May 27, 2009

The Honorable Martin P. Votel
Preble County Prosecuting Attorney
101 East Main Street
Courthouse, 1st Floor
Eaton, Ohio 45320

SYLLABUS: 2009-021

R.C. 5705.261 authorizes the filing of a petition to submit to the voters "[t]he question of decrease of an increased rate of levy approved for a continuing period of time by the voters of a subdivision" with regard to any levy approved by the voters for a continuing period of time under R.C. 5705.19, including a levy under R.C. 5705.19(L) for community mental retardation and developmental disabilities programs and services under R.C. Chapter 5126.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

May 27, 2009

OPINION NO. 2009-021

The Honorable Martin P. Votel
Preble County Prosecuting Attorney
101 East Main Street
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Dear Prosecutor Votel:

We have received your request for an opinion on the question whether the right to pursue a decrease of an increased rate of levy pursuant to R.C. 5705.261 applies to levies adopted for community mental retardation and developmental disabilities (MR/DD) programs and services under division (L) of R.C. 5705.19, or whether its application to levies under R.C. 5705.19 is limited to those levies established for the purposes set forth in divisions (G), (I), (J), or (U). Your request is prompted by the Preble County Board of Mental Retardation and Developmental Disabilities (PCMRDD), which has been informed that an aggrieved taxpayer intends to pursue a decrease in a levy that was adopted for a continuing period of time under R.C. 5705.19(L).

Your question pertains to R.C. 5705.261, which states in relevant part:

> *The question of decrease of an increased rate of levy approved for a continuing period of time by the voters of a subdivision may be initiated by the filing of a petition with the board of elections of the proper county* not less than seventy-five days before the general election in any year requesting that an election be held on such question. (Emphasis added.)

This language states plainly that the question of decreasing a levy approved for a continuing period of time may be initiated by the filing of a petition with the board of elections. It does not limit the levies to which it applies, requiring only that they be "approved for a continuing period of time by the voters of a subdivision," and thus the plain text of these provisions directly applies to any such levy, including levies adopted for community MR/DD programs and services.

R.C. 5705.19 authorizes the taxing authority of any subdivision (except a school district county school financing district) to adopt a resolution to submit to the voters a tax levy outside the ten-mill limitation[1] for the purpose or purposes listed in one of the divisions lettered from (A) through (TT). Division (L) authorizes a tax levy "[f]or community mental retardation and developmental disabilities programs and services pursuant to [R.C. Chapter 5126], except that the procedure for such levies shall be as provided in [R.C. 5705.222]." R.C. 5705.222 establishes a procedure and authorizes these MR/DD levies to be for any number of years not exceeding ten or for a continuing period of time.

Following the lettered divisions in R.C. 5705.19 that identify the various purposes for which taxes may be levied are several paragraphs containing provisions that pertain to some or all of the levies. These provisions, *inter alia*, require that some levies be for a continuing period of time and permit other levies to be either for a specified number of years or for a continuing period of time. These provisions also specify that four types of levies are subject to reduction pursuant to R.C. 5705.261 or by certain other means, as follows:

> *A levy for one of the purposes set forth in division (G), (I), (J),or (U) of this section may be reduced pursuant to* [*R.C. 5705.261* or 5705.31[2]]. A levy for one of the purposes set forth in division (G), (I), (J), or (U) of this section may also be terminated or permanently reduced by the taxing authority if it adopts a resolution stating that the continuance of the levy is unnecessary and the levy shall be terminated or that the millage is excessive and the levy shall be decreased by a designated amount.

R.C. 5705.19 (emphasis and footnote added).

The paragraph of R.C. 5705.19 quoted above is the language to which your question relates. You suggest that because R.C. 5705.19 states that a levy for one of the purposes set forth in division (G), (I), (J),or (U) may be reduced pursuant to R.C. 5705.261, it implies that levies for purposes set forth in other divisions of R.C. 5705.19, such as division (L), are not subject to

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[1] The ten-mill limitation provides that no property may be taxed in excess of one percent (10 mills) of its true value in money for all state and local purposes, except with voter approval or as provided in a municipal charter. *See* Ohio Const. art. XII, § 2; R.C. 5705.02; *see also, e.g.,* R.C. 5705.07; R.C. 5705.18.

[2] R.C. 5705.31 governs the duties of the county budget commission, after examining the annual tax budgets of county bodies and other financial information, to determine the total amount of property tax revenue proposed to be raised for each subdivision or other taxing unit. The county budget commission is authorized to reduce the rates of certain tax levies in some circumstances. In general, levies in excess of the ten-mill limitation that have been properly authorized must be approved without modification.

being reduced pursuant to R.C. 5705.261.[3] Under this interpretation, reduction under R.C. 5705.261 would be expressly authorized for a levy for streets, roads, and bridges under division (G) or a levy for fire, police, ambulance, or emergency medical services under division (I), (J), or (U). All other continuing levies authorized by R.C. 5705.19 would be omitted from the authorization of reduction under R.C. 5705.261 and excluded from the scope of R.C. 5705.261.[4]

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[3] *See State ex rel. Choices for South-Western City Sch. v. Anthony*, 108 Ohio St. 3d 1, 2005-Ohio-5362, 840 N.E.2d 582, at ¶46 ("R.C. 5705.261 is a general provision that specifies the procedure affecting several different types of levies authorized in other Revised Code provisions. Because these statutes relate to the same subject matter, they must be construed in pari materia and harmonized so as to give full effect to the statutes"). In the *Choices* case, the Ohio Supreme Court held that the board of elections did not abuse its discretion or clearly disregard applicable law by removing from the ballot a question of decreasing to zero a school district levy that had been approved under R.C. 5705.217. The court based its decision on the fact that R.C. 5705.217 stated that a levy could be decreased in accordance with R.C. 5705.261, but did not authorize the repeal or termination of the levy in accordance with R.C. 5705.261. In reaching its conclusion, the court examined other statutes that referred to R.C. 5705.261 and found that they distinguished between decreasing and terminating a levy. *Choices* thus stands for the proposition that a levy may not be terminated under R.C. 5705.261 unless the enabling statute for the levy authorizes a repeal or termination of the levy in addition to a decrease. *Choices* at ¶ 52.

With regard to R.C. 5705.19, the court quoted the paragraph that refers to divisions (G), (I), (J), and (U) and describes the means of decreasing or terminating those levies. The court limited its analysis to provisions that reference R.C. 5705.261 and did not address continuing levies under R.C. 5705.19 other than those under divisions (G), (I), (J), and (U). With regard to a levy under R.C. 5705.19(L), *Choices* requires the conclusion that the levy is not subject to termination under R.C. 5705.261 because R.C. 5705.19 does not expressly so state. However, the *Choices* court did not consider whether a levy under R.C. 5705.19(L) is subject to being decreased under R.C. 5705.261 and we do not extend the analysis in *Choices* to find that it is not. R.C. 5705.261 clearly authorizes a decrease in a levy, so it is not essential for the statute that enables a continuing levy to expressly authorize a decrease in accordance with R.C. 5705.261.

The issues raised by the relationship between R.C. 5705.19 and R.C. 5705.261 might be addressed by legislation. One possibility would be to: (1) delete references to R.C. 5705.261 from all sections of the Revised Code; (2) amend R.C. 5705.261 to apply to "any continuing levy regardless of the section of the Revised Code under which that levy is authorized to be levied"; and (3) amend R.C. 5705.261 to allow repeals of, as wells as reductions in, the levy rate.

[4] Various statutes other than R.C. 5705.19 make particular levies subject to R.C. 5705.261, and these statutes are not affected by your argument. *See, e.g.,* R.C. 3354.12(A) (community

This interpretation of R.C. 5705.19 as implicitly (though not explicitly) modifying the plain text of R.C. 5705.261 is based upon an argument that is colorable but not compelling, and instead the relationship between these sections is susceptible to a different and more plausible explanation that preserves the plain meaning of both sections. Divisions (G), (I), (J), and (U) are unique in R.C. 5705.19 and in the Revised Code because they are the only levies for which the subdivision may terminate or permanently reduce the levy rate by mere resolution of the taxing authority. Thus, it is likely that the reference to division (G), (I), (J), or (U) in connection with R.C. 5705.261 was included in R.C. 5705.19 simply to make clear that the resolution method for reduction or termination was not exclusive and did not prevent reduction under R.C. 5705.261.

To shed more light on the relationship between R.C. 5705.19 and R.C. 5705.261, it is appropriate to consider the history of the statutes and the object sought to be attained as factors that aid in determining the intention of the legislature. *See* R.C. 1.49.

History of R.C. 5705.19 and R.C. 5705.261

R.C. 5705.261 was initially enacted in 1959 as part of legislation that also amended R.C. 5705.19 and enacted R.C. 5705.192[5] to give school districts authority to seek voted levies that were permitted to be in effect for an indefinite period of time. 1959 Ohio Laws 574 (Am. Sub. H.B. 76, eff. Sept. 10, 1959). At that time, R.C. 5705.261 applied only to levies under then-R.C. 5705.192 and referenced them expressly. *See* 1959 Ohio Laws 574 (Am. Sub. H.B. 76, eff. Sept. 10, 1959). The continuing nature of a levy under then-R.C. 5705.192 was unusual; R.C. 5705.19 permitted no other levies to be in effect for a continuing period of time. The inclusion in then-R.C. 5705.192 of several means for decreasing the continuing portion of the levy was apparently intended to provide protection from a tax levy that had no termination date.

In subsequent years, other levies were authorized to be in effect for continuing periods of time, and references were inserted into R.C. 5705.261 indicating that these levies were subject to petitions requesting a vote on a decrease.[6] Possibly because the use of cross-references to statutes governing specific levies was becoming burdensome, the numerous references in R.C. 5705.261 were subsequently deleted. *See* 1975-1976 Ohio Laws, Part I, 929, 932 (Am. S.B. 434, eff. Jan. 17, 1977). As amended by Am. S.B. 434, R.C. 5705.261 set forth the more general language that currently appears in the statute, referring simply to a "levy approved for a

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college district); R.C. 5705.199(F), .21(B), .212(A)(3), .217(A), .218(G) (school district); R.C. 5705.215(E)(5) (county school financing district).

[5] This version of R.C. 5705.192 was repealed in 1977 and followed by a completely different version in 1990. *See* 1989-1990 Ohio Laws, Part I, 1272, 1287-88 (Sub. S.B. 257, eff. Sept. 26, 1990); 1977-1978 Ohio Laws, Part I, 1412 (Am. Sub. H.B. 1, eff. Aug. 26, 1977).

[6] *See, e.g.*, 1973 Ohio Laws, Part I, 142, 183 (Am. S.B. 44, eff. Sept. 11, 1973).

continuing period of time by the voters of a subdivision" and indicating that any such levy was subject to reduction by the filing of a petition to submit the matter to the voters.

In addition to amending R.C. 5705.261, Am. S.B. 434 amended R.C. 5705.19 so that it authorized an MR/DD levy under R.C. 5705.19(L) to be in effect for a continuing period of time and also to be subject to reduction under R.C. 5705.261 or R.C. 5705.31. *See* 1975-1976 Ohio Laws, Part I, 929, 931 (Am. S.B. 434, eff. Jan. 17, 1977).[7] At this point in time, therefore, it was made doubly and redundantly clear in the plain language of *both* R.C. 5705.19 *and* R.C. 5705.261 that an MR/DD levy was subject to reduction under R.C. 5705.261.

When Am. S.B. 434 was enacted, R.C. 5705.19 provided for several types of levies that were required or permitted to be in effect for a continuing period of time, including levies for detention home districts, district detention homes, forestry camps, or other district facilities. *See* note 7, *supra*. However, as amended by Am. S.B. 434, R.C. 5705.19 named only levies for school districts and MR/DD levies as levies that could be reduced pursuant to R.C. 5705.261 or R.C. 5705.31. That the General Assembly did not intend to exclude other continuing levies

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[7] Changes to R.C. 5705.19 made by Am. S.B. 434 were as follows:

> The number of years [during which a levy increase shall be in effect] may be any number not exceeding five, except that when the additional rate is for the payment of debt charges the increased rate shall be for the life of the indebtedness and except when the additional rate is for the purpose of providing current operating revenues for a school district and except when for the purpose of providing current expenses for a detention home district, a district organized under [R.C. 2151.65], or a combined district organized under [R.C. 2151.34 and 2151.65], and when for a county's share of the cost of maintaining and operating schools, district detention homes, forestry camps, or other facilities, or any combination thereof, established under either [R.C. 2151.34 or 2151.65] or under both of such sections, *the increased rate shall be for a continuing period of time*, and *when for the maintenance and operation of schools, training centers, workshops, and residential facilities for mentally retarded persons*, or for the maintenance and operation of a joint education district, *the increased rate* ~~may be for any number of years not exceeding ten~~ *MAY BE FOR A CONTINUING PERIOD OF TIME. A levy providing current operating revenues for a school district OR FOR MAINTENANCE AND OPERATION OF SCHOOLS, TRAINING CENTERS, WORKSHOPS, AND RESIDENTIAL FACILITIES FOR MENTALLY RETARDED PERSONS may be reduced pursuant to [R.C. 5705.261 or 5705.31]*.

1975-1976 Ohio Laws, Part I, 929, 931 (Am. S.B. 434, eff. Jan. 17, 1977) (upper case and strike-through in original; italics added for emphasis).

approved under R.C. 5705.19 from the coverage of R.C. 5705.261 is evidenced by the following analysis prepared by the Ohio Legislative Service Commission (LSC):

> [Am. S.B. 434] [r]educes the maximum, specified number of years that property tax levies for mental retardation programs may run from ten to five; permits tax levies for mental retardation programs to be voted for a continuing period of time; and *permits reductions of continuing levies for current expenses of detention home districts or the county's share of the cost of maintaining and operating schools, district detention homes, forestry camps, or facilities established in detention home districts by initiative and approval of a majority voting on the issue.*

Ohio Legislative Service Comm'n, Digest of Enactments, 111th General Assembly 8 (Aug.-Sept. 1976) (Am. S.B. 434).

Am. S.B. 434 made no changes in the language of R.C. 5705.19 pertaining to levies for detention home districts, district detention homes, forestry camps, or other district facilities, and R.C. 5705.19 did not include these levies in the list of levies that may be reduced pursuant to R.C. 5705.261. This LSC analysis indicates, however, that the effect of the legislation was to permit voters to reduce these levies. This result could be accomplished only through the amendment to R.C. 5705.261 that changed its terms to apply generally to every levy approved for a continuing period of time by the voters of a subdivision. For the LSC analysis to be accurate, R.C. 5705.261 must apply to levies under R.C. 5705.19 approved for a continuing period of time for current expenses of detention home districts or the county's share of the cost of maintaining and operating schools, district detention homes, forestry camps, or facilities established in detention home districts, even though R.C. 5705.19 does not expressly state that these levies are subject to reduction pursuant to R.C. 5705.261. *See Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159 (1980) (an analysis by the Ohio Legislative Service Commission is not binding, but it may be of assistance in statutory construction).

Hence, the history of R.C. 5705.19 and R.C. 5705.261 indicates that R.C. 5705.261 applies to every continuing levy approved by voters under R.C. 5705.19, regardless of whether R.C. 5705.19 states that a levy for that purpose may be reduced pursuant to R.C. 5705.261. The express reference to R.C. 5705.261 connected only with divisions (G), (I), (J), and (U) thus is reasonably considered to be informational in nature and to provide a comprehensive list of ways of reducing or terminating these levies (by resolution**,** by the county budget commission, or by filing a petition to submit the matter to the voters), rather than to exclude other continuing levies under R.C. 5705.19 from reduction pursuant to R.C. 5705.261.

Current Provisions Pertaining to MR/DD Levies

As outlined above, the 1977 version of R.C. 5705.19 provided that an MR/DD levy under R.C. 5705.19(L) was permitted to be in effect for a continuing period and was subject to reduction under R.C. 5705.261. This situation existed until 1988, when the arguably redundant

language of R.C. 5705.19 permitting MR/DD levies to be reduced under R.C. 5705.261 was deleted. *See* 1987-1988 Ohio Laws, Part I, 648, 710-12 (Sub. S.B. 155, eff. June 24, 1988).

The 1988 legislation also enacted R.C. 5705.222 and amended R.C. 5705.19(L) to state that the procedure for adopting MR/DD levies was "as provided in" R.C. 5705.222. As then enacted and still in effect, R.C. 5705.222 permits MR/DD levies to be for any number of years not exceeding ten or for a continuing period of time. Like R.C. 5705.19, R.C. 5705.222 now fails to state expressly that MR/DD levies may be reduced under R.C. 5705.261. However, under the interpretation set forth above, the absence in R.C. 5705.19 and R.C. 5705.222 of a reference connecting R.C. 5705.261 to an MR/DD levy does not render R.C. 5705.261 inapplicable to a levy under R.C. 5705.19 and 5705.222 that is approved for a continuing period of time. Rather, such an MR/DD levy is itself a "levy approved for a continuing period of time by the voters of a subdivision" within the plain meaning of R.C. 5705.261, as discussed above.

The conclusion that R.C. 5795.261 applies to all levies under R.C. 5705.19 that are approved by voters for a continuing period of time is consistent with the plain language of R.C. 5705.261 and the legislative history of R.C. 5705.19 and R.C. 5705.261, and it reflects the evident intent of the General Assembly. In addition, this conclusion implements the general rule, applicable to R.C. 5705.261 and similar statutes, that "initiative and referendum laws are to be construed liberally in favor of these reserved rights [of ballot access]," *State ex rel. Citizens for Responsible Taxation v. Scioto County Bd. of Elections*, 67 Ohio St. 3d 134, 138, 616 N.E.2d 869 (1993), as this construction provides the voters with a means of periodically reconsidering the rate of *any* levy that has been approved by voters for a continuing period of time.[8]

Conclusion

For the reasons set forth above, it is my opinion, and you are advised, that R.C. 5705.261 authorizes the filing of a petition to submit to the voters "[t]he question of decrease of an increased rate of levy approved for a continuing period of time by the voters of a subdivision" with regard to any levy approved by the voters for a continuing period of time under R.C.

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[8] R.C. 5705.261 states that the question of decreasing a continuing levy "may be initiated" by petition. The published version of R.C. 5705.261 is entitled "Referendum on levy decrease," although that language was not enacted by the General Assembly. *See generally Black's Law Dictionary* 788, 1285 (7th ed. 1999) (defining "initiative" as "[a]n electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate" and "referendum" as "[t]he process of referring a state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote"). The Ohio Constitution reserves to the people certain powers of initiative and referendum. *See* Ohio Const. art. II, §§ 1-1g; Ohio Const. art. X, §§ 1, 3; Ohio Const. art. XIII, § 7; Ohio Const. art. XVIII, § 5. This opinion considers the authority granted by R.C. 5705.261 and does not consider any attempt to modify this power by charter or in any other manner.

5705.19, including a levy under R.C. 5705.19(L) for community mental retardation and developmental disabilities programs and services under R.C. Chapter 5126.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General