March 13, 2006

The Honorable Nick A. Selvaggio
Champaign County Prosecuting Attorney
Champaign County Courthouse
200 North Main Street
Urbana, Ohio 43078

SYLLABUS: 2006-008

1. No existing statutory provisions authorize the board of county commissioners of a county that is a member of a regional council of governments (COG) to borrow money on behalf of the COG to fund a COG-created operation.

2. Assuming that a county that is a member of a COG is financially able to pay its proportionate share of the COG's operating expenses, the board of county commissioners is permitted to use other available county funds to pay additional amounts to the COG for expenses of the COG, and the members of the COG may amend the Agreement and By-Laws to reflect changes in the comparative contributions of the various members.

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OPINION NO. 2006-008

The Honorable Nick A. Selvaggio
Champaign County Prosecuting Attorney
Champaign County Courthouse
200 North Main Street
Urbana, Ohio 43078

Dear Prosecutor Selvaggio:

We have received your request for a formal opinion concerning the authority and responsibility of a board of county commissioners to provide funds to a regional council of governments (COG). Your request raises the following questions:

1. May the board of county commissioners borrow money on behalf of the COG to fund a COG-created operation?

2. If the board of county commissioners is authorized to borrow the money on behalf of the COG, may it use the 9-1-1 levy moneys that are generated in the following year to pay back the operating note from the previous year?

3: If the board of county commissioners is not authorized to borrow the money on behalf of the COG, and assuming the board is financially able to pay its proportionate share of the COG's operating expenses, does the Board have authority to use county general fund money to also pay another COG member's proportionate share?

For the reasons discussed below, we conclude that no existing statutory provisions authorize the board of county commissioners of a county that is a member of a COG to borrow money on behalf of the COG to fund a COG-created operation. We conclude, further, that, assuming that the county is financially able to pay its proportionate share of the COG's operating expenses, the board of county commissioners is permitted to use other available county funds to pay additional amounts to the COG for expenses of the COG, and the members of the COG may amend the Agreement and By-Laws to reflect changes in the comparative contributions of the various members.

Champaign Countywide Public Safety Communications System
Council of Governments

As explained in your letter, the Champaign County Commissioners and the City of Urbana, acting under R.C. Chapter 167, have formed a regional council of governments to provide throughout the county an Enhanced 9-1-1 System with Public Safety Answering Points under R.C. 4931.40 to R.C. 4931.70, and a Countywide Public Safety Communications System (CPSCS) under R.C. 307.63. In May of 2005, Champaign County voters passed a tax levy under R.C. 5705.19 that provides: "An additional tax for the benefit of CHAMPAIGN COUNTY for the purpose of **THE ESTABLISHMENT, MAINTENANCE AND OPERATION OF A COUNTYWIDE PUBLIC SAFETY COMMUNICATIONS SYSTEM** at a rate not exceeding 1 mill for each one dollar of valuation, which amounts to $0.10 for each one hundred dollars of valuation, for a continuing period of time, commencing in 2005, first due in calendar year 2006."

The Agreement Creating a Council of Governments (Agreement) provides for initial funding and in-kind contributions from the county and city. Agreement Art. IV(J), Art. VI(A), Art. VII(A) and (D). The intended in-service date was October 1, 2005. Agreement Art. VI(A). The Agreement provides that, until such time as a levy is enacted by the voters (through December 31, 2005), the county and city will share costs, with 60% of the costs being paid by the county and 40% by the city. Agreement Art. VII(C)(1). Then, beginning with the fiscal year starting January 1, 2006, unless or until a levy is enacted, the costs will be allocated in accordance with a stated formula. Agreement Art. VII(C)(2). If a levy is enacted, any required amounts that exceed the funds generated by the levy will be apportioned between the county and the city as provided in the Agreement. Agreement Art. VII(C)(3).

Under the Agreement, the COG's fiscal officer is the County Clerk/Administrator. Agreement Art. VII(E); *see* R.C. 167.04(B). The Agreement provides that, upon the passage of a levy or levies, "COG operations would be funded by a contract between the COG and the county in which levy funds would be used by the county to purchase public safety communications services from the COG pursuant to Ohio Rev. Code §§ 307.14-[.]16 and 167.08." Agreement Art. VII(B).

Pursuant to the By-Laws of the Champaign Countywide Public Safety Communications System Council of Governments (By-Laws), "[i]n the event that the County successfully implements a levy intended to fund the COG, the County Auditor and County Treasurer, upon receipt of the proceeds of the levy, shall take the appropriate steps to transfer the levy proceeds to the COG's Fiscal Officer, who shall administer the proceeds in a manner consistent with the COG Agreement and COG By-Laws, and consistent with generally accepted governmental accounting principles, as is approved by the Auditor of the State of Ohio for the accounting of and custody of the funds of political subdivisions." By-Laws III.

The Agreement provides for amendment of the Agreement or By-Laws, as follows:

> This Agreement and By-Laws may be amended by adopting any proposed amendment in the same manner by which this Agreement was authorized and executed. Either party may propose amendment language in writing to the other. The other party shall consider it and the parties may negotiate the language. No amendment shall take effect until both parties have authorized and executed it according to the applicable law governing each party.

Agreement Art. IX(A); *see also* Agreement Art. V; R.C. 167.01; R.C. 167.04. *See generally* 1997 Op. Att'y Gen. No. 97-036 at 2-215 to 2-216 (governmental entities that have entered into an agreement may amend the agreement if the terms of the agreement provide for amendment or if all parties to the agreement consent to amendment).

Organization and authority of a regional council of governments

A regional council of governments may be organized pursuant to R.C. 167.01 by agreement of the governing bodies of any two or more counties, municipal corporations, townships, special districts, school districts, or other political subdivisions. The participating bodies are members of the COG. R.C. 167.02. Each COG creates an agreement and by-laws to provide for its organization. R.C. 167.01; R.C. 167.04.

By statute, a COG is given authority to study governmental problems common to two or more members, to promote cooperative arrangements and coordinate action among its members and with other governmental entities, to make recommendations for review and action by its members and other public bodies, to promote cooperative agreements and contracts, and to perform planning functions. R.C. 167.03(A). A COG is also authorized to review, evaluate, and make recommendations relative to public facility projects, to perform comprehensive planning for proposed land development or uses having public metropolitan wide or interjurisdictional significance, and to coordinate local public policies and activities affecting the development of the region, although it is not permitted to displace any existing planning commission or agency. R.C. 167.03(B) and (D).

In addition to its statutory planning authority, a COG is given broad general authority to take steps through the appropriate action of the governing bodies of its members, to "perform such other functions and duties as are performed or capable of performance by the members and necessary or desirable for dealing with problems of mutual concern." R.C. 167.03(C). Further, the members are authorized to contract with the COG "to receive any service from such council or to provide any service to such council." R.C. 167.08. The contracts may also authorize the council "to perform any function or render any service in behalf" of the members that the members may perform or render. *Id.*[1]

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[1] When a COG acts on behalf of its members or by agreement with its members pursuant to R.C. 167.03(C) or R.C. 167.08, the COG is required to comply with any statutory restrictions that apply to the members. If different statutes apply to various participating member political

The members of a COG are authorized to appropriate funds to meet the expenses of the COG, and, as part of their financial support, may also provide services of personnel, use of equipment and office space, and other necessary services. R.C. 167.06(A). The COG "may establish schedules of dues to be paid by its voting members to aid the financing of the operations and programs" of the COG as provided in the agreement and by-laws. *Id.* The COG is permitted to accept funds, grants, gifts, and services from public or private sources, and must make an annual report to its members. R.C. 167.06(B) and (C).

Question 1: May the board of county commissioners borrow money on behalf of the COG to fund a COG-created operation?

Your first question is whether the board of county commissioners of a county that is a member of a COG may borrow money on behalf of the COG to fund a COG-created operation. We answer this question in the negative, because we have been unable to find statutory authority for the board of county commissioners to borrow money on behalf of the COG to fund activities of the COG.

It is firmly established that the board of commissioners of a county that is not a charter county possesses only the powers granted to it by statute, either expressly or by necessary implication. *See* 2004 Op. Att'y Gen. No. 2004-005 at 2-44; 1995 Op. Att'y Gen. No. 95-004 at 2-15.[2] It is also firmly established that, apart from its statutory powers under R.C. 167.03(A) and (B) to plan, study, coordinate, and make recommendations, a COG cannot do more than its individual members can do, and a member cannot do under a COG anything that it could not otherwise do. *See* R.C. 167.03(C); R.C. 167.08; 1990 Op. Att'y Gen. No. 90-091 at 2-390 to 2-391; *accord* 1998 Op. Att'y Gen. No. 98-004 at 2-25 ("the authority of a regional council of governments to act on behalf of its members is derived from its members and cannot exceed the authority that the members have"); 1989 Op. Att'y Gen. No. 89-063 at 2-274 ("a regional council

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subdivisions, the COG must comply with the most restrictive statutes and may do only what the most restricted participating member may do. *See, e.g.,* 1998 Op. Att'y Gen. No. 98-004 at 2-25 (in assuming duties and responsibilities of a member, a COG must comply with all statutory requirements imposed upon the member in the performance of those duties and responsibilities); 1990 Op. Att'y Gen. No. 90-091 at 2-390 to 2-391; 1982 Op. Att'y Gen. No. 82-103 at 2-283 ("[i]f a member political subdivision is restricted in carrying out a particular activity by requirements imposed by statute, the council's ability to act on behalf of the subdivision must be similarly restricted"); 1969 Op. Att'y Gen. No. 69-013 (if a COG member that is restricted by competitive bidding requirements authorizes the COG to arrange a purchase on its behalf, the COG must comply with the bidding requirements).

[2] This opinion does not address the authority of charter counties. *See, e.g.,* Ohio Const. art. X, §§ 3 and 4; 2001 Op. Att'y Gen. No. 2001-020; *see also* 2003 Op. Att'y Gen. No. 2003-026 at 2-219 to 2-220.

of governments is permitted to perform only those governmental functions that might otherwise be performed by the council's individual members"); note 1, *supra*.

In the instant case, the Agreement provides that start-up costs of the COG and funding for the year 2005 will be provided by contributions from the county and the city. Agreement Art. IV(J), Art. VI(A), Art. VII(A), Art. VII(C)(1). Under the By-Laws, the Fiscal Management Board of the COG is required to approve a capital budget and an operating budget, and to appropriate funds accordingly out of funds made available under the Agreement. By-Laws I(C)(5). The Fiscal Management Board of the COG "shall not expend more in any one fiscal year than the funds made available to the COG by its members" as provided in the Agreement. By-Laws I(C)(5). Thus, a COG is not permitted to obligate its members beyond the extent to which they have agreed to be obligated.

As provided in R.C. Chapter 167 and outlined above, a COG receives its basic funding through contributions from its members or from other gifts or grants. R.C. 167.06. A COG is not empowered to impose a tax or to issue bonds. *See, e.g.*, 1998 Op. Att'y Gen. No. 98-004 at 2-23 (a COG "has been given no authority to levy taxes or issue bonds"); 1979 Op. Att'y Gen. No. 79-018 at 2-61 ("[a] COG is given no authority to raise revenues by means other than acceptance of grants and assessments of its members"); 1974 Op. Att'y Gen. No. 74-080 at 2-330 ("[t]here is no indication of a legislative intent to confer taxing power" upon a COG); 1971 Op. Att'y Gen. No. 71-010 at 2-22.[3]

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[3] Documents that accompany your opinion request suggest that a COG has the authority to borrow money. Prior opinions of the Attorneys General that have considered the issue have concluded that a COG does not have that authority. *See, e.g.*, 1979 Op. Att'y Gen. No. 79-018 at 2-62 ("[m]embers of a COG may have authority to borrow money in different manners. . . . R.C. Chapter 167 does not prevent a political subdivision from incurring debt to pay its dues to the COG; however, the chapter does not suggest that a COG may be authorized, even by agreement of its members, to incur debt. . ."). In general, financial powers given to public bodies are construed strictly, and there must be clear authority to enter into financial transactions. *See State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916); 2004 Op. Att'y Gen. No. 2004-005 at 2-44 (a board of county commissioners may incur debt only if it has clear statutory authority to do so); 2003 Op. Att'y Gen. No. 2003-026 at 2-216. No language of R.C. Chapter 167 expressly authorizes a COG to borrow money.

It might be argued that a COG is permitted to exercise the powers of its members pursuant to R.C. 167.03(C) or R.C. 167.08 and borrow money pursuant to that authority. *See* R.C. 167.03(C) (a COG may "perform such other functions and duties as are performed or capable of performance by the members and necessary or desirable for dealing with problems of mutual concern"); R.C. 167.08 (contracts may authorize a COG "to perform any function or render any service" that the contracting political subdivisions may perform or render). However, Attorney General opinions have found that certain functions of member subdivisions – such as

In the instant case, the county's tax levy was passed for the purpose of the establishment, maintenance, and operation of a CPSCS, and proceeds from the levy may be used only for that purpose. *See* 1997 Op. Att'y Gen. No. 97-030 at 2-176 ("[i]t is . . . fundamental under Ohio law that money that is derived from a particular tax levy may be expended only for the purpose for which that levy was adopted"). The levy was submitted by the board of county commissioners to the voters of the county pursuant to R.C. 5705.19 and is a county tax levy. The county may, by agreement, exercise CPSCS functions through a COG, but the proceeds of the levy are county funds that must be directed to the proper purposes by the county. *See* 1989 Op. Att'y Gen. No. 89-063 at 2-277 (the authority of COG may be limited because certain functions of the members are within their exclusive authority and cannot be delegated to the COG).

The manner in which a board of county commissioners generally borrows money is through issuance of bonds or notes as authorized by statute. *See, e.g.*, R.C. Chapter 133 (uniform public securities law); R.C. 133.07 (limits on net indebtedness of county); 1996 Op. Att'y Gen. No. 96-048 (township may not provide security interest in property it purchases unless there is statutory authority); 1993 Op. Att'y Gen. No. 93-039 (township may incur debt only in accordance with statutory authority). The board of county commissioners is permitted to borrow money – that is, issue notes or bonds – only on behalf of the county, and not on behalf of other entities, unless there is specific statutory authority permitting it to act on behalf of another entity. *See* 2004 Op. Att'y Gen. No. 2004-005 at 2-44. We are aware of no such authority in the instant case.

Under basic principles of Ohio law, a political subdivision cannot incur bonded indebtedness without making provision to collect taxes to pay the debt. Ohio Const. art. XII, §11; 1993 Op. Att'y Gen. No. 93-039 at 2-208. A written agreement to make specific future payments of money constitutes a bond and creates bonded indebtedness. *State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 73, 285 N.E.2d 362 (1972). Accordingly, a county cannot make a commitment to incur debt unless it has a source of income to pay back the debt that it is incurring.

Under the terms of the ballot language, the CPSCS levy adopted in Champaign County commences in 2005, and the proceeds are "first due in calendar year 2006." There are statutory provisions authorizing taxing authorities to issue anticipation securities to obtain the use of funds before tax proceeds are received. R.C. Chapter 133 contains the uniform public securities law and provides generally for the taxing authority of any subdivision to issue limited amounts of securities in anticipation of the collection of current property tax revenues or in anticipation of

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those requiring the exercise of discretion regarding financial matters – cannot be delegated to the COG. *See* 1989 Op. Att'y Gen. No. 89-063 at 2-277 ("[t]he authority of a regional council of governments may . . . be limited because certain functions are within the exclusive authority of the member subdivisions and cannot be delegated to the council"). As a general matter, transactions involving the borrowing of money come within this restriction. Hence, current law does not support the practice of a COG borrowing money.

revenues from other sources, with the restriction that the proceeds of the anticipation securities may be used only for the purpose of the levy and for financing costs related to the securities. R.C. 133.10. With certain exceptions, anticipation securities may not be issued prior to the first day of the fiscal year for which revenues are anticipated and must mature not later than the last day of that year. R.C. 133.10(E)(2).

With regard to voted property tax levies, however, there is express statutory authority for anticipation notes to be issued after the approval of the levy by the voters. R.C. 133.24(B); R.C. 5705.191; *see also* R.C. 5705.19; R.C. 5705.193. Further, except for capitalized interest, "debt charges on tax anticipation notes shall be payable only from the proceeds of the tax levy anticipated," R.C. 133.24(D). Hence, in appropriate circumstances, the board of county commissioners may, upon the approval of a tax levy by the voters under R.C. 5705.19, issue notes in anticipation of the proceeds of the tax levy and pay the costs of the anticipation notes from the proceeds of the levy. Thus, if the appropriate circumstances exist, the statutes would permit Champaign County to issue anticipation notes in 2005 for the proceeds of the CPSCS levy, with the intent of paying the debt from levy proceeds anticipated to be received in 2006.

It is not clear, however, that, in the instant case, the Agreement and By-Laws would permit Champaign County to take this action. Pursuant to the Agreement, the county is to pay levy moneys to the COG pursuant to a contract by which the county purchases public safety communications services from the COG. Agreement Art. VII(B). Pursuant to the By-Laws, the county's obligation with regard to the levy is to transfer levy proceeds to the COG's Fiscal Officer "upon receipt of the proceeds of the levy." By-Laws III. No provision is made for the issuance of anticipation notes. Accordingly, it might be argued that the county's issuance of anticipation notes would conflict with the county's obligations under these provisions of the Agreement and By-Laws.

The Agreement provides for changes in funding allocation at such time as a levy "is enacted," in apparent contemplation of the receipt of the levy proceeds. Agreement Art. VII(C). The Agreement thus may assume that levy moneys will be available as soon as the levy is enacted, or may assume that anticipation securities will be issued. The Agreement and By-Laws could be amended to provide clearly that the county may issue anticipation securities on its own behalf. However, existing statutes would not permit the amendment of the Agreement and By-Laws to permit the county to issue anticipation notes (and thus incur debt) on behalf of the COG.

The board of county commissioners is empowered to issue anticipation securities or otherwise incur debt only for the county's purposes, and not on behalf of the COG. As discussed above, the levy was adopted as a county levy and remains a county levy. The COG might, by agreement with the county, be authorized to carry out particular functions pertaining to the levy on behalf of the county, and must, in those circumstances, comply with requirements imposed upon the county with regard to the performance of those functions. *See* 1982 Op. Att'y Gen. No. 82-103; note 1, *supra*. Nonetheless, the board of county commissioners, as the taxing authority under R.C. Chapter 5705, must retain the authority to receive levy proceeds and incur debt only

on behalf of the county. *See* R.C. 5705.01(A) and (C); 1998 Op. Att'y Gen. No. 98-004; 1989 Op. Att'y Gen. No. 89-063 at 2-277.

We conclude, accordingly, that no existing statutory provisions authorize the board of county commissioners of a county that is a member of a COG to borrow money on behalf of the COG to fund a COG-created operation.

Question 2: If the board of county commissioners is authorized to borrow the money on behalf of the COG, may it use the 9-1-1 levy moneys that are generated in the following year to pay back the operating note from the previous year?

Your second question asks, if the board of county commissioners is authorized to borrow money on behalf of the COG, whether the board may use the levy proceeds that are generated in 2006 to pay back the operating note from the year 2005. As discussed above, the board is not empowered to borrow money on behalf of the COG, so we need not address this question.

Question 3: If the board of county commissioners is not authorized to borrow the money on behalf of the COG, and assuming the board is financially able to pay its proportionate share of the COG's operating expenses, does the Board have authority to use county general fund money to also pay another COG member's proportionate share?

Your third question asks, if the board of county commissioners is not authorized to borrow the money on behalf of the COG, and assuming the board is financially able to pay its proportionate share of the COG's operating expenses, whether the Board has authority to use county general fund money to also pay another COG member's proportionate share.

Under 167.06(A), the member governments of the COG "may appropriate funds to meet the expenses of the council." Members may give the COG services, the use of equipment or office space, real or personal property, or money. The council is permitted to establish schedules of dues for payment by its voting members to aid in the financing of the operations and programs of the COG, as provided in the Agreement or By-Laws. R.C. 167.06(A). The COG may accept funds, grants, gifts, or services from its members or other public or private sources. R.C. 167.06(B).

Hence, a COG member is permitted to make payments to the COG to meet the COG's expenses. To supplement the amounts established by the Agreement and By-Laws, the members are permitted to make additional payments and to provide additional assistance to the COG to pay for its expenses and aid in its operations and programs. R.C. 167.06. Therefore, it appears to be permissible for the county to pay more than its agreed-upon share to the COG for 2005, provided that the county has moneys that may lawfully be used for this purpose.

Should the county make such additional payments, it would be appropriate to amend the Agreement and By-Laws as necessary to reflect the changes in financial contributions between

the county and the city. The amounts required from each member of a COG are established by agreement of the members, and the members may change the arrangement as they deem appropriate. Agreement Art. V, Art. IX(A); *see also* R.C. 167.01; R.C. 167.04; R.C. 167.06. It should be noted, however, that in order for a board of county commissioners to take on the obligation of another governmental body directly and pay, on behalf of that other governmental body, amounts that the other body owes, the board of county commissioners must have clear statutory authority to make the expenditure, and that authority appears to be absent in the instant case. *See* 2004 Op. Att'y Gen. No. 2004-005 at 2-44. Thus, the city would retain its obligation to pay its agreed-upon share to the COG unless the Agreement is changed.

Thus, if the county is financially able to pay its proportionate share of the COG's operating expenses for the CPSCS, the board of county commissioners is permitted to use other available county funds to pay additional amounts to the COG to cover other costs of the COG's operation. The members of the COG may amend the Agreement and By-Laws to reflect changes in the amounts of contributions made by the members.

Therefore, we conclude that, assuming that a county that is a member of a COG is financially able to pay its proportionate share of the COG's operating expenses, the board of county commissioners is permitted to use other available county funds to pay additional amounts to the COG for expenses of the COG, and the members of the COG may amend the Agreement and By-Laws to reflect changes in the comparative contributions of the various members.

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. No existing statutory provisions authorize the board of county commissioners of a county that is a member of a regional council of governments (COG) to borrow money on behalf of the COG to fund a COG-created operation.

2. Assuming that a county that is a member of a COG is financially able to pay its proportionate share of the COG's operating expenses, the board of county commissioners is permitted to use other available county funds to pay additional amounts to the COG for expenses of the COG, and the members of the COG may amend the Agreement and By-Laws to reflect changes in the comparative contributions of the various members.

Respectfully,

JIM PETRO
Attorney General