February 5, 2013

The Honorable Gary A. Nasal
Miami County Prosecuting Attorney
Miami County Safety Building
201 West Main Street
Troy, Ohio 45373

SYLLABUS: 2013-003

1. The schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, remains in effect.

2. Pursuant to the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, a tax levied under R.C. 6101.61 to pay the annual levy of a conservancy district that was created prior to January 1, 1934, is not subject to the ten-mill limitation.

MIKE DEWINE
OHIO ATTORNEY GENERAL

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2013-003

The Honorable Gary A. Nasal
Miami County Prosecuting Attorney
Miami County Safety Building
201 West Main Street
Troy, Ohio 45373

Dear Prosecutor Nasal:

You have requested an opinion about the validity and application of a schedule to Article XII, § 2 of the Ohio Constitution. Specifically, you ask:

1. Does the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, remain in effect?

2. Does the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, exempt from the ten-mill limitation a tax levied under R.C. 6101.61 to pay the annual levy of a conservancy district that was created prior to January 1, 1934?

3. May the Department of Taxation or another state agency take legal or administrative action to (1) prevent county or city officials from treating a tax levied under R.C. 6101.61 as not subject to the ten-mill limitation or (2) modify the amount levied by a county or city under R.C. 6101.61 to ensure that Article XII, § 2 of the Ohio Constitution is not violated?

Purpose and Effect of a Schedule to the Ohio Constitution

No provision in the Ohio Constitution or Revised Code addresses schedules to the Ohio Constitution. Nevertheless, throughout the history of Ohio, schedules have been submitted to, and adopted by, the state's electors as part of the process for enacting and amending Ohio's constitutions. *See State ex rel. Graves v. Brown*, 18 Ohio St. 2d 61, 62-63, 247 N.E.2d 463 (1969); *City of Euclid v. Heaton*, 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968); *State ex rel. Duffy v. Sweeney*, 152 Ohio St. 308, 312-13, 89 N.E.2d 641 (1949); *State ex rel. City of Akron v. Slusser*, 144 Ohio St. 123, 133-34, 56 N.E.2d 239 (1944); *Citizens' Bank of Steubenville v. Wright*, 6 Ohio St. 318, 325 (1856); *Albertoni v. Shaffer*, 15 Ohio App. 55, 62 (Summit County 1921); 1995 Op. Att'y Gen. No. 95-013 at 2-66;

Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution: A Reference Guide* 339-49 (2004).

A schedule to the Ohio Constitution, while not a part of that document, has legal force once the schedule takes effect. *See State ex rel. Duffy v. Sweeney*, 152 Ohio St. at 312-13; *State ex rel. Attorney General v. McCracken*, 51 Ohio St. 123, 126-27 (1894); *State ex rel. Attorney General v. Taylor*, 15 Ohio St. 137, 142 (1864); *Citizens' Bank of Steubenville v. Wright*, 6 Ohio St. at 325; *Albertoni v. Shaffer*, 15 Ohio App. at 62. A schedule may provide "important information, such as the method of submitting amendments to the voters, the effective date of proposed amendments if adopted by the voters, and the effect of adopted amendments on existing law." Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution: A Reference Guide* 339 (2004); *see State ex rel. Attorney General v. McCracken*, 51 Ohio St. at 126-27; *State ex rel. Attorney General v. Taylor*, 15 Ohio St. at 142. Thus, once a schedule to a constitutional amendment takes effect, the directives of the schedule have the force of law. *See State ex rel. Graves v. Brown*, 18 Ohio St. 2d at 62-63; *City of Euclid v. Heaton*, 15 Ohio St. 2d 65 (syllabus, paragraph 1); *State ex rel. Duffy v. Sweeney*, 152 Ohio St. at 312-13; *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29 (1916) (syllabus, paragraph 1); *Albertoni v. Shaffer*, 15 Ohio App. at 62.

Effect of a Schedule to Article XII, § 2 of the Ohio Constitution

Your first question asks whether the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, remains in effect. Article XII, § 2 of the Ohio Constitution establishes restrictions on the power of state and local taxing authorities to tax real property. One limitation, known as the ten-mill limitation (unvoted taxes or inside millage), provides that, "[n]o property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation." Ohio Const. art. XII, § 2; *see* R.C. 5705.02. Under this constitutional mandate, up to ten mills of "property taxes may be levied without the approval of the voters, and this inside millage is allocated among various taxing authorities." 2005 Op. Att'y Gen. No. 2005-024 at 2-246.

Although Article XII, § 2 of the Ohio Constitution does not espouse any exemptions to the ten-mill limitation, exemptions appear in a schedule to this provision of the Ohio Constitution. At the election held on November 7, 1933, Ohio electors were asked whether Article XII, § 2 of the Ohio Constitution, as adopted November 5, 1929, should be amended to establish the ten-mill limitation.[1]

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[1] Article XII, § 2 of the Ohio Constitution, as adopted November 5, 1929, authorized the levying of up to fifteen mills of property taxes without voter approval. *See* 1929 Ohio Laws 790 (House Joint Resolution 8, adopted Mar. 19, 1929) (proposal by the General Assembly to amend Article XII, § 2 of the Ohio Constitution, which was passed by Ohio electors, and became effective on January 1, 1931).

See 1933-1934 Ohio Laws, Part II, 446-47 (initiative petition to amend Article XII, § 2 of the Ohio Constitution, which was passed by Ohio electors, and became effective on January 1, 1934). The votes cast in favor of the proposed constitutional amendment exceeded the votes cast against the amendment, and thus on January 1, 1934, Article XII, § 2 of the Ohio Constitution was amended to include the ten-mill limitation.[2] *See id.*

At the same time that the electors voted to amend Article XII, § 2 of the Ohio Constitution, they also voted in favor of approving a schedule to Article XII, § 2 of the Ohio Constitution.[3] This schedule set forth (1) the effective date of the amendment to Article XII, § 2 of the Ohio Constitution and (2) information pertaining to the effect of the ten-mill limitation on certain tax levies:

> SCHEDULE: If the votes for the proposal shall exceed those against it, the amendment shall go into effect January 1, 1934, and existing section 2 of article XII of the constitution of the state of Ohio shall be repealed and annulled; but the following enumerated levies shall not be subject to the limitation of one per cent established by such amendment: (1) All levies for interest and sinking fund or retirement of bonds issued or authorized prior to said date which are not subject to the present limitation of one and one-half per cent imposed by section 2 of article XII and the schedule thereto as approved by the electors of the state on November 5, 1929; (2) All tax levies provided for by the conservancy act of Ohio or the sanitary district act of Ohio, as said laws are in force on January 1, 1934, for the purpose of conservancy districts and sanitary districts organized prior to said date; (3) All tax levies authorized prior to said date by vote of the electors of any political subdivision of the state, pursuant to laws in

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[2] Since January 1, 1934, Article XII, § 2 of the Ohio Constitution has been amended three times. *See* 1989-1990 Ohio Laws, Part IV, 7052-53, 7294 (Am. Sub. House Joint Resolution 15, adopted Apr. 5, 1990) (proposal by the General Assembly to amend Article XII, § 2 of the Ohio Constitution, which was passed by Ohio electors, and became effective on January 1, 1991); 1974 Ohio Laws, Part II, 1315-16, 1373 (House Joint Resolution 59, adopted June 3, 1974) (proposal by the General Assembly to amend Article XII, § 2 of the Ohio Constitution, which was passed by Ohio electors, and became effective on January 1, 1975); 1969-1970 Ohio Laws, Part III, 3040-42, 3145 (Am. Senate Joint Resolution 8, adopted Apr. 2, 1970) (proposal by the General Assembly to amend Article XII, § 2 of the Ohio Constitution, which was passed by Ohio electors, and became effective on January 1, 1971). None of the amendments, however, repealed the ten-mill limitation set forth in Article XII, § 2 of the Ohio Constitution.

[3] The schedule to Article XII, § 2 of the Ohio Constitution that was adopted at the election held on November 7, 1933, amended the schedule to Article XII, § 2 of the Ohio Constitution that was adopted at the election held on November 5, 1929. *See* 1933-1934 Ohio Laws, Part II, 446-47 (initiative petition to amend Article XII, § 2 of the Ohio Constitution, which was passed by Ohio electors, and became effective on January 1, 1934); 1929 Ohio Laws 790 (House Joint Resolution 8, adopted Mar. 19, 1929) (proposal by the General Assembly to amend Article XII, § 2 of the Ohio Constitution, which was passed by Ohio electors, and became effective on January 1, 1931).

> force at the time of such vote, to be made for or during a period of years extending beyond January 1, 1934, which levies are outside of the present limitation of one and one-half per cent imposed by section 2 of article XII and the schedule thereto as approved on November 5, 1929; and (4) All tax levies provided for by the charter of a municipal corporation pursuant to law and which were authorized prior to January 1, 1934, and are not subject to the present limitation of one and one-half per cent imposed by said section and schedule as approved on November 5, 1929.

1933-1934 Ohio Laws, Part II, 446-47 (initiative petition to amend Article XII, § 2 of the Ohio Constitution, which was passed by Ohio electors, and became effective on January 1, 1934).

Once the schedule to Article XII, § 2 of the Ohio Constitution took effect, the directives of the schedule had the force of law. *See State ex rel. Graves v. Brown*, 18 Ohio St. 2d at 62-63; *City of Euclid v. Heaton*, 15 Ohio St. 2d 65 (syllabus, paragraph 1); *State ex rel. Duffy v. Sweeney*, 152 Ohio St. at 312-13; *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403 (syllabus, paragraph 1); *Albertoni v. Shaffer*, 15 Ohio App. at 62. Further, since the schedule took effect, Ohio electors have not voted in favor of repealing, either expressly or by implication, the schedule or the constitutional language prescribing the ten-mill limitation even though they have voted in favor of amending Article XII, § 2 of the Ohio Constitution three times.[4] *See* note 2, *supra* (setting forth the three times that Article XII, § 2 of the Ohio Constitution has been amended since the schedule to Article XII, § 2 of the Ohio Constitution took effect).

As neither the schedule nor the constitutional language prescribing the ten-mill limitation have been repealed by Ohio electors since the ten-mill limitation took effect on January 1, 1934, the directives for implementing the ten-mill limitation set forth in the schedule have been in effect for

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[4] It has been argued that insofar as the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, was not before Ohio electors when they subsequently voted in 1990, 1974, and 1970 in favor of amending Article XII, § 2 of the Ohio Constitution, the schedule was repealed. *See* 1994 Op. Att'y Gen. No. 94-057 at 2-279 n.2. For the reason that follows, we are not persuaded by this argument.

As explained earlier, upon the schedule taking effect, the directives of the schedule became law in Ohio. *See State ex rel. Graves v. Brown*, 18 Ohio St. 2d 61, 62-63, 247 N.E.2d 463 (1969); *City of Euclid v. Heaton*, 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968) (syllabus, paragraph 1); *State ex rel. Duffy v. Sweeney*, 152 Ohio St. 308, 312-13, 89 N.E.2d 641 (1949); *State ex rel. McNamara v. Campbell*, 94 Ohio St. 403, 115 N.E. 29 (1916) (syllabus, paragraph 1); *Albertoni v. Shaffer*, 15 Ohio App. 55, 62 (Summit County 1921). This occurred because Ohio electors voted in favor of adopting the schedule. Since the schedule's adoption, Ohio electors have not voted to repeal the schedule or the constitutional language prescribing the ten-mill limitation. Thus, it cannot reasonably be said that Ohio electors have repealed, either expressly or by implication, the schedule. The schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, therefore continues to have the force of law.

almost 80 years and will continue in effect until repealed by Ohio electors.[5] *See generally MacDonald v. Bernard*, 1 Ohio St. 3d 85, 86, 438 N.E.2d 410 (1982) ("[t]he survival of our system of government requires that proper respect be given to the will of the people as expressed at the ballot box"); *Mehling v. Moorehead*, 133 Ohio St. 395, 408, 14 N.E.2d 15 (1938) ("unless it is shown that the result [of an election] was contrary to the will of the electorate, it will not be disturbed"); *State ex rel. Weinberger v. Miller*, 87 Ohio St. 12, 36, 99 N.E. 1078 (1912) ("the intention and purpose of all elections is to register the will of the people honestly expressed through the ballot"); *Hockett v. State Liquor License Bd.*, 25 Ohio Dec. 117, 143, 16 Ohio N.P. (n.s.) 417 (C.P. Franklin County 1914) ("[*a*] *fortiori*, if the people themselves in whom resides the source of all power, decide to reverse the principles of the police power which have been heretofore established by legislatures and the judiciary, the power to declare which having always heretofore been exercised by the legislative branch of government, as part of the inherent power of government, there is no power to prevent such action by the people themselves in the exercise of their power to make constitutions, or laws, under the initiative and referendum, except by the adoption of another and radically different or contrary amendment or law, by legally authorized expression of the people at an election duly authorized and held"), *aff'd*, 91 Ohio St. 176, 110 N.E. 485 (1915). Thus, the directives for implementing the ten-mill limitation set forth in the schedule remain in effect as the law in Ohio.

Application of Article XII, § 2 of the Ohio Constitution to a Tax Levied under R.C. 6101.61

Your second question asks whether the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, exempts from the ten-mill limitation a tax levied under R.C. 6101.61 to pay the annual levy of a conservancy district that was created prior to January 1, 1934. R.C. 6101.61 authorizes political subdivisions to levy a tax to pay the annual levy of a conservancy district:[6]

> Whenever, under [R.C. Chapter 6101], the board of directors of a conservancy district has determined, ordered, and levied an annual levy in accordance with [R.C.

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[5] The language and purpose of a directive in a schedule to the Ohio Constitution may indicate that the directive is temporary in nature. *See State ex rel. Attorney General v. McCracken*, 51 Ohio St. 123, 126-27 (1894); *State ex rel. Attorney General v. Taylor*, 15 Ohio St. 137, 142 (1864). *See generally State ex rel. Duffy v. Sweeney*, 152 Ohio St. 308 (the language of a schedule and the Ohio Constitution may be examined to determine the operative effect of a directive in the schedule). With regard to the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, the language of the schedule indicates that its directives concerning exemptions from the ten-mill limitation are to remain operative until no tax levy qualifies for one of the exemptions.

[6] R.C. 6101.55 authorizes a conservancy district to determine, order, and levy an annual levy, "which shall include all assessments, or installments of assessments, together with interest, levied under [R.C. Chapter 6101], which become due in the ensuing year."

> 6101.55], the board shall certify to the governing or taxing body of each political subdivision assessed, a notice and statement of the annual levy, setting forth the total amount payable by the political subdivision and included in the annual levy and the items making up the total.

A political subdivision that receives a notice and statement of an annual levy is required to "promptly take all the legal and necessary steps to provide for the payment of the annual levy." R.C. 6101.61. The political subdivision also includes the amount of the annual levy in the tax budget for the ensuing year; levies and assesses a tax at a uniform rate upon all the taxable property within the subdivision "so as to provide sufficient funds for the payment of the annual levy after deduction of any portion of the levy paid from other sources[;]" and certifies the tax to the county auditor who certifies the levy for collection to the county treasurer. *Id*. The proceeds of a tax levied by a political subdivision under R.C. 6101.61 are required to be used to pay the annual levy of a conservancy district. *Id*.

Pursuant to R.C. 6101.61, there is no requirement that a tax levy to pay the annual levy of a conservancy district be approved by electors before being levied. This means that a tax levied under R.C. 6101.61 constitutes a tax levy for unvoted inside millage on taxable real property and thus is subject to the ten-mill limitation unless the schedule to Article XII, § 2 of the Ohio Constitution exempts the tax levy from the ten-mill limitation. *See* 1994 Op. Att'y Gen. No. 94-057 at 2-279 ("the total amount of unvoted taxes actually levied may not exceed ten mills" and a tax levy that "has not been submitted to the voters … is … an unvoted levy"); 1988 Op. Att'y Gen. No. 88-011 at 2-42 (the "limit on the total unvoted tax is known as the 'ten-mill limitation,' sometimes referred to as 'inside millage'"); *see also State ex rel. Lewis v. Scioto-Sandusky Conservancy Dist.*, 160 Ohio St. 155, 158-60, 113 N.E.2d 633 (1953) (an unvoted preliminary tax levied by a conservancy district pursuant to G.C. 6828-43 (now R.C. 6101.45) is a tax as contemplated by Article XII, § 2 of the Ohio Constitution and is subject to the ten-mill limitation unless the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by voters at the election held on November 7, 1933, exempts the tax from the ten-mill limitation); *Pennsylvania R.R. Co. v. Scioto-Sandusky Conservancy Dist.*, 101 Ohio App. 61, 62-63, 137 N.E.2d 891 (Franklin County 1956) (same as the previous parenthetical).

One of the several exceptions to the ten-mill limitation set forth in the schedule to Article XII, § 2 of the Ohio Constitution declares that the limitation does not apply to a tax levy "provided for by the conservancy act of Ohio …, as said laws are in force on January 1, 1934, for the purpose of conservancy districts … organized prior to said date." This exception applies to a tax levied under R.C. 6101.61 only if (1) R.C. 6101.61 was part of the Conservancy Act of Ohio in force on January 1, 1934, and (2) the proceeds of the tax levy are for a conservancy district organized prior to January 1, 1934. *See State ex rel. Lewis v. Scioto-Sandusky Conservancy Dist.*, 160 Ohio St. at 158-60; *Pennsylvania R.R. Co. v. Scioto-Sandusky Conservancy Dist.*, 101 Ohio App. at 62-63.

As your question concerns a conservancy district that was created prior to January 1, 1934, one of the requirements of the exception has been satisfied. With respect to the other requirement, R.C. 6101.61 (former G.C. 6828-55) was part of the Conservancy Act of Ohio in force on January 1, 1934. *See* 1914 Ohio Laws 13 (H.B. 19, filed Feb. 17, 1914) (enacting G.C. 6828-1 to 6828-79 (now

R.C. Chapter 6101), which was referred to as the Conservancy Act of Ohio).[7] While R.C. 6101.61 has been amended since January 1, 1934, political subdivisions have retained the authority under R.C. 6101.61 to levy a tax for the benefit of a conservancy district. *See* 1999-2000 Ohio Laws, Part III, 6991, 7035 (Sub. H.B. 617, eff. Sept. 21, 2000); 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953); 1937-1938 Ohio Laws 163, 205 (Am. S.B. 69, filed Apr. 19, 1937). Because the provisions of R.C. 6101.61 were part of the Conservancy Act of Ohio in force on January 1, 1934, the exception applies to a tax levied under that statute when the proceeds of the tax levy benefit a conservancy district that was created prior to January 1, 1934.[8] Therefore, pursuant to the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, a tax levied under R.C. 6101.61 to pay the annual levy of a conservancy district that was created prior to January 1, 1934, is not subject to the ten-mill limitation.

Authority of a County Prosecuting Attorney to Advise State Officials

Your final question asks whether the Department of Taxation or another state agency may take legal or administrative action to (1) prevent county or city officials from treating a tax levied under R.C. 6101.61 as not subject to the ten-mill limitation or (2) modify the amount levied by a county or city under R.C. 6101.61 to ensure that Article XII, § 2 of the Ohio Constitution is not violated. R.C. 109.14 states that the Attorney General may advise "the prosecuting attorneys of the several counties respecting their duties in all complaints, suits, and controversies in which the state is, or may be a party." R.C. 309.09(A), in turn, provides that a prosecuting attorney is the legal adviser of the board of county commissioners and all other county officers and boards. A prosecuting attorney does not, however, have a duty or the authority to determine what, if any, legal or administrative action the Department of Taxation or another state agency may take against county or city officials to enforce Article XII, § 2 of the Ohio Constitution. *See* R.C. 109.12 ("[t]he attorney general, when so

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[7] G.C. 6828-55 (now R.C. 6101.61), as it existed on January 1, 1934, provided that it shall be the duty of the governing or taxing body of a political subdivision "to levy and assess a tax, by a uniform rate upon all the taxable property within the political subdivision" for the benefit of a conservancy district. 1914 Ohio Laws 13, 47 (H.B. 19, filed Feb. 17, 1914).

[8] To qualify for an exception to the ten-mill limitation under the schedule to Article XII, § 2 of the Ohio Constitution some tax levies had to be approved by electors prior to January 1, 1934. Under the schedule, this included certain prescribed tax levies for interest and sinking fund or retirement bonds; tax levies approved by electors prior to January 1, 1934, and extending beyond January 1, 1934; and tax levies provided by municipal charter and authorized prior to January 1, 1934.

The exception to the ten-mill limitation for conservancy districts set forth in the schedule to Article XII, § 2 of the Ohio Constitution is not, however, limited to tax levies that were approved by electors prior to January 1, 1934. For this reason, a tax levied under R.C. 6101.61 after January 1, 1934, qualifies for the exception to the ten-mill limitation for conservancy districts set forth in the schedule to Article XII, § 2 of the Ohio Constitution when the proceeds of the tax levy are for the benefit of a conservancy district that was created prior to January 1, 1934.

requested, shall give legal advice to a state officer, board, commission, the warden of a state correctional institution, the superintendent, trustees, or directors of a benevolent institution of the state, and the trustees of the Ohio state university, in all matters relating to their official duties"). *See generally* 2004 Op. Att'y Gen. No. 2004-032 at 2-290 ("a county prosecuting attorney has only the powers granted by statute and has no power to enlarge the scope of the duties of the office by providing legal services without statutory authority"). Accordingly, we are unable to provide you with an answer to your final question. *See generally* 2012 Op. Att'y Gen. No. 2012-029 at 2-255 ("a prosecuting attorney may only advise county officers of their statutory obligations"); 1988 Op. Att'y Gen. No. 88-008 at 2-25 (the Attorney General may advise statutory clients only to the extent of their duties).

Conclusions

For the foregoing reasons, it is my opinion, and you are hereby advised as follows:

1. The schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, remains in effect.

2. Pursuant to the schedule to Article XII, § 2 of the Ohio Constitution that was adopted by Ohio electors at the election held on November 7, 1933, a tax levied under R.C. 6101.61 to pay the annual levy of a conservancy district that was created prior to January 1, 1934, is not subject to the ten-mill limitation.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General