August 24, 2011

The Honorable Dennis P. Will
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035

SYLLABUS: 2011-031

The proceeds of a tax levied pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system may be used by a county to fund the acquisition or construction of a permanent improvement to provide a suitable facility to serve as a public safety answering point in the countywide 9-1-1 system.

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OPINION NO. 2011-031

The Honorable Dennis P. Will
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225 Court Street, 3rd Floor
Elyria, Ohio 44035

Dear Prosecutor Will:

You have requested an opinion concerning the authority of a county to use the proceeds of a tax levied pursuant to R.C. 5705.19 to fund permanent improvements.[1] Specifically, you ask: May the proceeds of a tax levied pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system be used by a county to fund "permanent improvements necessary to house 9-1-1 operations?"[2] (Bold omitted.) Based on the following, the proceeds of a tax levied pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system may be used by a county to fund the acquisition or construction of a permanent improvement to provide a suitable facility to serve as a public safety answering point in the countywide 9-1-1 system.[3]

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[1] For purposes of R.C. 5705.19, a "permanent improvement" is "any property, asset, or improvement with an estimated life or usefulness of five years or more, including land and interests therein, and reconstructions, enlargements, and extensions thereof having an estimated life or usefulness of five years or more." R.C. 5705.01(E). *See generally* 2000 Op. Att'y Gen. No. 2000-048 at 2-297 ("[r]eal property and improvements thereon are … considered to be 'permanent improvements' for tax levy purposes").

[2] This opinion does not consider the authority of a county to use the proceeds of a tax levied pursuant to R.C. 5705.19(BB) to fund permanent improvements to a building used in the operation of a countywide 9-1-1 system when the county (1) has acquired home rule powers pursuant to Article X, § 1 of the Ohio Constitution, (2) operates under a charter adopted pursuant to Article X, §§ 3 and 4 of the Ohio Constitution, or (3) adopts the alternative form of county government prescribed in R.C. Chapter 302.

[3] In your letter, you state that the county would like to use the proceeds of a tax levied pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system to reimburse the general fund for the cost of permanent improvements to a building used to house 9-1-1 operations in the county. Any such reimbursement by the county must be done in accordance with the laws of Ohio. *See City of Niles v. The Union Ice Corp.*, 133 Ohio St. 169, 184, 12 N.E.2d 483 (1938) (G.C.

R.C. 5705.19 authorizes a board of county commissioners to levy taxes in excess of the ten-mill limitation for various purposes.[4] *See* R.C. 5705.03(B)(1). This authority includes levying a tax "[f]or the establishment and operation of a 9-1-1 system, as defined in [R.C. 4931.40]."[5] R.C. 5705.19(BB). When a county levies a tax pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system, the county must deposit the proceeds from the levy in a special fund and use the proceeds only for the purposes authorized by R.C. 5705.19(BB). 1998 Op. Att'y Gen. No. 98-032 at 2-181 and 2-182; *see* Ohio Const. art. XII, § 5; R.C. 5705.09(D); R.C. 5705.10(C) and (H); *see also* R.C. 5705.19(WW) (a resolution relative to a tax levy in excess of the ten-mill limitation "shall be confined to the purpose or purposes described in one division of this section, to which the revenue derived therefrom shall be applied"). *See generally* 1998 Op. Att'y Gen. No. 98-023 at 2-127 ("[p]roceeds derived from a special levy must, in accordance with R.C. 5705.10,

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5625-13a (now R.C. 5705.15), "permitting political subdivisions to transfer 'any public funds under its supervision' to another municipal fund, does not release municipal corporations from the limitations upon their taxing power, imposed by the Constitution"); *In re Petition for Transfer of Funds by Perry Township*, 52 Ohio App. 3d 1, 556 N.E.2d 191 (Montgomery County 1988) (R.C. 5705.15 is unconstitutional under Article XII, § 5 of the Ohio Constitution as applied to the transfer of funds from special funds created for a particular purpose to funds that may be expended for a different purpose). *See generally* Ohio Const. art. XII, § 5 ("[n]o tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied"); R.C. 5705.14-.16 (authorizing the transfer of moneys between funds in the county treasury).

It is, in part, a factual question whether, in a particular situation, a county may use the proceeds of a special fund to reimburse the general fund for an expenditure. *See* 1999 Op. Att'y Gen. No. 99-054 at 2-333 and 2-334; 1964 Op. Att'y Gen. No. 64-1209; 1954 Op. Att'y Gen. No. 4342, p. 508; 1951 Op. Att'y Gen. No. 859, p. 648. We express no opinion whether Lorain County may use the proceeds of a tax levied pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system to reimburse the general fund for the cost of a permanent improvement to a building used to house 9-1-1 operations in the county. *See* 1999 Op. Att'y Gen. No. 99-054 at 2-333 and 2-334.

[4] In Ohio, the ten-mill limitation provides that the aggregate amount of taxes that may be levied on any taxable property in a county may "not in any one year exceed ten mills on each dollar of tax valuation of [the county], except for taxes specifically authorized to be levied in excess thereof." R.C. 5705.02; *see* Ohio Const. art. XII, § 2; R.C. 5705.03; R.C. 5705.07; R.C. 5705.18. "Levies within the ten-mill limitation are commonly referred to as 'inside millage.' Levies in excess of ten mills are commonly referred to as 'outside millage' and must be specifically authorized." 2009 Op. Att'y Gen. No. 2009-054, at 2-404 n.1; *see* R.C. 5705.02-.04; R.C. 5705.07; R.C. 5705.18.

[5] R.C. 4931.40(A) defines a "9-1-1 system" as "a system through which individuals can request emergency service using the telephone number 9-1-1." *See generally* R.C. 4931.40-.70 (authorizing a county to establish and maintain a countywide 9-1-1 system).

'be credited to a special fund for the purpose for which the levy was made' and 'be used only for the purposes for which such fund is established'"). This means that the proceeds of a tax levied pursuant to R.C. 5705.19(BB) may be expended only for the establishment and operation of a countywide 9-1-1 system. *See* 1998 Op. Att'y Gen. No. 98-032 at 2-181 ("the proceeds from a tax levied under R.C. 5705.19(BB) may be expended only for the purposes authorized therein"). *See generally* 1988 Op. Att'y Gen. No. 88-101 at 2-498 n.2 ("I am aware of no theory that would permit a board of county commissioners, by the inclusion of particular language in a resolution of necessity for a tax levy, to expand the purposes of the levy beyond those authorized by statute").

The terms "establishment" and "operation" are not statutorily defined for purposes of R.C. 5705.19(BB). Nor have these terms acquired a particular meaning from the courts. When terms in a statute have not "acquired a technical or particular meaning, whether by legislative definition or otherwise," the common or ordinary meaning of the terms applies. R.C. 1.42.

In the ordinary sense, the terms "establishment" and "operation" are defined as follows:

> **establishment** … the act of establishing something or the state of being established: as … the act of bringing into existence, creating, founding, originating, or setting up so that a certain continuance is assured … <the ~ of a factory>…[.]
>
> ....
>
> **operation** … an exertion of power or influence : FUNCTIONING, WORKING[.]

Webster's Third New International Dictionary 778, 1581 (unabr. ed. 1993). Accordingly, the use of the terms "establishment" and "operation" in R.C. 5705.19(BB) indicates that the proceeds of a tax levied pursuant to R.C. 5705.19(BB) are to be used to set up and run a countywide 9-1-1 system.

When a county sets up and runs a countywide 9-1-1 system, the county may be required to provide funding, facilities, equipment, and staff to operate a public safety answering point (PSAP) in the countywide 9-1-1 system.[6] *See* R.C. 4931.43(B) ("[t]he proposal and the final plan adopted by the [9-1-1 planning] committee shall specify … (2) [t]he location and number of [PSAPs]…; (3) [w]hich subdivision will establish, equip, furnish, operate, and maintain a particular [PSAP]; … (5) [w]hether the cost of establishing, equipping, furnishing, operating, or maintaining each [PSAP] should be … allocated among the subdivisions served by the [PSAP] and, if any such cost is to be allocated, the formula for so allocating it"); *see also* R.C. 4931.41(D)(1) (each PSAP of a countywide 9-1-1 system

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[6] The responsibilities and duties of a county and other political subdivisions participating in a countywide 9-1-1 system are set forth in a final plan adopted under R.C. 4931.44(B) or an amended final plan adopted under R.C. 4931.45. *See* R.C. 4931.44(C) ("[a]fter a countywide plan approved in accordance with this section is adopted, all of the telephone companies and subdivisions included in the plan are subject to the specific requirements of the plan and to [R.C. 4931.40-.70]"). *See generally* R.C. 4931.42-.45 (setting forth provisions governing the adoption and amendment of a plan for a countywide 9-1-1 system).

"shall be operated by a subdivision and shall be operated constantly"); R.C. 4931.41(E) ("[e]xcept to the extent provided in a final plan that provides for funding of a 9-1-1 system in part through charges imposed under [R.C. 4931.51], each subdivision served by a [PSAP] shall pay the subdivision that operates the [PSAP] the amount computed in accordance with the allocation formula set forth in the final plan"). A PSAP is "a *facility*[7] to which 9-1-1 system calls for a specific territory are initially routed for response and where personnel respond to specific requests for emergency service by directly dispatching the appropriate emergency service provider, relaying a message to the appropriate provider, or transferring the call to the appropriate provider." R.C. 4931.40(P) (emphasis and footnote added). A county "that operates a [PSAP] *shall pay all of the costs associated with establishing, equipping, furnishing, operating, and maintaining that facility* and shall allocate those costs among itself and the subdivisions served by the [PSAP] based on the allocation formula in a final plan." R.C. 4931.41(D)(2) (emphasis added); *see* R.C. 4931.43(B)(3). Thus, a county that sets up and runs a countywide 9-1-1 system may be required to set up and run a facility that serves as a PSAP in the countywide 9-1-1 system.

In order to enable a county to set up and run a PSAP in a countywide 9-1-1 system, the county must have the related authority to acquire or construct a permanent improvement to provide a suitable facility to serve as the PSAP. *See* 1987 Op. Att'y Gen. No. 87-106 at 2-707 ("[t]he authority to operate a multipurpose senior center necessarily implies the authority to acquire the facilities that are required for such operation"); *see also* 1989 Op. Att'y Gen. No. 89-032 at 2-133 (it has "long been established that a board of health may, as an incidental power, acquire and hold such property as is necessary to the performance of its statutory duties"). *See generally State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 470, 423 N.E.2d 105 (1981) (a power "may be fairly implied where it is reasonably related to the duties of the public agency"); *Fed. Gas & Fuel Co. v. City of Columbus*, 96 Ohio St. 530, 541, 118 N.E. 103 (1917) (a public officer or body "is naturally and necessarily vested with a wide discretion to do such incidental things as are reasonably and manifestly" in the public's interests to perform an act, provided such things are not prohibited by statute); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph 4) ("[w]here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"), *aff'd*, 241 U.S. 565 (1916); 1973 Op. Att'y Gen. No. 73-057 at 2-218 ("each specific detail of the carrying out of an express purpose need not be expressly stated before the board may exercise its authority with respect to such detail, for an express authority to do an act carries with it the authority to do the necessary incidental acts to accomplish the purpose for which the express authority was given as fully as though each such incidental detail were expressly authorized in separate and distinct terms"); 1928 Op. Att'y

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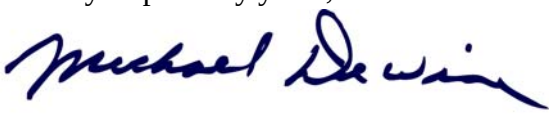
[7] Because the term "facility" is not defined for purposes of R.C. 4931.40-.70, the term is to be accorded its common, ordinary meaning. *See* R.C. 1.42. Thus, as used in R.C. 4931.40-.70, the term "facility" denotes "something … that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." *Webster's Third New International Dictionary* 812-13 (unabr. ed. 1993).

Gen. No. 2955, vol. IV, p. 2736, at 2740 ("[t]he delegation of a power to accomplish a certain end, necessarily carries with it the power to do all things necessary to consummate that purpose"). In other words, the duty imposed upon a county to set up and run a PSAP in a countywide 9-1-1 system includes the concomitant authority to acquire or construct a permanent improvement to provide a suitable facility to serve as the PSAP.

Because setting up and running a PSAP in a countywide 9-1-1 system by a county involves the acquisition or construction of a permanent improvement to provide a suitable facility to serve as the PSAP, the acquisition or construction of such a permanent improvement relates to the establishment of the countywide 9-1-1 system. *See Webster's Third New International Dictionary* 778, 1581 (unabr. ed. 1993). Therefore, the proceeds of a tax levied pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system may be used by a county to fund the acquisition or construction of a permanent improvement to provide a suitable facility to serve as a PSAP in the countywide 9-1-1 system.[8] *See generally* 2000 Op. Att'y Gen. No. 2000-048 at 2-298 (proceeds from a tax levy for "current expenses" or "current operating expenses" may be used to acquire or construct permanent improvements when "the authorizing statute explicitly permits such use").

In conclusion, it is my opinion, and you are hereby advised that the proceeds of a tax levied pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system may be used by a county to fund the acquisition or construction of a permanent improvement to provide a suitable facility to serve as a public safety answering point in the countywide 9-1-1 system.

Very respectfully yours,



MICHAEL DEWINE
Ohio Attorney General

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[8] R.C. 5705.19(F) authorizes a board of county commissioners to levy a tax in excess of the ten-mill limitation "[f]or the construction or acquisition of any specific permanent improvement or class of improvements that the taxing authority of the subdivision may include in a single bond issue." This grant of authority does not, however, prohibit the proceeds of a tax levied pursuant to R.C. 5705.19(BB) for the establishment and operation of a countywide 9-1-1 system from being used by a county to fund the acquisition or construction of a permanent improvement to provide a suitable facility to serve as a PSAP in the countywide 9-1-1 system. *See* R.C. 5705.19(WW) ("[t]he existence in any other division of this section of authority to levy a tax for any part or all of the same purpose or purposes does not preclude the use of such revenues for any part of the purpose or purposes of the division under which the resolution is adopted"); 1986 Op. Att'y Gen. No. 86-103 at 2-570 n.1 ("[t]he fact that a construction fund is provided for by a separate division of R.C. 5705.19 does not prevent a tax from being levied for construction purposes pursuant to [R.C. 5705.19(L)]").