances which are segregated for the purpose of carrying on specific activities or attaining certain objectives in accordance with special rules, restrictions, or limitations”) (emphasis added).

A previous Attorney General opinion advised that the creation or establishment of a fund under R.C. 6137.02 “amounts to nothing more than creating the appropriate bookkeeping system.” 1960 Op. Att’y Gen. No. 1148, p. 86, at 88. This understanding of the meaning of “fund” has been applied in other circumstances as well. *See, e.g.*, 1986 Op. Att’y Gen. No. 86-056, at 2-305 (“funds ... are procedural devices for keeping financial records”); 1981 Op. Att’y Gen. No. 81-035, at 2-135 (“a ‘fund’ is conceptualized as a convenient business device which ‘amounts to no more than assigning a name to a segregated portion of an agency’s [moneys]’”) (quoting 1957 Op. Att’y Gen. No. 772, p. 287, at 289); 1937 Op. Att’y Gen. No. 1465, vol. III, p. 2447, at 2451 (“[f]unds are merely bookkeeping devices”). Accordingly, a fund need not be a bank account, but may be an entry or line item on a ledger or spreadsheet, for example. A “fund” is nothing more than a reasonable bookkeeping mechanism that allows for the accurate tracking of financial records. Thus, so long as a system exists for the accurate tracking of maintenance assessment moneys, such a system satisfies the definition of “fund” as that term is used in R.C. 6137.02 and R.C. 6137.04.

#### **Establishment of a Post-August 23, 1957 Ditch Maintenance Fund under R.C. 6137.02**

Your second question asks whether, for ditches approved for construction after August 23, 1957,<sup>4</sup> a maintenance fund is automatically created, for the purpose of R.C. 6137.02, when a board of county commissioners or joint board of county commissioners approves the construction of a ditch. You question whether express language in a resolution creating a maintenance fund for the ditch is required to establish the fund.

As set forth above, R.C. 6137.02 provides, in relevant 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 [R.C. Chapter 6131]. *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 [R.C. Chapter 6133]. (Emphasis added.)

Although R.C. 6137.02 requires a board of county commissioners or joint board of county commissioners to “establish” a maintenance fund, there is no language in the statute that requires a

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<sup>4</sup> August 23, 1957, is the effective date of various amendments to R.C. Chapter 6137. 1956-1957 Ohio Laws 577, 607-616 (Am. Sub. H.B. 220, eff. Aug. 23, 1957); *see also* 1961 Ohio Laws 582, 988 (Am. H.B. 1, eff. Jan. 10, 1961); 1958 Op. Att’y Gen. No. 2511, p. 478, at 479.

board or joint board to include express language in a resolution that commands the creation of the fund. Indeed, R.C. 6137.02 does not require a precise method by which a fund must be established; the statute simply states that a fund shall be established, with no description of what a board is required to do to establish such a fund.

When an official or board is commanded to perform a particular act by statute but is not given the manner in which to carry out that act, the official or board has the authority to determine any reasonable manner or method for carrying out the command. *See Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, at 608 (1878) (“[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner”); *see also State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365 (1960) (“[w]here a statute clearly confers power to do a certain thing without placing any limitation as to the manner or means of doing it, and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption is that it should be performed in a reasonable manner *not in conflict with any law of the state*”) (emphasis in original). To determine what is a reasonable method of fulfilling the command of R.C. 6137.02 that a maintenance fund be established, we consider the meaning of the term “establish,” as that term is used in the statute. As with the term “fund,” R.C. Chapter 6137 does not define the word “establish.” Accordingly, we must look to the ordinary definition of the word to determine its meaning for the purpose of R.C. 6137.02. *Carter v. Div. of Water, City of Youngstown*, 146 Ohio St. 203, 65 N.E.2d 63 (1946) (syllabus, paragraph 1); *see also Weaver v. Edwin Shaw Hosp.*, 104 Ohio St. 3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, at ¶ 13.

The word “establish” may have different meanings depending on the context in which it is used. *See* 2016 Op. Att’y Gen. No. 2016-021, at 2-226 to 2-227; *Pa. Co. for Ins. v. Contributors to Pa. Hosp.*, 63 R.I. 466, 472, 9 A.2d 269 (1939); *see also Tompkins v. Dist. Boundary Bd.*, 180 Or. 339, 348, 177 P.2d 416 (1947) (“[t]he word ‘establish’ has many meanings, varying with the subject matter with which it is used”); *Novak v. Trustees of Orphans’ Home*, 123 Md. 161, 166, 90 A. 997 (1914) (“[t]he word ‘establish’ may ... be used with varying meanings, the most common of which is to found, or to bring into being”). The word “establish” has been defined as “[t]o bring about or into existence.” *Black’s Law Dictionary* 546 (6th ed. 1990); *see also Webster’s New World College Dictionary* 497 (5th ed. 2014) (defining “establish” as “to cause to be or happen; bring about”); *Merriam-Webster’s Collegiate Dictionary* 427 (11th ed. 2005) (defining “establish” as “to bring into existence; bring about, effect”); *Webster’s Third New International Dictionary of the English Language* 778 (unabridged ed. 1993) (defining “establish” as “to bring into existence, create, make, start, originate, found, or build usu[ally] as permanent or with permanence in view; to bring about: effect”). *Compare Rosecrans v. Pacific Elec. Ry. Co.*, 21 Cal. 2d 602, 607, 134 P.2d 245 (1943) (“[t]he word ‘establish’ carries with it the implication of originating with a view to its permanent existence. To establish and maintain embraces a continuing obligation”) (citations omitted). Thus, a common definition of the word “establish” is “to bring about” or “effect.”

To shed further light on the meaning of “establish” in R.C. 6137.02 and the duty of a board of county commissioners to “establish” a ditch maintenance fund, it is helpful to review the general duties of a county auditor with respect to tracking public moneys. “A county auditor is responsible for maintaining the financial records of the county, certifying moneys into the



county treasury, and issuing warrants for all moneys payable from the county treasury.” 2017 Op. Att’y Gen. No. 2017-034, at 2-335. A county auditor must “certify all moneys into the county treasury (except as to moneys collected on the tax duplicate), specifying by whom to be paid, what fund to be credited, and to charge the treasurer with such moneys.” *Id.*; R.C. 319.13. “After public moneys have been deposited into the county treasury, the county auditor is responsible for accounting for such moneys.” 2002 Op. Att’y Gen. No. 2002-005, at 2-24. “In addition, the county auditor is required to prepare a monthly statement of the county’s finances. R.C. 319.15. The monthly financial statement must include ‘the amount of money received to the credit of each fund and account, the amount disbursed from each, the balance remaining to the credit of each, and the balance of money in the treasury and depository.’” *Id.* (quoting R.C. 319.15). “Before moneys in a county treasury may be disbursed, the county auditor must issue warrants on the county treasurer authorizing the disbursements.” *Id.* The county auditor shall keep a record of each warrant, “showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund.” *Id.* (quoting R.C. 319.16). Thus, in practical terms, the county auditor is the public official responsible for creating a physical recordkeeping system to track the moneys in the county’s treasury, including ditch maintenance assessment moneys. *See, e.g.*, R.C. 6137.06 (“[t]he auditor shall keep such records as are necessary to show clearly at the close of each year the amount of money expended from the drainage maintenance funds on each drainage improvement or each drainage maintenance district”). A board of county commissioners is not responsible for the physical creation of a ditch maintenance fund under R.C. 6137.02. That responsibility rests with the county auditor.

With the responsibilities of a board of county commissioners and a county auditor in mind, we read R.C. 6137.02 to mean that a board of county commissioners or joint board of county commissioners shall bring about or effect the creation of an appropriate bookkeeping device for the repair, upkeep, and permanent maintenance of a ditch constructed under R.C. Chapters 6131 or 6133. To “bring about” a ditch maintenance fund, the board of county commissioners must take some action that effects the inclusion of a ditch in the county auditor’s bookkeeping system for ditch maintenance moneys. A board of county commissioners brings about a ditch maintenance fund when the county auditor is prompted to perform his duties with respect to the tracking of maintenance assessment moneys. As discussed above, a “fund” is, *inter alia*, a bookkeeping device for keeping accurate track of financial records. The action of a board or joint board of county commissioners that brings about the inclusion of a ditch in the bookkeeping system of the county auditor may be the board’s adoption of a resolution that expressly creates a fund *or* it may be the board’s adoption of a resolution authorizing the construction of a ditch.

There are instances in the Revised Code when express language is required to be in a resolution for a governmental body to establish something, whether that be a fund, an account, or another object. In general, establishment of the object is discretionary in those instances. *See, e.g.*, R.C. 307.381(A) (a board of county commissioners in a county with a building department certified under R.C. 3781.10 “*may by resolution establish* a county board of building appeals”) (emphasis added); R.C. 3501.17(I)(1)(a) (“[a]t the request of a majority of the members of the board of elections, the board of county commissioners *may, by resolution, establish* an elections revenue fund”) (emphasis added); R.C. 5705.13 (“[a] taxing authority of a subdivision, *by resolution* or ordinance,

*may establish* reserve balance accounts to accumulate currently available resources for [certain purposes]”) (emphasis added); R.C. 5705.132 (“a board of township trustees, *by resolution, may establish* a reserve balance account to accumulate currently available resources for any purpose for which the board may lawfully expend money of the township other than for the purposes for which a reserve balance account may be established under [R.C. 5705.13]”) (emphasis added); R.C. 6117.03 (“[w]henever authorized by the legislative authority of any municipal corporation, the board of county commissioners *may by resolution* lay out, *establish*, and maintain one or more sewer districts within its county to include a part or all of the territory within such municipal corporation as the whole or a part of [the sewer district within the county]”) (emphasis added).

Unlike R.C. 6137.02, the statutes cited in the preceding paragraph require express language in a resolution to “establish” an object because the decision to establish the object is *discretionary*, given the use of the word “may” in those statutes. A resolution with express language is required in the above circumstances so that the exercise of the governmental body’s discretion is made manifest on the public record. In those circumstances, if express language establishing the fund or other object is not contained in a resolution, the authorizing entity’s act of establishing the fund is not documented, and therefore not effected. Under R.C. 6137.02, by contrast, the establishment of a ditch maintenance fund for the maintenance of ditches is *mandatory*. R.C. 6137.02 contains no requirement that a fund be established by expressly mentioning the fund in a resolution because a board or joint board of county commissioners *has no discretion not to establish* the fund. The use of different words in R.C. 6137.02 and the other statutes cited above signals that the words were intended to have different meanings. The General Assembly, “[h]aving used certain language in the one instance and wholly different language in the other, it will ... be presumed that different results were intended.” *Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927); *see also* 2002 Op. Att’y Gen. No. 2002-020, at 2-130.

The mandatory nature of the establishment of a ditch maintenance fund under R.C. 6137.02, coupled with the ordinary meaning of “establish,” leads to the conclusion that a board or joint board of county commissioners’ adoption of a resolution approving the construction of a ditch satisfies R.C. 6137.02’s requirement that the board establish a maintenance fund. Adoption of the resolution authorizing construction of the ditch constitutes the board’s action that brings about the maintenance fund for the ditch. Once a resolution approving construction of a ditch has been adopted by the board, the requirement that the ditch be incorporated into the county auditor’s bookkeeping system for ditch maintenance moneys is triggered. Upon approval of such resolution, the maintenance fund is established by the board of county commissioners, and, the county auditor is prompted to perform his responsibilities with respect to maintenance moneys for the ditch.<sup>5</sup>

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<sup>5</sup> Two additional circumstances, referenced above, help to confirm the conclusion that the requirement that a board of county commissioners or joint board of county commissioners “establish” a maintenance fund does not necessitate express language creating the fund in a resolution. First, a newly constructed ditch may be added to an existing maintenance district, thereby including maintenance moneys for that particular ditch in an existing fund for the

We conclude that a board or joint board of county commissioners may “establish” a fund for the purpose of R.C. 6137.02 by approving a resolution that authorizes the construction of a ditch. The resolution need not expressly mention the creation of a ditch maintenance fund. The adoption of a resolution authorizing the construction of a ditch is itself sufficient to establish a maintenance fund for the purpose of R.C. 6137.02.

### **Relationship of 2017 Op. Att’y Gen. No. 2017-044 to the Advice in this Opinion**

In 2017 Op. Att’y Gen. No. 2017-044, we advised:

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.

2017 Op. Att’y Gen. No. 2017-044 (syllabus, paragraph 2). A corollary to this advice is that only a joint board of county commissioners has the authority to levy maintenance assessments on the benefited property owners of a joint county ditch; neither a county engineer nor one of the participating boards of county commissioners is authorized to unilaterally levy such maintenance assessments.

In receiving requests for a formal opinion, the Attorney General is routinely asked to assume certain facts in answering the legal questions raised by the opinion requester. *See, e.g.*, 2018 Op. Att’y Gen. No. 2018-012, slip op. at 1-2 n.2; 2005 Op. Att’y Gen. No. 2005-031, at 2-331. In 2017 Op. Att’y Gen. No. 2017-044, the opinion requester stated that “the joint board of county commissioners did not establish a maintenance fund for the repair, upkeep, and permanent maintenance” of a particular joint county ditch. *Id.* at 2-420. Accordingly, we examined the legal questions posed to us under the assumption that a maintenance fund had not, in fact, been established. We did not consider what actions are legally sufficient to “establish” a “fund” under R.C. 6137.02. In 2017 Op. Att’y Gen. No. 2017-044, we addressed the issue of *who* has the authority to establish a ditch maintenance fund.

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maintenance district. *See* R.C. 6137.04. Second, a ditch may be combined with other improvements into a single maintenance fund for maintenance purposes. *Id.* In those two circumstances, the maintenance fund for the newly constructed ditch already exists in the form of a fund created pursuant to R.C. 6137.04; maintenance moneys for the newly constructed ditch are deposited in an appropriate fund under R.C. 6137.04 based upon the recommendation of the county engineer.

In this opinion, we have addressed the question of *how* a ditch maintenance fund may be established and concluded that a resolution approving the construction of a joint county ditch by a joint board of county commissioners is sufficient to establish a ditch maintenance fund for the purpose of R.C. 6137.02. To levy maintenance assessments and collect the revenue from those assessments, members of a joint board of county commissioners must merely act as one body and approve, by majority vote, the levying of assessments. *See* R.C. 6133.04. In other words, once a resolution authorizing the construction of a joint county ditch has been approved, a maintenance fund is established, and nothing in the law prevents a joint board of county commissioners from then levying maintenance assessments for the repair and maintenance of the joint county ditch. Thus, the conclusions reached in this opinion do not alter the advice provided in 2017 Op. Att’y Gen. No. 2017-044.

Boards of county commissioners of two counties share a responsibility to act as a joint board of county commissioners with respect to a joint county ditch that is partially in the territory each county. As a general principle, governmental entities should cooperate with one another concerning financial matters in which they have mutual interests. *See* 2013 Op. Att’y Gen. No. 2013-032, at 2-337. “The courts have recognized the responsibility of the various branches of government to cooperate with one another in carrying out their duties.” 1998 Op. Att’y Gen. No. 98-005, at 2-33; *see also State ex rel. Hague v. Ashtabula Cnty. Bd. of Comm’rs*, 123 Ohio St. 3d 489, 2009-Ohio-6140, 918 N.E.2d 151, at ¶ 23 (“a reasonably exercised spirit of mutual cooperation among the branches of government is essential”) (quoting *State ex rel. Johnston v. Taulbee*, 66 Ohio St. 2d 417, 420, 423 N.E.2d 80 (1981)). The same principle applies with equal force to separate governmental entities within the same branch of government. Under R.C. Chapter 6133, the members of two boards of county commissioners who have formed a joint board of county commissioners have a duty to operate in good faith in the levying of maintenance assessments on benefited landowners for the repair, upkeep, and permanent maintenance of a joint county ditch.

That members of a joint board of county commissioners have a duty to operate in good faith in levying maintenance assessments does not imply that all decisions of the joint board must be unanimous. R.C. 6133.04 provides that all decisions of a joint board of county commissioners “shall be made by a vote of a majority of the county commissioners constituting the joint board.” In the event of a tie vote, the Revised Code provides that the Director of the Department of Natural Resources shall be the deciding vote:

The director of the department of natural resources shall be a member *ex officio* of the joint board and may participate, either in person or through a designated representative, in deliberations and proceedings of the joint board but shall have no vote except in case of tie, in which case the proceedings shall be adjourned for thirty days, during which time the director shall review the proceedings and cast the deciding vote. The vote shall be recorded in the journal.

R.C. 6133.04.

**Conclusions**

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

1. Under R.C. 6137.02, a separate ditch maintenance fund is not required for each single county ditch constructed pursuant to R.C. Chapter 6131; revenue from maintenance assessments associated with multiple ditches constructed pursuant to R.C. Chapter 6131 may be administered under a single ditch maintenance fund.
2. Under R.C. 6137.04, a separate ditch maintenance fund is required for each joint county ditch constructed pursuant to R.C. Chapter 6133.
3. For ditches approved for construction under R.C. Chapters 6131 or 6133 after August 23, 1957, a resolution adopted by a board of county commissioners or joint board of county commissioners approving the construction of the ditch is sufficient to establish a maintenance fund for the purpose of R.C. 6137.02.

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