

OPINION NO. 99-030**Syllabus:**

A board of alcohol, drug addiction, and mental health services is permitted under the terms of R.C. 340.03(A)(5) and R.C. 340.033(A)(12) to expend public funds to promote the approval by the electorate of a tax levy for mental health programs or alcohol and drug addiction programs, provided that the board has public funds available that may lawfully be expended for that purpose. (1979 Op. Att'y Gen. No. 79-022, approved and followed. 1994 Op. Att'y Gen. No. 94-041; 1992 Op. Att'y Gen. No. 92-029; 1968 Op. Att'y Gen. No. 68-124; 1937 Op. Att'y Gen. No. 1245, vol. III, p. 2142; 1920 Op. Att'y Gen. No. 1532, vol. II, p. 915, distinguished.)

To: Tim Oliver, Warren County Prosecuting Attorney, Lebanon, Ohio
By: Betty D. Montgomery, Attorney General, April 14, 1999

We are in receipt of your request asking whether the Warren County Board of Alcohol, Drug Addiction, and Mental Health Services may use public dollars to promote its levy campaign. You have asked that we consider the conclusions reached in 1979 Op. Att'y Gen. No. 79-022 and determine if they are still applicable. That opinion considered statutory language authorizing a community mental health and retardation board to "[r]ecruit and promote local financial support for mental health and retardation programs from private and public sources," then appearing in R.C. 340.03(I), and concluded that the board was authorized to expend public funds to promote the approval of a tax levy by the electorate.

Statutory language analogous to that at issue in 1979 Op. Att'y Gen. No. 79-022 now appears in R.C. 340.03(A)(5) and relates to the funding of mental health programs by a board of alcohol, drug addiction, and mental health services (ADAMH board). Corresponding language relating to financial support for alcohol and drug addiction programs appears in R.C. 340.033(A)(12).¹

To address your request, let us first consider the organization and authority of ADAMH boards. Alcohol, drug addiction, and mental health service districts and joint-county districts are established pursuant to R.C. 340.01(B) and are given a variety of duties concerning the evaluation, development, coordination, and funding of programs relating to alcohol, drug addiction, and mental health services. *See* R.C. 340.03; R.C. 340.033. They are governed by ADAMH boards. *See* R.C. 340.02; note 1, *supra*.

ADAMH boards receive some state funds and may also request money from any participating county. R.C. 340.07-.09; R.C. 5119.62. With the approval of the voters, property taxes may be levied by a board of county commissioners under R.C. 5705.19, R.C. 5705.191, or R.C. 5705.221, or by the ADAMH board of a joint-county district under R.C.

¹ Where community mental health boards established under former R.C. 340.02 continue to function, they have all the powers, duties, and obligations of ADAMH boards with regard to mental health services. R.C. 340.021(A). Similarly, alcohol and drug addiction services boards have those powers, duties, and obligations with regard to alcohol and drug addiction services. *Id.* Statutory references to ADAMH boards include those other boards. *Id.* Accordingly, for purposes of this opinion, references to ADAMH boards also include community mental health boards and alcohol and drug addiction services boards.

5705.19 or R.C. 5705.191. See R.C. 5705.01(A), (C), (I); R.C. 5705.03; 1981 Op. Att'y Gen. No. 81-044; 1979 Op. Att'y Gen. No. 79-022; 1975 Op. Att'y Gen. No. 75-089.²

1979 Op. Att'y Gen. No. 79-022 noted that several earlier opinions had concluded that there was no authority for a statutorily-created governmental entity to expend public funds to promote the approval of a tax levy by the electorate. See 1968 Op. Att'y Gen. No. 68-124 (syllabus) (finding regional water district "without authority to expend public funds to conduct an educational campaign, the ultimate goal of which is to insure passage" of a bond issue); 1937 Op. Att'y Gen. No. 1245, vol. III, p. 2142 (finding board of county commissioners without authority to expend public funds for advertisements showing voters the necessity of a tax levy); 1920 Op. Att'y Gen. No. 1532, vol. II, p. 915 (syllabus) (finding board of education "without authority to expend public funds in printing and mailing to each taxpayer literature and advertising matter in favor of any proposition to be voted upon by the electors at an election called by such board of education"). The 1979 opinion approved those earlier opinions but distinguished them because of the language of the relevant statutes. The 1979 opinion found a different conclusion appropriate in the matter there at issue on the grounds that "*the terms of R.C. 340.03 specifically place upon a community mental health and mental retardation board the duty of actively seeking both public and private financial support for its programs.*" 1979 Op. Att'y Gen. No. 79-022, at 2-79 (emphasis added).

Subsequent opinions have also concluded that public entities are not permitted to expend public funds to promote the approval of a tax levy by the voters. See 1994 Op. Att'y Gen. No. 94-041 (finding board of trustees of county tuberculosis hospital without authority to expend public moneys to promote the approval of a tax levy by the electorate); 1992 Op. Att'y Gen. No. 92-029 (finding county children services board or county department of human services without authority to expend public funds to promote the approval of a tax levy for children services). Again, the conclusions were based on the statutory language under consideration in each opinion, which differed from that appearing in R.C. 340.03. Therefore, those opinions can readily be distinguished from the matter here at issue.

As noted in the earlier opinions, it is well established that the authority for a public entity to act in financial transactions must be clearly granted, and any doubt must be resolved against a proposed expenditure. See *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571, 572 (1916). A general grant of authority to carry out statutory functions is not sufficient to authorize an expenditure for the promotion of a tax levy. See 1994 Op. Att'y Gen. No. 94-041; 1992 Op. Att'y Gen. No. 92-029; 1979 Op. Att'y Gen. No. 79-022.

It has been determined that the language here under consideration is sufficiently specific to authorize the expenditure of public funds to attempt to persuade voters to approve a tax levy. The language currently appearing in R.C. 340.03 states plainly that, subject to rules issued by the Director of Mental Health after consultation with relevant constituencies, "the board of alcohol, drug addiction, and mental health services shall ... (5) Recruit and promote local financial support for mental health programs from private and public sources." R.C. 340.03(A). The corresponding language of R.C. 340.033 states that, in accordance with procedures and guidelines established by the Department of Alcohol and Drug Addiction Services, an ADAMH board "shall ... (12) Recruit and promote local finan-

² A board of county commissioners is not required to provide resources beyond those set forth in a community mental health plan developed and submitted under R.C. 340.03 or a plan for alcohol and drug addiction services prepared and submitted under R.C. 340.033 and R.C. 3793.05. R.C. 340.011(B).

cial support, from private and public sources, for alcohol and drug addiction programs." R.C. 340.033(A). The word "shall" is ordinarily construed to be mandatory. *See Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1). Thus, an ADAMH board is given the duty of promoting local financial support, from private and public sources, for mental health programs and for alcohol and drug addiction programs. A levy, which is a public source of dollars, has been consistently construed to fall within the contemplation of this statutory language.

In 1979, the Ohio Attorney General construed the language of R.C. 340.03 as authorizing the expenditure of public funds to promote the approval of a tax levy by the electorate. That construction has been adopted and followed for nearly twenty years. In 1989 the General Assembly elected to include the language at issue—then applicable to mental health programs—in the statutory provisions of R.C. 340.033 governing alcohol and drug addiction programs. *See* 1989-1990 Ohio Laws, Part III, 4170, 4203 (Am. Sub. H.B. 317, eff. Oct. 10, 1989). The General Assembly's use of this language following the issuance of 1979 Op. Att'y Gen. No. 79-022 suggests that the General Assembly concurred in the interpretation set forth in that opinion.

More recently, the General Assembly has enacted additional legislation, again indicating a legislative intent that ADAMH boards have statutory authority to expend public funds to promote tax levies. R.C. 9.03, enacted by the General Assembly in Am. Sub. S.B. 201, 122nd Gen. A. (1998) (eff. Dec. 21, 1998), provides general authority for the governing body of a political subdivision³ to "use public funds to publish and distribute newsletters, or to use any other means, to communicate information about the plans, policies, and operations of the political subdivision to members of the public within the political subdivision and to other persons who may be affected by the political subdivision." R.C. 9.03(B).

The statute contains certain exceptions to this grant of authority to communicate information, as follows:

(C) Except as otherwise provided in division (A)(5) of section 340.03 or division (A)(12) of section 340.033 [340.03.3] of the Revised Code, no governing body of a political subdivision shall use public funds to do any of the following:

(1) Publish, distribute, or otherwise communicate information that does any of the following:

- (a) Contains defamatory, libelous, or obscene matter;
- (b) Promotes alcoholic beverages, cigarettes or other tobacco products, or any illegal product, service, or activity;
- (c) Promotes illegal discrimination on the basis of race, color, religion, national origin, handicap, age, or ancestry;

³ By definition, a political subdivision is a body corporate and politic (except a charter municipal corporation or a charter county) that is responsible for governmental activities in a geographic area smaller than the state and is subject to the sovereign immunity of the state. R.C. 9.03(A); *see* Ohio Const. art. I, § 16; *see also* R.C. 2743.01(B); R.C. 2744.01(F).

(d) Supports or opposes any labor organization or any action by, on behalf of, or against any labor organization;

(e) *Supports or opposes* the nomination or election of a candidate for public office, the investigation, prosecution, or recall of a public official, or *the passage of a levy or bond issue.*

(2) Compensate any employee of the political subdivision for time spent on any activity to influence the outcome of an election for any of the purposes described in division (C)(1)(e) of this section. Division (C)(2) of this section does not prohibit the use of public funds to compensate an employee of a political subdivision for attending a public meeting to present information about the political subdivision's finances, activities, and governmental actions in a manner that is not designed to influence the outcome of an election or the passage of a levy or bond issue, even though the election, levy, or bond issue is discussed or debated at the meeting.

R.C. 9.03 (emphasis added). Thus, in general, a political subdivision is permitted to expend public funds to communicate information but is not permitted to expend public funds to support or oppose the passage of a levy or bond issue.⁴ However, the statute recognizes the exceptions provided in R.C. 340.03(A)(5) and R.C. 340.033(A)(12), thereby acknowledging that those statutes authorize expenditures that would otherwise be prohibited—namely, expenditures to support the passage of a tax levy. This recent legislative enactment provides additional support for the conclusion that ADAMH boards are permitted to expend public funds to support the passage of tax levies. Therefore, we approve and follow 1979 Op. Att'y Gen. No. 79-022 on that point.⁵

⁴ A provision pertaining specifically to boards of education appears in R.C. 3315.07(C)(1) and states: "Except as otherwise provided in [R.C. 3315.07(C)(2), authorizing the presentation of information about school finances and activities and board actions], no board of education shall use public funds to support or oppose the passage of a school levy or bond issue." See 1981-1982 Ohio Laws, Part I, 1557, 1558 (Am. Sub. H.B. 72, eff. Sept. 28, 1981); see also 1991 Op. Att'y Gen. No. 91-064.

There may be some question as to the distinction between merely disseminating information and conducting a campaign to promote a particular ballot issue. See 1968 Op. Att'y Gen. No. 68-124; see also *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1 (1976); *Putter v. Montpelier Pub. Sch. Sys.*, 166 Vt. 463, 697 A.2d 354 (1997). Thus, it may be necessary to consider questions involving specific facts on a case-by-case basis.

⁵ It is generally accepted that the dissemination of information is a proper function of a public body and that public money may be expended for that purpose. See *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981); 1994 Op. Att'y Gen. No. 94-041, at 2-210 n.1; 1992 Op. Att'y Gen. No. 92-029, at 2-110 n.3. Accordingly, even without express statutory authority, public officials and public offices may be permitted to inform the public of the consequences that are expected to follow from the passage or defeat of a particular tax levy. For example, if a tax levy will provide funds for a particular program, or if the defeat of a tax levy will result in the inability to fund a particular program, public officials may so inform the public, either orally or in print. In addition, public officials may express their own views regarding the merits of a particular ballot issue. The general authority to expend funds and administer public programs, however, does not permit a public body or a public official to expend public funds specifically to attempt to persuade

Of course, an ADAMH board may expend for the promotion of a tax levy only moneys that are available for that purpose. Certain funding sources may prohibit the expenditure of funds for purposes of promoting a levy or may require that all funds be spent for some other specific purpose. *See, e.g.*, Ohio Const. art. XII, § 5 (proceeds of a tax levy may be expended only for the purpose for which the tax was levied); R.C. 340.07; R.C. 340.09; R.C. 5119.62. The language that permits an ADAMH board to expend public funds to promote its levies does not provide funds, but merely allows the board to expend for that purpose such funds as the board may have that may lawfully and appropriately be expended for that purpose. Thus, an ADAMH board is permitted under the terms of R.C. 340.03(A)(5) and R.C. 340.033(A)(12) to expend public funds to promote the approval by the electorate of a tax levy for mental health programs or alcohol and drug addiction programs, provided that the board has public funds available that may lawfully be expended for that purpose.

We are aware that various arguments have been made that the expenditure of public funds to promote voter approval of a tax levy is unconstitutional. *See, e.g.*, 1994 Op. Att'y Gen. No. 94-041, at 2-210 n.2 (“[t]here may also be constitutional impediments to the enactment of a statutory provision authorizing the expenditure of public moneys by the board of trustees of a county tuberculosis hospital for the purpose of advocating voter approval of a tax levy”); 1992 Op. Att'y Gen. No. 92-029, at 2-111 n.4 (“[t]here is significant question whether a legislative enactment authorizing the use of public funds to promote or oppose passage of a tax levy would be constitutional. *See generally* Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 Harv. L. Rev. 535 (1980). Thus, if the statutory scheme in Op. No. 79-022 were not distinguishable from that at issue in your inquiry, the propriety of the result in that opinion would need to be reconsidered”).⁶

Some recent cases discuss potential constitutional arguments on this point. *See, e.g.*, *Carter v. City of Las Cruces*, 121 N.M. 580, 915 P.2d 336 (N.M. Ct. App. 1996); *see also Burt v. Blumenauer*, 299 Or. 55, 699 P.2d 168 (1985); *Putter v. Montpelier Pub. Sch. Sys.*, 166 Vt. 463, 697 A.2d 354 (1997). Our research has disclosed, however, that many of the cases prohibiting the expenditure of public funds to promote the passage of a tax levy find that the relevant statutory language does not authorize the expenditure. *See, e.g.*, *Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1 (1976); *Mines v. Del Valle*, 201 Cal. 273, 257 P. 530 (1927), *overruled in part on other grounds by Stanson v. Mott*, 17 Cal. 3d 206, 551 P.2d 1 (1976); *Burt v. Blumenauer*.

Judicial language suggesting the unconstitutionality of public expenditures to promote ballot issues is generally dictum. It usually includes exceptions for statutes that plainly authorize particular expenditures. *See, e.g.*, *Stanson v. Mott*, 17 Cal. 3d at 209-210, 551 P.2d at 3 (“at least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign”); *Mines v. Del Valle*, 201 Cal. at 287, 257 P. at 537 (“[t]o use ... public funds to advocate the adoption of a proposition [bond issue] which was opposed by a large number of ... electors

people to vote a particular way on a ballot issue—that is, to say “Vote Yes on Issue X.” Authority to expend public money for that purpose must be specifically granted.

⁶ The authority cited for the constitutional question concerns municipal corporations that seek to take positions on statewide referendum issues. *See* Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 Harv. L. Rev. 535 (1980). That issue is distinguishable from the issue whether a public entity may promote passage of its own tax levy. *See Alabama Libertarian Party v. City of Birmingham*, 694 F. Supp. 814 (N.D. Ala. 1988).

would be manifestly unfair and unjust to the rights of said ... electors and the action of the board of public service commissioners in so doing cannot be sustained unless the power to do so is given to said board in clear and unmistakable language"); *Anderson v. City of Boston*, 376 Mass. 178, 187 n.10, 380 N.E.2d 628, 634 n.10 (1978) ("there may well be situations in which a public purpose would be served by municipal advocacy. We would give, of course, considerable deference to legislative findings concerning the existence of a public purpose in such situations"); *Citizens to Protect Public Funds v. Board of Educ.*, 13 N.J. 172, 181, 98 A.2d 673, 677 (1953) (an expenditure to advocate only one side of a bond issue "is ... not within the implied power and is not lawful in the absence of express authority from the Legislature").⁷

A frequently-quoted statement was made in 1953 by Justice William J. Brennan, Jr., then of the Supreme Court of New Jersey and subsequently of the United States Supreme Court, as follows: "The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint." *Citizens to Protect Public Funds v. Board of Educ.*, 13 N.J. at 181, 98 A.2d at 677. The New Jersey case, however, was decided on the grounds that the issues concerning promotion of a ballot question were moot. *Id.* at 178, 98 A.2d at 676. The argument that public funds should not be expended to promote the passage of a tax levy has been expressed in various contexts, *see, e.g., Palm Beach County v. Hudspeth*, 540 So. 2d 147, 154 (Fla. Ct. App. 1989) ("[t]he appropriate function of government in connection with an issue placed before the electorate is to enlighten, NOT to proselytize"), but it has not been firmly adopted as a principle of law, *see, e.g., Stanson v. Mott; Putter v. Montpelier Pub. Sch. Sys.*⁸

⁷ The proposition that funds may be expended to promote tax levies if clear statutory authority is provided was expressed in an early opinion of the Ohio Attorney General as follows:

There is no question but that a reasonable expenditure of public funds to advertise the necessity of a tax levy in certain cases would be perhaps a proper and in some instances even a laudable purpose, but, as has been stated by this office, it is a lawful rather than a laudable purpose that justifies the expenditure of the taxpayers' money. The remedy in the instant case is obviously with the legislature.

1937 Op. Att'y Gen. No. 1245, vol. III, p. 2142, at 2143. 1979 Op. Att'y Gen. No. 79-022 adopted and applied this analysis, finding clear statutory authority for the expenditure of public funds to promote a tax levy.

⁸ The argument that public funds should not be expended to promote the passage of a tax levy was expressed in 1920 Op. Att'y Gen. No. 1532, vol. II, p. 915, at 917, as follows:

[A] board of education has no authority to issue propaganda matter favorable to some particular side of a question to all the electors and then have the school funds, which belong to all the electors, used for the payment of such advertising and propaganda. In other words, it would be using the funds in which one portion of the electors had equal rights with another group for the benefit of one group; that is, using one's funds against himself.

To the contrary, at least one federal court has expressly allowed the expenditure of public money to promote the passage of a tax levy. *Alabama Libertarian Party v. City of Birmingham* concerned a special election to impose a property tax for library enhancement and to levy a charge on telephone subscribers for enhanced 911 emergency telephone service, and another special election to approve a bond issue. *Alabama Libertarian Party v. City of Birmingham*, 694 F. Supp. 814 (N.D. Ala. 1988). The city used public funds to pay for advertising and brochures to promote passage of the propositions. The court upheld the city's expenditures against a challenge that they violated the First Amendment rights of dissenting citizens, stating, in part:

The City and its officials not only have the right, but the duty, to determine the needs of its citizens and to provide funds to service those needs. The funds must come from some source. The City officials are charged with the responsibility of providing those funds by some means. If they cannot directly tax through ordinance, they have the incidental right to solicit the votes of citizens to provide those means

...The City in effect made a finding that the funds were needed and that it should seek the support of its citizens in acquiring these funds. This is clearly a public function.

...While defendants might be forbidden to spend funds to support candidates, oppose initiative proposals, etc., they are not forbidden to publicize and seek public support for their own governmental proposals ...

Alabama Libertarian Party v. City of Birmingham, 694 F. Supp. at 817-18. This analysis appears to be applicable to the matter here under consideration.

Thus, while the issue whether public funds may be expended to promote the passage of various types of ballot issues is one of controversy and one on which legal experts may differ, *see, e.g., Putter v. Montpelier Pub. Sch. Sys.*, there is judicial authority that would permit the expenditure of public funds to promote the passage of a tax levy for the purposes of the board proposing the levy, when there is statutory authority for such expenditure, *see Alabama Libertarian Party v. City of Birmingham*. It would be possible to give R.C. 340.03(A)(5) and R.C. 340.033(A)(12) a more narrow reading than that adopted in 1979 Op. Att'y Gen. No. 79-022, to permit an ADAMH board to recruit and promote local financial support only through means other than attempting to persuade the electorate to pass a levy. *See Stanson v. Mott*, 17 Cal. 3d at 218, 551 P. 2d at 20-21 (distinguishing between legislative lobbying and election campaigning). In light of the history of the existing language and the recent legislation enacted by the General Assembly, however, we deem it appropriate to retain the established interpretation of that language, absent legislative amendment or clear direction from the courts.

It is important to note that, as with any expenditure of public funds, the ADAMH board is bound by the requirement that it exercise its discretion in a reasonable manner and is subject to judicial review for an abuse of discretion. *See, e.g., State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981); 1989 Op. Att'y Gen. No. 89-068; 1986 Op. Att'y Gen. No. 86-086. This opinion does not constitute a finding that any particular expenditure is reasonable or properly authorized.

For these reasons, it is my opinion, and you are hereby advised, that a board of alcohol, drug addiction, and mental health services is permitted under the terms of R.C.

340.03(A)(5) and R.C. 340.033(A)(12) to expend public funds to promote the approval by the electorate of a tax levy for mental health programs or alcohol and drug addiction programs, provided that the board has public funds available that may lawfully be expended for that purpose. (1979 Op. Att'y Gen. No. 79-022, approved and followed. 1994 Op. Att'y Gen. No. 94-041; 1992 Op. Att'y Gen. No. 92-029; 1968 Op. Att'y Gen. No. 68-124; 1937 Op. Att'y Gen. No. 1245, vol. III, p. 2142; 1920 Op. Att'y Gen. No. 1532, vol. II. p. 915, distinguished.)