July 6, 2004

The Honorable Thomas L. Sartini
Ashtabula County Prosecuting Attorney
25 West Jefferson Street
Jefferson, Ohio 44047-1092

SYLLABUS: 2004-022

If a county auditor establishes a schedule of specified dates for paying advances of real property taxes authorized by R.C. 321.34(A) to each board of education that submits a resolution requesting advances pursuant to the schedule, and if the county auditor fails to advance funds as required by the schedule, then the county must pay interest in accordance with R.C. 135.351(C).

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OPINION NO. 2004-022

The Honorable Thomas L. Sartini
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25 West Jefferson Street
Jefferson, Ohio 44047-1092

Dear Prosecutor Sartini:

We have received your request for an opinion concerning the advancement of tax proceeds to a school board. You have asked the following question:

> Where a county auditor, as a result of discussions with school board treasurers, establishes specific dates for *automatic* advancements of real property tax collections to school boards, and then fails to advance funds according to that schedule, is interest payable to the school board as prescribed in R.C. 135.351(C)?

As you have described the matter, the issue is whether, upon the failure of the county auditor to adhere to a schedule of automatic advances that was established by the county auditor and relied upon by the school boards, the moneys that would have been advanced if the schedule had been followed are the subject of a request for advancement, thereby triggering the payment of interest pursuant to R.C. 135.351(C). For the reasons that follow, we conclude that, if a county auditor establishes a schedule of specified dates for paying advances of real property taxes authorized by R.C. 321.34(A) to each board of education that submits a resolution requesting advances pursuant to the schedule, and if the county auditor fails to advance funds as required by the schedule, then the county must pay interest in accordance with R.C. 135.351(C).

Background

In the situation you have described, the county auditor began in 1997 to make automatic advances of real property taxes to school districts on certain dates, after receiving a general authorization for the advances, but without receiving a separate request immediately prior to each advancement. Documents from 1999 indicate that the county auditor scheduled certain dates for these automatic advancements of real property tax proceeds to boards of education. The school treasurers and the county auditor apparently agreed upon the schedule.

The materials provided to us indicate that, in a memorandum addressed to all school treasurers, the county auditor stated, in part: "Enclosed for your convenience is a copy of the agreed upon dates for scheduled advances throughout the year." The enclosure states:

REQUEST FOR ADVANCE OF TAXES COLLECTED

> File copy of Board Resolution authorizing advancements with the Auditor by January 15th of each year.
>
> The request for advance of taxes collected must be filed with the County Auditor prior to the receipt of advances on tax collection.
>
> First half real Estate advances will automatically be given at 90% of collection on January 31, February 14, and March 7th. No advances will be given in June unless specifically requested in writing.
>
> Second half advances will be given the first week of July and August, even if a June advance was received.
>
> Any Personal Property advance must be requested in writing. Advances will be given at 75% of collection.

The schedule set forth by the county auditor thus provides for advances of real property tax proceeds to be paid automatically, at ninety percent of the amounts collected, on January 31, February 14, and March 7. Under the schedule, advances are given in June only if specifically requested in writing. Second half advances are given the first week of July and August, without the need for a specific request. The county auditor's schedule thus provides for the advance payment of tax proceeds on specified dates. It requires that, to participate in the scheduled advance payments, a board of education must, by January 15th of each year, file a copy of a resolution authorizing the advance payments.

You have informed us that advances consistent with the schedule were made over the next several years, through January 31, 2003. However, no advancements were made as scheduled on February 14, 2003, or March 7, 2003. Instead, the final settlement check for that period was paid to the school districts on or about March 13, 2003.

On March 12, 2003, the Treasurer of the Geneva Area City School District asked the county auditor by e-mail why no advance payments had been made on February 14, 2003, or March 7, 2003, and received only the response that the final settlement was done and checks would be arriving soon. The Geneva Area City School District received its full settlement check on March 13, 2003. On January 16, 2004, and again on January 26, 2004, the Geneva Area City School District Treasurer made a written demand to the county auditor for payment of interest on the amounts that were not advanced as scheduled, from the dates of February 14, 2003, and

March 7, 2003, until the date when the full settlement funds were received (March 13, 2003). The issue is whether interest is due on these amounts pursuant to R.C. 135.351(C).

Statutes governing the collection and distribution of real property tax proceeds

To address your question, it is helpful to review the statutes governing the distribution of real property tax proceeds to a school district. Under Ohio law, the county treasurer collects real property tax payments and keeps records of amounts received. *See* R.C. 321.07-.10. By statute, the county treasurer is required to make semiannual settlements with the county auditor for taxes and assessments collected. R.C. 321.24(A) and (C); *see also* R.C. 321.29; 1985 Op. Att'y Gen. No. 85-067, at 2-261. Immediately after each real property tax settlement, on demand and on presentation of the warrant of the county auditor, the county treasurer is required to pay to the treasurer of a school district "all moneys in the county treasury payable" to the school district. R.C. 321.31; *see also Ratterman v. State*, 44 Ohio St. 641, 10 N.E. 678 (1887).

R.C. 321.34 provides for the payment of moneys in the county treasury to local authorities in advance of the settlements established by statute. It permits local authorities (including boards of education), by resolution, to request the county auditor to pay their treasurers "any money that may be in the county treasury to the accounts of such local authorities, respectively, and lawfully applicable to the purpose of the current fiscal year in which such request is made," subject to certain restrictions. R.C. 321.34(A). Boards of education have specific authority to request, by resolution, money that is to be included in a settlement under R.C. 321.24(C). R.C. 321.34(A)(2).

R.C. 135.351 requires the county to pay interest on moneys that are not paid to a local authority in a timely fashion.[1] Moneys due to boards and subdivisions following the real

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[1] The full text of R.C. 135.351 is as follows:

> (A) Except as provided in sections 135.352 [135.35.2] and 1545.22 of the Revised Code, all interest earned on money included within the county treasury shall be credited to the general fund of the county.
>
> (B) Unless otherwise provided by law, with respect to moneys belonging to another political subdivision, taxing district, or special district that are deposited or invested by the county, the county shall pay and distribute such moneys in accordance with division (B)(1), (2), or (3) of this section, as appropriate:
>
> (1) On or before the tenth day of the month following the month in which the county received such moneys or on or before such later date authorized by the legislative authority or other governing body of the other political subdivision or district, pay and distribute all such moneys to the treasurer or other appropriate officer of the other political subdivision or district.

property tax settlement must be paid and distributed "within five business days after the final date prescribed by law for such settlement, or if the settlement date is lawfully extended, within five business days after the date of such lawful extension." R.C. 135.351(B)(2). Advances of real property tax requested pursuant to R.C. 321.34 must be paid and distributed "within five business days after the request for the advance is delivered to the county auditor." R.C. 135.351(B)(3). If payment and distribution of these amounts is not made within the time period prescribed, the county must pay to the entity whose payment was delayed "any interest that the county has received or will receive on any moneys or advance described in that division which accrues after the date such moneys or advance should have been distributed, together with the principal amount of such moneys or advance." R.C. 135.351(C). The county must make the payment of principal and interest within five business days after the treasurer files a written demand for payment with the county auditor. *Id.; see State ex rel. Old Fort Local Sch. Dist. Bd. of Educ. v. Smith*, No. 13-82-34, 1983 Ohio App. LEXIS 11517 (Seneca County Mar. 25, 1983)

> (2) With respect to moneys due to boards and subdivisions under section 321.31 of the Revised Code, pay and distribute such moneys within five business days after the final date prescribed by law for such settlement, or if the settlement date is lawfully extended, within five business days after the date of such lawful extension.
>
> (3) With respect to moneys for which any advance authorized by section 321.34 or 321.341 [321.34.1] of the Revised Code has been requested, pay and distribute such moneys within five business days after the request for the advance is delivered to the county auditor.
>
> (C) If the county fails to make any payment and distribution required by division (B) of this section within the time periods prescribed by that division, the county shall pay to the appropriate other political subdivision, taxing district, or special district any interest that the county has received or will receive on any moneys or advance described in that division which accrues after the date such moneys or advance should have been distributed, together with the principal amount of such moneys or advance. The county shall make this payment of principal and interest within five business days after the treasurer or other appropriate officer of such other political subdivision or district files a written demand for payment with the county auditor.

R.C. 135.351(C) establishes an exception from the general requirement that interest earned on money included within the county treasury is credited to the general fund of the county, *see* R.C. 135.351(A), for interest on moneys that are not distributed in a timely manner. *See, e.g.*, 1997 Op. Att'y Gen. No. 97-043, at 2-261 to 2-262; 1985 Op. Att'y Gen. No. 85-067, at 2-260.

(the duty to pay interest if a request for advance payment of school district funds is not granted in a timely manner is a clear legal duty enforceable by writ of mandamus).[2]

Authority of county auditor to establish a schedule for paying advances of real property taxes to boards of education

It is important to note, initially, that it is inappropriate to use a formal opinion of the Attorney General to make findings of fact or to attempt to determine rights between particular parties. *See, e.g.*, 2003 Op. Att'y Gen. No. 2003-019, at 2-145; 1991 Op. Att'y Gen. No. 91-016, at 2-82 n.2 ("[t]he opinion-rendering function of the Attorney General is not an appropriate forum for making findings of fact"); 1990 Op. Att'y Gen. No. 90-111, at 2-502 (the Attorney General is "unable to make findings of fact or to interpret provisions of a particular contract or agreement"); 1986 Op. Att'y Gen. No. 86-039, at 2-198 (the Attorney General is "unable to use the opinion-rendering function of this office to make determinations concerning the validity of particular documents, or the rights of persons under such documents"); 1983 Op. Att'y Gen. No. 83-057, at 2-232 ("[t]his office is not equipped to serve as a fact-finding body; that function may be served by your office or, ultimately, by the judiciary"). Clearly, we cannot predict what a court might decide in a particular case. *See* 2003 Op. Att'y Gen. No. 2003-029, at 2-247. Therefore, we are not able, by means of this opinion, to make a definitive determination regarding the legal responsibility of the county to pay interest in the situation you have described. However, we are able to consider the matters at issue and provide a discussion of relevant principles that may then be applied to particular circumstances by persons authorized to act in those circumstances.

The basic issue presented by your request is whether the institution of a schedule for automatic advancements constitutes a request for each of those advancements, so that the failure of the county auditor to adhere to the schedule triggers the interest requirement of R.C. 135.351(C). Before we can answer that question, it is necessary to consider the authority of a county auditor to establish a schedule for making advance payments of real property taxes to boards of education, and the authority of a board of education to participate in the scheduled payments.

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[2] Your letter of request refers to 1985 Op. Att'y Gen. No. 85-067, which discussed the distribution of moneys pursuant to R.C. 135.351 as then in effect. Since the issuance of that opinion, R.C. 135.351 has been amended so that various matters at issue in the 1985 opinion are now addressed directly by the provisions of R.C. 135.351. *See* 1985-1986 Ohio Laws, Part II, 4388 (Am. Sub. H.B. 446, eff. July 16, 1986) (title) (among other changes, amendment to RC. 135.351 establishes "an interest penalty if tax settlement proceeds are not distributed to subdivisions in a timely fashion"). Therefore, 1985 Op. Att'y Gen. No. 85-067 is no longer completely accurate, and the analysis set forth in this opinion is based upon current statutes, rather than upon 1985 Op. Att'y Gen. No. 85-067.

Both the county auditor and the board of education have only the authority that they are granted by statute, either expressly or by implication as necessary to carry out the express authority. *See* R.C. Chapter 319; R.C. Chapter 3313; *State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84, 197 N.E. 112 (1935) (syllabus, paragraph 1); *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 134 N.E. 655 (1921) (syllabus, paragraph 2); *Schultz v. Erie County Metro. Park Dist. Bd.*, 26 Ohio Misc. 68, 69, 269 N.E.2d 72 (C.P. Erie County 1971) (quoting 44 Ohio Jur. 2d 546, § 60, in part as follows: "The rule in respect of implied powers is that, in addition to the powers expressly given by statute to an officer or board of officers, he or it has by implication of such additional powers as are necessary for the due and efficient exercise of the power expressly granted or as may be fairly implied from the statute granting the express powers"); 2003 Op. Att'y Gen. No. 2003-029; 1984 Op. Att'y Gen. No. 84-005, at 2-15. The statutes governing the advance payments of real property tax proceeds to school districts do not expressly authorize the county auditor to establish a schedule of dates for automatic advancements to school districts, nor do they expressly authorize the boards of education to agree to such a schedule. R.C. 321.34(A) simply provides for the advance payment of "any money that may be in the county treasury" to the account of a particular local authority "[w]hen" the local authority so requests. R.C. 135.351(B)(3) provides that, when an advance authorized by R.C. 321.34 has been requested, the county must "pay and distribute such moneys within five business days after the request for the advance is delivered to the county auditor."

It has been stated that "[t]he provisions of [R.C. 321.34] are mandatory, and advance disbursements not in compliance therewith are unauthorized and illegal." 1960 Op. Att'y Gen. No. 1845, p. 692 at 694; *see also State ex rel. Nat'l City Bank v. Bd. of Educ.*, 52 Ohio St. 2d 81, 85, 369 N.E.2d 1200 (1977); *Arnold v. Bd. of Educ.*, 20 Ohio L. Abs. 220 (Ct. App. Mahoning County 1935) (advance payment of school funds made in absence of request was unauthorized and therefore illegal); 1984 Op. Att'y Gen. No. 84-005. Further, the interest requirement of R.C. 135.351(C), operating as an exception to the general rule that interest earned on money included within the county treasury shall be credited to the general fund of the county, has been narrowly construed. As was stated in 1985 Op. Att'y Gen. No. 85-067, at 2-260 to 2-261:

> To carry out the intent of R.C. 135.351, it is appropriate to read the interest provision of R.C. 135.351(C) as requiring the county to pay interest to a political subdivision or district only if the county has clearly failed to carry out its responsibilities. See State ex rel. Chester Township Bd. of Trustees v. Makowski, 12 Ohio St. 3d 94, 97, 465 N.E.2d 453, 456 (1984) ("R.C. 135.351 requires the counties to disburse tax funds to the local taxing authorities within specified time limits and authorizes the payment of interest only when those time requirements are not complied with"); Op. No. 82-027 at 2-81 ("R.C. 135.351 requires that the county return the interest earned on money included within the county treasury only if the county has failed to return the principal to the subdivision at the appropriate time. . . .Any interest earned prior to the date specified for the distribution. . .would be credited to the county's general fund, pursuant to R.C.

135.351(A)"). See generally R.C. 1.47; Cochrel v. Robinson, 113 Ohio St. 526, 149 N.E. 871 (1925).

See also State ex rel. Locher v. Menning, 95 Ohio St. 97, 99, 115 N.E. 571 (1916) ("[t]he authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county").

It has been recognized that, in carrying out statutory duties, the county auditor is authorized to establish procedures to facilitate the performance of the duties and increase the efficiency of the office. *See, e.g.*, 2003 Op. Att'y Gen. No. 2003-029 (syllabus, paragraph 3) (county auditor is authorized to require that requests for reimbursement of travel expenses be accompanied by itemized receipts); 1990 Op. Att'y Gen. No. 90-034; 1985 Op. Att'y Gen. No. 85-018, at 2-72 ("the auditor has the duty of exercising reasonable discretion in the circumstances of each sale" of forfeited land). As was stated in *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918): "Every officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty." *See* 1994 Op. Att'y Gen. No. 94-066, at 2-324 ("[i]f … the General Assembly has granted an officer or entity authority to perform a particular function without specific directions as to the manner of performing that function, the officer or entity may exercise a reasonable discretion in its performance"); *see also State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365 (1960); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph 4), *aff'd sub nom. Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). Accordingly, it is appropriate for a county auditor to take steps to organize and streamline the payment of advancements, provided that the steps taken are consistent with the requirements of R.C. 135.351, R.C. 321.34, and other relevant statutory provisions.

By establishing a schedule for the payment of advancements to school districts under R.C. 321.34, the county auditor is, in effect, inviting resolutions requesting advancements on particular days. It is evident that the selection of several appropriate days for the advancement of moneys to school districts may promote the efficient administration of the auditor's responsibilities, both by permitting advance planning and by allowing the efficiency of serving a number of school districts at the same time.

By submitting a resolution authorizing advancements in accordance with the county auditor's schedule, a board of education is requesting advance payments to which it is entitled under R.C. 321.34(A). A board of education has authority to make those requests at any time, and may clearly choose to coordinate its requests with a schedule prepared by the county auditor. *See* R.C. 321.34; R.C. 3313.17.

Thus, although the establishment of a schedule for the payment of advances is not expressly authorized by statute, it appears that such a schedule may comport with statutory requirements. Compliance with R.C. 321.34(A) may be achieved by requiring that, in order to

participate in the scheduled automatic advancements, the board of education must submit a proper resolution requesting the advancements. The school districts' rights to receive advance payments may be protected by permitting each board of education that does not choose to participate in the established schedule to refrain from submitting a resolution authorizing payment under that schedule and, instead, to request advancements separately on dates that it selects, as authorized by statute.

It might be argued that an inconsistency results because, under the schedule, payments will not be made within five business days after the request for the advance is delivered to the county auditor, as provided in R.C. 135.351(B)(3). This inconsistency, however, does not appear to be significant. The five-day requirement for payment imposed by R.C. 135.351(B)(3) is intended to assure that advancements are made in a timely manner. It is rendered unnecessary by the agreement that payments will be made on particular dates, thus assuring the school districts of timely payments. The boards of education might state in their resolutions that they waive the five-day requirement, in favor of the scheduled payment dates, or the requests combined in the single resolution submitted by each board of education might be deemed to be submitted five days prior to each payment date. In any event, the five-day provision does not appear to be so substantial as to prevent the county auditor from establishing the alternative of a schedule for automatic advancements.

We conclude, accordingly, that a county auditor is authorized to establish a schedule for paying advances of real property taxes to boards of education on specified dates, and to permit each board of education to participate in the scheduled advances by submitting a single resolution authorizing its participation. Boards of education have corresponding authority to adopt and submit resolutions necessary to authorize their participation in the scheduled advances. Thus, the establishment of a schedule for automatic advancements is within the powers granted to the county auditor by R.C. 135.351 and R.C. 321.34 and is a permitted method of implementing these statutes.

Payment of interest when scheduled advance payments are delayed

Because the institution of a program for automatic advancements of real property taxes is not expressly authorized by statute, the legal effect of such a program is not expressly established by statute. The manner in which the county auditor or a school district must comply with the schedule may be affected by the terms of any agreement under which the schedule was created, the terms of any policy established by the county auditor, or the terms of a particular resolution submitted by a board of education. We are unable to determine by means of this opinion the precise nature of the arrangement for automatic advances that you have described.[3]

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[3] For example, you have provided information indicating that, in the instant case, the county auditor has stated that her compliance with the advancement schedule was "optional,"

However, if it is found in a particular case that a county auditor has established a schedule that requires the payment of advances on specified dates in accordance with a resolution submitted by a board of education, then it must be concluded that the interest requirements of R.C. 135.351(C) are applicable. R.C. 321.34(A) states that, "[w]hen the local authorities by resolution so request, the county auditor shall" make advance payments of money in the county treasury credited to their accounts. R.C. 135.351(C) provides that, if payment of a requested advance is not made within prescribed time periods, "the county shall pay … any interest that the county has received or will receive" after the date when the money should have been distributed. Use of the word "shall" indicates the mandatory nature of these provisions. *See Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1); *State ex rel. Justice v. Thomas*, 35 Ohio App. 250, 258, 172 N.E. 397 (Marion County 1930) (the county auditor, as a ministerial officer, must comply strictly with statutory requirements); *Arnold v. Bd. of Educ.;* 1999 Op. Att'y Gen. No. 99-054, at 2-331.

The fact that a schedule has been implemented by the submission of a resolution requesting several advances on scheduled dates, in place of the submission of separate resolutions requesting those advances, does not change the nature of the obligation to pay interest for failure to make timely distribution. When the county auditor establishes a policy of paying advances on scheduled dates to boards of education that have submitted a single resolution authorizing the payment of advances on those dates, that policy provides the boards of education with an administrative alternative to the submission of separate requests throughout the year. Therefore, it is appropriate for the interest requirement to take effect with respect to each scheduled advance as it would if each advance were requested separately.

By implementing a schedule for automatic advances to school districts, the county auditor invites requests for advances on certain dates in order to standardize operations and make the process of paying advances more efficient. Having invited and received those requests, the county auditor may not then disregard them. Rather, if for some reason advances are not paid in accordance with the requests, the county is obligated to pay interest for the period of delay, as it would if any other request for advance payment were not honored in a timely manner. *See* 1991 Op. Att'y Gen. No. 91-009, at 2-49 ("[i]f timely payment and distribution is not made under R.C. 135.351(B), interest must be paid … under R.C. 135.351(C)"). We conclude, therefore, that a resolution by which a board of education authorizes the county auditor to pay advances pursuant to R.C. 321.34 according to a schedule established by the county auditor constitutes a request for the advances pursuant to R.C. 321.34, and the failure of the county auditor to make payment and

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and that even though a board of education submitted a resolution authorizing the scheduled advances, the board of education was also required to submit specific requests for advances. We are unable to make the investigation or findings necessary to determine the precise terms of the program offered by the county auditor in this case, or the terms of any resolution or agreement.

distribution in accordance with the schedule triggers the interest requirements of R.C. 351.135(C).

Conclusion

Therefore, it is my opinion, and you are advised that, if a county auditor establishes a schedule of specified dates for paying advances of real property taxes authorized by R.C. 321.34(A) to each board of education that submits a resolution requesting advances pursuant to the schedule, and if the county auditor fails to advance funds as required by the schedule, then the county must pay interest in accordance with R.C. 135.351(C).

Respectfully,

JIM PETRO
Attorney General