



COUNTY ADVISORY BULLETIN

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BULLETIN 2011-06

NOVEMBER, 2011

DITCH MAINTENANCE UPDATE

APPLICABLE LEGISLATION: Am. Sub. H.B 114

REVISED CODE SECTIONS: ORC Sections 1515.29, 6137.112

SPONSORS: McGregor

Reps. Amstutz, Carey, R. Adams, Anielski, Baker, Beck, Blair, Blessing, Boose, Brenner, Bulp, Buchy, Combs, Derickson, Dovilla, Duffey, Garland, Gonzales, Goodwin, Hackett, C. Hagan, Hall, Hayes, Henne, Hollington, Huffman, Johnson, Landis, McClain, McKenney, Mecklenborg, Newbold, Patmon, Peterson, Roegner, Rosenberger, Ruhl, Schuring, Sears, Slaby, Sprague, Stebelton, Thompson, Uecker, Young

Sens. Bacon, Beagle, Brown, Daniels, Gillmor, Hite, Hughes, LaRose, Lehner, Manning, Obhof, Patton, Sawyer, Tavares, Turner, Widener, Wilson

EFFECTIVE DATE: June 29, 2011

BULLETIN SUMMARY

H.B. 114, the state transportation budget for the FY 2012 and 2013 biennium, included language that provides for a much needed update to Ohio's ditch laws. Specifically, the act, supported by CCAO, the County Engineers' Association of Ohio (CEAO), and the Ohio Farm Bureau (OFB), address problems under Ohio law with ditch maintenance funds. The act amends ORC Section 1515.29 and enacts ORC Section 6137.112. These sections are included at Exhibit 1.

Under prior law, these funds were limited to only 20% of the original construction cost of a ditch. A board of county commissioners had no authority to increase the original estimated construction cost of a ditch to account for inflation or to the amount the ditch would cost to construct now (2004 Op. Att'y Gen. No. 2004-035).

H.B. 114 authorizes a board of county commissioners, or a joint board of county commissioners, to adjust the permanent base of a ditch improvement that is used to calculate maintenance fund assessments. In addition, the act similarly authorizes commissioners, or a joint board, to use these same ditch maintenance procedures to maintain soil and water conservation district improvements.

BACKGROUND

Approximately two-thirds of Ohio's cropland acres are naturally poorly drained and rely on man-made or artificial means to remove excess water. Today Ohio has an estimated 83,000 miles of perennial and intermittent streams and open channels, as well as nearly 20,000 miles of constructed streams and channels. Cities, villages, and rural landowners all rely on this drainage network to prevent flooding, soggy backyards, and wet basements.

The four legal procedures that may be used to initiate the formal construction or reconstruction of a group drainage improvement include the following:

1. Mutual Agreement of the Landowners.
2. County Petition Ditch Law (ORC Chapter 6131).
3. Conservation Works of Improvement (ORC Chapter 1515).
4. Conservancy District Law (ORC Chapter 6101).

The drainage petition laws that have existed in Ohio for the past 150 years generally have changed very little. Just as the laws called for a century and a half ago, petitions for assistance are filed by the affected landowners, and public views are held along with a series of public assessment hearings to determine the fate of the petition.

For the first 100 years, after going through the petition process, maintenance of these improvements reverted back to the individual property owners where the improvement was constructed. Some property owners maintained their ditches; others did not. As a result, in some cases, the very same open ditch was petitioned and reconstructed every 25 years. Not surprisingly in these instances, petitioning a drainage improvement was not necessarily popular with the neighbors due to the fact that large, one-time assessments could be levied by the commissioners to re-clean a ditch not maintained for extended periods of time.

This frustration and inefficiency led to the only major change in the century-and-a-half drainage laws. In 1957, the Ohio General Assembly attempted to address these problems by enacting what is now known as ORC Chapter 6137. This Chapter of law, commonly known as the Ditch Maintenance Fund Law, mandated the creation of a permanent maintenance plan for ditches constructed under the petition laws, so that a particular section of a ditch would never have to go through a petition again.

Later towards the end of the 1960's, ORC Chapter 1515 was enacted to provide for drainage petitions to be completed through local soil and water conservation districts, but also provided for similar maintenance of those improvements.

SUMMARY OF OHIO'S PETITION DITCH PROCESS

(Editor's note: This section is intended to summarize the ORC sections pertaining to Ohio's Petition Ditch Laws (ORC 6131, 6133, 6135, 6137). For a much more comprehensive review of Ohio's Drainage and Ditch Laws, please see CCAO Commissioners Handbook Chapter 29.)

Initiation of Petition

Any landowner can file a petition with the clerk of the board of county commissioners to construct an "improvement." The petition must:

1. State the proposed benefits.
2. State that it will be conducive to the public welfare.
3. Include a description of the type of work ("improvement") petitioned for.
4. State that all costs of engineering, construction, and future maintenance will be assessed to the benefiting parcels of land.

In addition, the petitioner also must file a \$500 bond plus \$2 for each parcel of land in excess of 200 parcels.

Notice and Hearing

After a petition is filed, the clerk gives notice to the county commissioners and the county engineer, which then must view the proposed project. Within 10-90 days the board must hold its first hearing. The clerk must mail a legal notice to all owners in watershed. The notice must contain the date, location and times of both the public viewing and the preliminary hearing. The notice also will indicate that all costs of engineering, construction, and future maintenance will be assessed to the owners.

View

The county commissioners and county engineer must meet near the proposed project location and "hear the proof offered at that time by any owner affected by the proposed improvement." They must "go over and along the line" of the proposed project and each branch, lateral, or spur mentioned in the petition.

First Hearing and Preliminary Report

At the first hearing, the commissioners must hear the preliminary report and any evidence offered by any owner for or against the project.

The preliminary report is filed by the county engineer. This report must include the preliminary estimate of costs, comments on the feasibility, and a statement of his or her opinion as to whether benefits from the project are likely to exceed the estimated cost. Often, an engineer may provide a number of options including varying routes or types of construction for discussion.

At the first hearing, if the commissioners find that the project is not necessary, not conducive to the public welfare, or finds that the costs are more than the benefits, the board shall dismiss the petition.

Approving the Petition

The commissioners may approve the petition if they find that the project is necessary, conducive to the public welfare, and is "reasonably certain" that the costs are less than the benefits. The order is effective on the day of the hearing. The commissioners then order the county engineer to prepare a survey and plans, detailing the required easements and estimated construction costs necessary to solve the prayer of the petition. In addition, the county engineer must provide an assessment schedule involving all those landowners within the watershed and based upon the benefits derived from the construction. Finally, the county engineer also is required to determine a schedule of damages to any of the parcels involved within the scope of the construction.

Final Hearing and Action on the Petition

At the final hearing, the commissioners hear all evidence offered and consider the schedules and reports filed by the county engineer. They will either reaffirm the board's former order granting the petition, or they will set aside the former order and dismiss the petition.

The commissioners then approve and confirm the assessments and order the engineer to receive bids for the construction of the project. They also set the date, time, and place for the receiving of bids which must be at least 25 days after the order. Commissioners also determine when the assessments must be paid and whether bonds or notes will be issued.

The commissioner's clerk must immediately transmit to the auditor the schedules listing all assessments as approved by the commissioners. Any owner opposed to the petition, the project, or who claims his assessment is excessive may appeal.

Base for Maintenance Assessments

The original schedule of benefit assessments upon owners for the initial construction of the improvement is maintained by the county auditor to serve as the permanent base for maintenance assessments. The assessments are levied by the auditor in such percentage of the permanent base as authorized by the board of county commissioners. In other words, the same percentage for construction assessments based on the benefits to landowners is used in devising the maintenance assessments (ORC 6137.11).

Maintenance Funds

Each county must establish and maintain a maintenance fund for the repair, upkeep, and permanent maintenance of each project (ORC 6137.02). The maintenance fund is maintained, as needed, by assessments levied upon all landowners in the watershed not more than once annually based on the estimated benefits for construction of the project. The maintenance fund can at no time have an unencumbered balance greater than 20% of all construction costs of the project. The minimum assessment is \$2 (ORC 6137.03).

The maintenance assessment, certified by the commissioners and auditor, is made upon the "substantial completion" of a project and on or before July 1 of each year. It is placed on the next succeeding tax duplicate to be collected and paid with other special assessments.

Reduction of Assessments/Other Law Regarding Assessments

Any owner may apply for a reduction in the maintenance assessment because of work he or she proposes (clearing brush, removing silt or debris, etc.). Landowners using best management practices to reduce runoff, erosion, and sedimentation certified by the board of supervisors of the soil and water conservation service may qualify for up to a 50% reduction in assessments.

After six annual maintenance fund assessments have been made, the commissioners will review the assessment fund and may increase or decrease the respective benefit apportionments to reflect changes in the benefits that occurred during the six years. The board will review this every six years (ORC 6137.08).

FLAW IN PRIOR OHIO LAW

As noted, ORC Section 6137.03 provides for the collection of a maintenance fee from the landowners. This assessment is levied annually and collected the same as real property taxes. An assessment shall represent a percentage of the estimated benefits as estimated by the County Engineer.

The problem is that ORC Section 6137.03 limits the amount of the maintenance fund collected to 20% of the original construction cost. Because many of the drainage improvements under maintenance are over 50 years-old, the construction cost base is so low that a 20% limitation does not allow adequate funds to accumulate for the proper maintenance and repair of the projects. Given that construction inflation has increased by as much as 300-400% since the original construction, even the maximum 20% annual assessment cannot keep the improvement in adequate repair.

HB 114 CHANGES

Single County Ditches (ORC Chapter 6131) and Joint County Ditches (ORC Chapter 6133)

First, the language authorizes a board of county commissioners, or a joint board if one has been appointed, to use procedures and requirements governing assessments, maintenance and cleaning, and inspections that are established in the Ditch Maintenance Fund Law in order to maintain soil and water conservation district works of improvement.

Second, the new language authorizes a board of county commissioners to request the county engineer to estimate the construction cost of an existing ditch improvement as if that improvement were to be constructed at the time of the permanent base review that is required by ongoing law.

If the board of county commissioners requests the county engineer to estimate the current construction cost of an existing ditch improvement, the board's request must occur at the time of the review of the permanent base of the improvement for maintenance fund assessments. This is required after six annual maintenance fund assessments have been made on owners benefitting from the improvement.

Once the county engineer provides a new estimate of the construction cost, each affected landowner is mailed a legal notice and invited to a public hearing held by the county commissioners, to consider the need for the construction cost adjustment of the assessment base.

The clerk of the board, at least 30 days before a hearing at which the board will consider the estimate as the construction cost of the improvement, must send notice to each owner that would be affected. The notice must be sent by certified or first class mail. For each improvement, all individual notices must be sent by the same type of mail. The act requires "legal notice" to be printed in plain view on an envelope. The notice must state the amount of the present permanent base for the maintenance assessment, the proposed new permanent base amount with respect to the owner, and the date of the hearing on the proposed change.

At the hearing, records of past maintenance practices and fees can be discussed. After the proceedings are complete and testimony for or against the adjustment has been made, the commissioners decide whether to accept the new construction cost as the permanent base for the maintenance assessment. Before a permanent base can be changed, the board must find that the landowner benefits from the improvement and that the amount of the benefit exceeds the assessment.

If the board, by adoption of a resolution at the hearing required under the act, approves the estimate as the construction cost of the improvement in lieu of the original construction cost, the estimate must be the permanent base that is used to calculate maintenance fund assessments for owners who benefit from the improvement. The approved estimate of construction cost must serve as the permanent base for purposes of the Ditch Maintenance Fund Law until such time as it is revised in accordance with the act.

ORC Section 6157.11 further provides the landowner has a right of appeal to the county common pleas court on the issue of whether any such assessment is levied according to benefits.

Soil and Water Conservation District Improvements (ORC Chapter 1515)

ORC Section 1515.29 mandates that the board of county commissioners or, if a joint county board of commissioners has been created under ORC Section 1515.22, the joint board, maintain the works of improvement constructed by the board for a soil and water conservation district. HB 114's applicable language allows the board or joint board to use the procedures and requirements established under the Ditch Maintenance Law Fund. Thus, for the purposes of soil and water conservation district projects, boards of commissioners can likewise use the new language to update the construction basis of the projects for purposes of maintenance.

ACKNOWLEDGEMENTS

The County Commissioners Association of Ohio expresses its gratitude to Larry Gearhardt, Director of Legal and Local Affairs with the Ohio Farm Bureau Federation; Douglas Reinhart, Auglaize County Engineer; and the numerous former and current legislators who supported this legislative change including Representatives Dick Adams (R-Piqua), Roland Winburn (D-Dayton), Arlene Setzer (R-Vandalia), Seth Morgan (R-Huber Heights), and Senators Bill Beagle (R-Tipp City), Tom Roberts (D-Dayton), and Fred Strahorn (D-Dayton).

Exhibit 1

Ohio Revised Code Sections 1515.29 and 6137.112

As Enacted by H.B. 114 of the 129th General Assembly

Sec. 1515.29. The board of county commissioners, or, if a joint board of county commissioners has been created under section 1515.22 of the Revised Code, the joint board, shall maintain the works of improvement constructed by the board for a soil and water conservation district. For that purpose, the board or joint board may use procedures and requirements established in sections 6137.08 to 6137.14 of the Revised Code and may contract with or authorize the supervisors or joint board of supervisors of a soil and water conservation district to perform maintenance of such works of improvement.

Sec. 6137.112. (A) At the time that the board of county commissioners reviews the permanent base of an improvement for maintenance fund assessments after six annual maintenance fund assessments have been made as provided in section 6137.11 of the Revised Code, the board may request the county engineer to estimate the construction cost of the improvement if that improvement were to be constructed at the time of the permanent base review. Not less than thirty days prior to a hearing at which the board will consider the estimate as the construction cost of the improvement, the clerk of the board shall send to each owner that would be affected a notice by certified mail, return receipt requested, or by first class mail in a five-day return envelope. For each improvement, all individual notices shall be sent by the same type of mail. Whichever method the board chooses, the words "legal notice" shall be printed in plain view on the face of the envelope. The notice shall state the amount of the present permanent base for maintenance assessment, the proposed new permanent base amount with respect to the owner, and the date of the hearing on the proposed change.

(B) The board of county commissioners, by adoption of a resolution at the hearing required under division (A) of this section, may approve the estimate as the construction cost of the improvement in lieu of the original construction cost of the improvement. If approved, the estimate of construction cost shall be the permanent base that is used to calculate maintenance fund assessments for owners benefiting from the improvement. The approved estimate of construction cost shall serve as the permanent base for the purposes of this chapter until such time as it is revised in accordance with this section.