

September 25, 2018

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

SYLLABUS:

2018-022

A board of county commissioners or joint board of county commissioners may use the petition and approval processes of R.C. Chapter 6131 or R.C. Chapter 6133, as appropriate, to construct improvements along a river that has narrowed at various points to alleviate the flooding that occurs at such points. The improvements shall be maintained in accordance with R.C. Chapter 6137.



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OPINION NO. 2018-022

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 authority of the Putnam County Board of Commissioners to use the ditch petition and approval processes under R.C. Chapter 6131 or R.C. Chapter 6133 to construct improvements at various points along the Blanchard River. You have also asked whether maintenance of such improvements shall be performed in accordance with R.C. Chapter 6137. The Blanchard River traverses Putnam County as well as Hancock County and Hardin County.<sup>1</sup> You have explained that property owners along the river have approached Putnam County to consider the ditch petition and approval processes described in R.C. 6131.04 and related statutes to alleviate flooding problems caused by “pinch” points, which are points along the Blanchard River that have narrowed so as to exacerbate flooding in times of increased precipitation.

R.C. 6131.04 provides that any property owner may petition a board of county commissioners for the construction of an improvement that will benefit the owner’s land:

Any owner may file a petition with the clerk of the board of county commissioners of the county in which is located a part of the land that is averred

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<sup>1</sup> R.C. Chapter 6131 describes the petition and approval processes for ditches and other improvements that are located entirely within a single county in Ohio. R.C. Chapter 6133 describes the petition and approval processes for ditches and other improvements that are located in two or more counties in Ohio. R.C. Chapter 6135 describes the petition and approval processes for ditches and other improvements that are located in at least one county in Ohio and a county of another state. Because the Blanchard River traverses only counties that are located in Ohio, and does not enter into counties located in another state, we will limit our analysis in this opinion to the ditch petition and approval processes as described in R.C. Chapter 6131 (single county ditches) and R.C. Chapter 6133 (joint county ditches).

to be benefited by the *construction of a proposed improvement*. The petition shall state that the construction of the improvement is necessary, will benefit the petitioner, and will be conducive to the public welfare; shall state the nature of the work petitioned for; and may ask to locate, clean, remove obstructions from, construct, reconstruct, *straighten, deepen, widen, alter*, box, tile, fill, wall, or arch any ditch, drain, *watercourse*, floodway, creek, run, *or river or to change the course*, location, or terminus *thereof*, or may ask to construct a levee, wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for control of water. (Emphasis added).

The Revised Code defines “improvement,” at R.C. 6131.01(C), in pertinent part:

- (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*. (Emphasis added.)

Thus, the Revised Code authorizes a property owner to petition a board of county commissioners to construct improvements that will benefit the owner’s land, and the definition of “improvement” encompasses a number of types of projects, including widening or altering the course of a river or watercourse. R.C. 6131.01(C)(1)-(2). “Benefit” is defined for the purposes of R.C. Chapter 6131 and R.C. Chapter 6133 as an “advantage[] to land and owners, to public corporations as entities, and to the state resulting from drainage, conservation, control and management of water, and environmental, wildlife, and recreational improvements.” R.C. 6131.01(F). “Benefit” includes the “[i]ncreased value of land resulting from the improvement”; “[r]emoval of water conditions that jeopardize public health, safety, or welfare”; and “[e]limination or reduction of damage from flood.” *Id.* (emphasis added).

In the case of a joint county improvement, property owners in multiple counties may petition a joint board of county commissioners to construct an improvement that benefits land in multiple counties. R.C. 6133.03 (“[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 to R.C. 6131.64] relating to single county ditches insofar as applicable”). When a property owner petitions for an improvement that will be located in or benefit land in two or more counties in Ohio, “the proceeding shall be 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 improvement.” R.C. 6133.02.

A board of county commissioners is a creature of statute with only those powers expressly provided by law or implied by necessity. 2016 Op. Att’y Gen. No. 2016-016, at 2-157; 2004 Op. Att’y Gen. No. 2004-031, at 2-281. A joint board of county commissioners, similarly, as a creature of statute, has only those powers expressly provided by law or necessarily implied thereby. *See* 2017 Op. Att’y Gen. No. 2017-044, at 2-421 to 2-422. Accordingly, so long as the work intended to be done to the Blanchard River falls under the definition of “improvement” as set forth at R.C. 6131.01(C), then the Putnam County Board of Commissioners or the joint board of the Putnam, Hancock, and Hardin County Commissioners may proceed with such work in accordance with the procedures described in R.C. Chapter 6131 or R.C. Chapter 6133, as appropriate. In addition, if the proposed work on the Blanchard River is an improvement, then maintenance to the improvement shall be performed in accordance with R.C. Chapter 6137. *See* R.C. 6137.02 (for each improvement constructed under R.C. Chapter 6131 and R.C. Chapter 6133, a fund shall be established “for the repair, upkeep, and permanent maintenance of [the] improvement”); R.C. 6137.05 (“[t]he maintenance fund ... shall be subject to use of the board of county commissioners, or joint board of county commissioners, as the case may be, for the necessary and proper repair or maintenance of any improvement constructed under [R.C. Chapter 6131 and R.C. Chapter 6133]”).

“Legislative intent is the preeminent consideration in construing a statute. To determine the legislative intent, we first review the statutory language. In reviewing the statutory language, we accord the words used their usual, normal, or customary meaning.” *Gutmann v. Feldman*, 97 Ohio St. 3d 473, 2002-Ohio-6721, 780 N.E.2d 562, at ¶ 14 (quoting *State ex rel. Wolfe v. Delaware Cnty. Bd. of Elections*, 88 Ohio St. 3d 182, 184, 724 N.E.2d 771 (2000)). “[W]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation.” *State ex rel. Jones v. Conrad*, 92 Ohio St. 3d 389, 392, 750 N.E.2d 583 (2001) (citing *Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St. 3d 549, 553, 721 N.E.2d 1057 (2000)).

As noted above, the deepening, widening, or altering of a river is included within the kinds of improvements for which property owners may petition a board of county commissioners to construct. R.C. 6131.01(C)(1)-(2). “River” has been defined as “a natural surface stream of water of considerable volume and permanent or seasonal flow,” or a “watercourse.” *Webster’s Third New International Dictionary of the English Language* 1962 (unabridged ed. 1993). It has also been defined as “[a] natural, flowing body of water that empties into another body of water, such as a lake, sea, or channel.” *Black’s Law Dictionary* 1525 (10th ed. 2014); *see also Webster’s New World College Dictionary* 1255 (5th ed. 2014) (defining “river” as “a natural stream of water larger than a creek and emptying into an ocean, a lake, or another river”); *Merriam-Webster’s Collegiate Dictionary* 1076 (11th ed. 2005) (defining “river” as “a natural stream of water of [usually] considerable volume[;] watercourse”). It follows, therefore, that the Blanchard River, a body of water that empties into the Auglaize River, falls under the definition of “river” as that term is used in R.C. 6131.01. *See, e.g.,* Ohio Dep’t of Natural Res., Div. of Watercraft, *Blanchard River*, <http://watercraft.ohiodnr.gov/portals/watercraft/pdfs/maps/western/blanchardRiver.pdf> (last visited Sept. 24, 2018).

The provisions of R.C. Chapter 6131 and R.C. Chapter 6133 afford a board of county commissioners or joint board of county commissioners wide latitude in constructing an improvement upon receipt of an improvement petition. *See* 1958 Op. Att’y Gen. No. 2775, p. 579, at 584 (a board of county commissioners may construct ditches or enclosed drain pipes to remove and dispose of surplus water or “control ... drainage to prevent the overflow of any land in the county”). Although a question of fact is involved in any construction project under R.C. Chapter 6131 or R.C. Chapter 6133 as to whether the project is an improvement or merely maintenance, we have previously concluded that the deepening and widening of a ditch would appear “to fall into the category of improvement rather than maintenance.” 1958 Op. Att’y Gen. No. 2511, p. 478, at 488. Accordingly, we now conclude that the deepening, widening, or altering of the Blanchard River is an “improvement,” as that term is defined in R.C. 6131.01. Upon receipt of a petition by the landowners affected by the proposed improvement project, the Putnam County Board of Commissioners may proceed with the approval process outlined in R.C. Chapter 6131. If the proposed improvement stretches into Hancock County, Hardin County, or both, then the joint board of county commissioners composed of the commissioners of the affected counties may proceed with the approval process outlined in R.C. Chapter 6133. If the improvement is constructed, the improvement shall be maintained in accordance with R.C. Chapter 6137. *See, e.g.,* R.C. 6137.01; R.C. 6137.02; R.C. 6137.03; R.C. 6137.05.

It should be noted that, in approving an improvement for construction, a board of county commissioners must, among other things, determine that the improvement “will be conducive to the public welfare and that the cost of the proposed improvement will be less than the benefits conferred by its construction.” R.C. 6131.02; *see also* R.C. 6131.01(F) (defining “benefit”). Whether the benefits derived from construction of a particular improvement will exceed the costs of constructing the improvement is a factual question that is committed, in the first instance, to the discretion of the board of county commissioners considering the improvement petition. The county commissioners are aided in their cost/benefit analysis by reports from the county engineer. *See* R.C. 6131.09 (“[t]he engineer shall file at the first hearing, as a guide to the commissioners and the petitioners, a preliminary report including his preliminary estimate of cost, his comment on feasibility of the project, and a statement of his opinion as to whether benefits from the project are likely to exceed the estimated cost”); R.C. 6131.12 (“[i]f the board of county commissioners finds that a proposed improvement is necessary and that it will be conducive to the public welfare, and if the board is reasonably certain that the cost thereof will be less than the benefits, it may grant the prayer of the petition”).

Finally, this opinion does not address any potential environmental issues that may arise from the widening, deepening, or alteration of the Blanchard River. For example, the Blanchard River Watershed is part of the Western Land Basin and is subject to certain restrictions regarding the application of fertilizer and manure on land surfaces. *See* R.C. 905.326; R.C. 939.08; R.C. 939.09. In addition, it is conceivable that construction along the Blanchard River may affect wetlands in Putnam, Hancock, or Hardin County. *See generally* R.C. 6111.02-.028 (describing requirements for completing certain work impacting wetlands); [2017-2018 Ohio Monthly Record, Pamphlet No. 7, at p. 2-1850] Ohio Admin. Code 3745-2-01 (surface water quality standards); [2016-2017 Ohio Monthly Record, Pamphlet No. 5, at p. 2-1198] Ohio Admin. Code

3745-1-02(B)(97) (defining “wetlands”); *see also* R.C. 6131.12 (“[w]hen deciding whether to grant the prayer of the [improvement] petition, the board shall give consideration to the protection of environmentally significant areas when those areas could be adversely affected by the construction of the proposed improvement”). Accordingly, it is advisable that, before any construction commences, the board of county commissioners or joint board of county commissioners considering an improvement petition contact the Ohio Environmental Protection Agency for guidance regarding any water quality or other environmental requirements that may affect the construction of an improvement along the Blanchard River.<sup>2</sup>

### **Conclusion**

Based on the foregoing, it is my opinion, and you are hereby advised that a board of county commissioners or joint board of county commissioners may use the petition and approval processes of R.C. Chapter 6131 or R.C. Chapter 6133, as appropriate, to construct improvements along a river that has narrowed at various points to alleviate the flooding that occurs at such points. The improvements shall be maintained in accordance with R.C. Chapter 6137.

Very respectfully yours,



MICHAEL DEWINE  
Ohio Attorney General

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<sup>2</sup> This opinion does not address improvements that may be constructed through the processes described in R.C. Chapter 940, which authorizes the supervisors of a soil and water conservation district to “construct ... preventive and control measures and other works of improvement for natural resource conservation and development and flood prevention.” R.C. 940.06(C); *see also* R.C. 940.19 (“[a]n owner of land that is located in a soil and water conservation district may file a petition with the supervisors of the district requesting the construction of a conservation work of improvement”); R.C. 940.03 (“[e]ach county shall have a soil and water conservation district coextensive with the geographic area of the county, and each district shall constitute a political subdivision of this state”). The processes described in R.C. Chapter 940 are apparent alternatives to the processes described in R.C. Chapter 6131 and R.C. Chapter 6133. Nothing in R.C. Chapter 940 restricts a board of county commissioners from proceeding under the petition, approval, and maintenance processes described in R.C. Chapter 6131, R.C. Chapter 6133, and R.C. Chapter 6137.