July 27, 2005

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

SYLLABUS: 2005-030

1. Prisoners are included in the population of the municipal corporation where they are incarcerated for purposes of determining the percentage of a county's population residing in municipal corporations, and the cap on a county's share in the undivided local government fund pursuant to R.C. 5747.51(H) and the undivided local government revenue assistance fund pursuant to R.C. 5747.62(H).

2. When the boundaries of a municipal corporation and township overlap, the inhabitants of the overlapping territory are considered to be municipal residents for purposes of determining the percentage of a county's population residing in municipal corporations, and the cap on a county's share in the undivided local government fund pursuant to R.C. 5747.51(H) and the undivided local government revenue assistance fund pursuant to R.C. 5747.62(H).

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OPINION NO. 2005-030

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

Dear Prosecutor Will:

You have requested an opinion about how to determine, for purposes of distributing the undivided local government fund (ULGF) and the undivided local government revenue assistance fund (ULGRAF), the percentage of a county's population that is living in municipal corporations. Specifically, you ask whether prisoners should be included in the population of the municipality where they are incarcerated, and whether persons who are residing in an area that is part of both a municipality and township should be included in the municipality's population. We conclude that both prisoners and residents of "dual jurisdictions" should be included in the municipal population, but because the statutory schemes for distribution of the ULGF and ULGRAF are rather complex, we will summarize them briefly before setting forth our analyses leading to these conclusions.

Apportionment of Undivided Local Government Fund and Undivided Local Government Revenue Assistance Fund

Within each county treasury is established an undivided local government fund and undivided local government revenue assistance fund. R.C. 5747.50; R.C. 5747.61. The primary source of revenue for the ULGF is the state treasury's local government fund, R.C. 5747.03(A)(1); R.C. 5747.50; R.C. 5747.51, and the primary source of revenue for the ULGRAF is the state treasury's local government revenue assistance fund. R.C. 5747.03(A)(4); R.C. 5747.61. Both state funds are credited with a portion of the money collected from the state income tax, R.C. 5747.03, the state sales and use taxes, R.C. 5739.21; 5741.03, and other revenue.

The state tax commissioner must determine each county's proportionate share of both funds, and distribute to each county its share of the available moneys, R.C. 5747.50; R.C. 5747.501; R.C. 5747.51; R.C. 5747.61. The county must deposit the moneys from each fund to the credit respectively of the undivided local government fund and the undivided local government revenue assistance fund in the county treasury. R.C. 5747.50; R.C. 5747.61. The county budget commission then determines the amount from each fund needed by, and to be

apportioned to, each subdivision within the county for current operating expenses, based on the subdivision's tax budget.[1] R.C. 5747.51; R.C. 5747.62. *See* R.C. 5747.01(Q)(1) and R.C. 5747.62(A) (defining "subdivision" to mean a county, municipal corporation, park district, or township). *See generally City of Reynoldsburg v. Licking County Budget Commission*, 104 Ohio St. 3d 453, 2004-Ohio-6773, 820 N.E.2d 323, at ¶ 12 (the "ULGF and the ULGRAF are established by R.C. Chapter 5747 to provide state financial support to smaller governmental units in the state"); *City of Canton v. Stark County Budget Commission*, 40 Ohio St. 3d 243, 243, 533 N.E.2d 308 (1988) (the undivided local government fund "consists of money due the county from the state to assist the county and its subdivisions in their current operations"). A subdivision's share in the county's ULGF and ULGRAF is based on its "relative need" as compared to the "relative need" of the other subdivisions entitled to receive moneys from the funds.[2] *See generally Lake County Budget Commission v. Village of Willoughby Hills*, 9 Ohio St. 2d 108, 224 N.E.2d 120 (1967) (syllabus, paragraph 2) ("[t]he need of a subdivision for revenue, in addition to what it has, is an essential requirement for any apportionment to that subdivision from the county undivided local government fund").

A county's share of the proceeds in each fund is capped, however, if a certain percentage of its population resides within municipal corporations. R.C. 5747.51(H); R.C. 5747.62(H). For example, if 81% or more of the county's population resides within municipalities, the county may receive no more than 30% of the available moneys in the ULGF and ULGRAF.[3] *Id.* If the county's proportionate share exceeds this limitation, the county budget commission must adjust the county's share accordingly and increase the proportionate share of the other subdivisions on a pro rata basis. *Id. See generally Lucas County Board of Commissioners v. City of Toledo*, 28 Ohio St. 2d 214, 218, 277 N.E.2d 193 (1971) ("[w]e see nothing unreasonable or unlawful in maintaining that limitation [on the county's share] in light of the ever decreasing role that county

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[1] *See* R.C. 5705.28-.31 (adoption of a subdivision's tax budget). *See also Wise v. Summit County Budget Commission*, 36 Ohio St. 2d 114, 304 N.E.2d 390 (1973).

[2] For each fund, the county budget commission determines a subdivision's "relative need" by first deducting from the subdivision's total expenditures its revenue and certain, statutorily specified expenditures, such as those for permanent improvements and debt charges. R.C. 5747.51(B)-(F); R.C. 5747.62(B)-(F). The budget commission then totals the "relative need" of all participating subdivisions and computes a "relative need factor" by dividing the total amount in the fund by the total relative need of all participating subdivisions. R.C. 5747.51(G); R.C. 5747.62(G). The relative need of each subdivision is then multiplied by the relative need factor to determine the subdivision's proportionate share in each fund. R.C. 5747.51(H); R.C. 5747.62(H).

[3] The other limitations on a county's share in the ULGF and ULGRAF are, if the percentage of municipal population within a county is less than 41%, the county's share of each fund may not exceed 60%, and if the municipal population is between 41% and 80%, the county's share may not exceed 50%. R.C. 5747.51(H); R.C. 5747.62(H).

governments play in counties where the municipal populations and territories are constantly expanding").

Inclusion of Prisoners in Municipality's Population

Your first question is whether, in determining the percentage of a county's population that resides within municipalities, for purposes of capping the county's share of the ULGF and ULGRAF, prisoners should be included in the population of the municipality where their detention facility is located. R.C. 5747.51(H) and R.C. 5747.62(H) state that the respective subdivisions' populations are those shown "in the reports on population in Ohio by the department of development (DOD) as of the twentieth day of July of the year in which the tax budget is filed with the budget commission." As explained more fully below, the population reports referred to in R.C. 5747.51(H) and R.C. 5747.62(H) do include prisoners as residents of the locale where they are incarcerated. You contend, however, that because R.C. 703.01 requires that prisoners who are not otherwise residents of a municipal corporation be excluded from the municipality's population, in determining whether the municipality is a village or city, then such prisoners should be excluded from a municipality's population for purposes of determining under R.C. 5747.51 and R.C. 5747.62 the percentage of a county's population that resides in municipal corporations. Your contention fails to recognize, however, that R.C. 703.01 explicitly uses different criteria than R.C. 5747.51 and R.C. 5747.62 to measure population.[4]

By way of background, Ohio's constitution classifies a municipal corporation as a city or a village, depending upon the size of its population—municipalities with a population of five thousand or more are cities and all others are villages—and authorizes the General Assembly to prescribe the method of transition from one class to the other. Ohio Const. art. XVIII, § 1. To carry out this constitutional responsibility, the General Assembly has enacted R.C. 703.01, the statute you refer to, providing that a municipal corporation which, "*at the last federal census*, had a population of five thousand or more" is a city, and "[a]ll other municipal corporations are villages" (emphasis added). R.C. 703.01 further provides that, "[c]ities, which, *at any federal census*, have a population of less than five thousand, shall become villages," and "[v]illages, which, *at any federal census*, have a population of five thousand or more, shall become cities" (emphasis added). However, the classification of a municipal corporation as a village cannot be changed to that of a city "by virtue of there being counted, in determining the population of that municipal corporation … [p]ersons under detention in a detention facility located within the municipal corporation if the residential addresses of those persons when not detained in that

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[4] The term, "population," is defined, for purposes of the Revised Code generally, to mean "that shown by the most recent regular federal census," unless another definition is provided for in a specific statute. R.C. 1.59(D). *See* 1999 Op. Att'y Gen. No. 99-033 (syllabus, paragraph 2) ("[a]t the current time, the only regular federal census is the decennial federal census, which is required by the provisions of 13 U.S.C.A. § 141(a)"). R.C. 1.59(D) is inapplicable in this instance since R.C. 5747.51 and R.C. 5747.62, and R.C. 703.01 provide their own respective definition or description of "population."

facility, as determined by the records of the facility, are at a place other than the municipal corporation in which the facility is located." R.C. 703.01(B)(1)(b).[5] *See generally* R.C. 703.01(B)(3) and R.C. 2921.01(F) (defining "detention facility").[6]

As a general matter, the phrases "last federal census" and "any federal census," as used in R.C. 703.01(A), will refer to the last federal *decennial* census, conducted by the U.S. Census Bureau pursuant to 13 U.S.C. § 141.[7] And, as can be adduced from the language of R.C. 703.01, excluding the number of prisoners from the population shown by the "last" or "any" federal census, federal censuses include prisoners within the population of the locale where they are confined, and not where they might otherwise reside if not incarcerated.[8] *See District of Columbia v. United States Department of Commerce*, 789 F. Supp. 1179 (D.D.C. 1992) (it was not arbitrary and capricious for the Census Bureau to enumerate inmates of a correctional facility as residents of the geographic locality where the facility is located, rather than where the inmates would have been living if not incarcerated). *Accord Borough of Bethel Park v. Stans*, 449 F.2d 575 (3rd Cir. 1971) (the decision of the Census Bureau to enumerate persons confined to

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[5] Also, a village may not have its status changed to a city by having counted in its population "[c]ollege or university students in attendance at an educational institution located within the municipal corporation if the residential addresses of those students when not in attendance at the institution, or the residential addresses of the guardians of those students … are at a place other than the municipal corporation in which the institution is located." R.C. 703.01(B)(1)(a).

[6] You state that the village of Grafton in Lorain County would be a city if prisoners incarcerated in facilities located in Grafton were included in its population count. As we will see, however, this point is irrelevant to determining the percentage of a county's population residing in municipal corporations for purposes of R.C. 5747.51(H) and R.C. 5747.62(H), because both a city and village are municipal corporations.

[7] A statistical compilation or survey conducted by the U.S. Census Bureau pursuant to 13 U.S.C. § 8(b) also qualifies as a "federal census" for purposes of R.C. 703.01(A). *State ex rel. Brubaker v. Brown*, 163 Ohio St. 241, 126 N.E.2d 439 (1955). 13 U.S.C. § 8(b) authorizes the Bureau to "make special statistical compilations and surveys," at the request of federal, state, and local agencies, which must pay for "the actual or estimated cost" of the Bureau's work. *Id. Cf.* 13 U.S.C. § 181 (note 12, *infra*).

[8] The Census Bureau identifies as a subset of population the numbers and demographics of persons, such as prisoners, who are "residents of group quarters," and the decennial census breaks out the populations of group quarters by type of group quarter. The Prison Policy Initiative reports that the 2000 decennial census showed Lorain County with a population of 284,664. Of that number, 3,691 were state prisoners, 1,343 of whom came from Lorain County. http://www.prisonersofthecensus.org/ohio/importing.shtml.

institutions as residents of the state where they are confined has a rational basis).[9] Although R.C. 703.01 adjusts the federal census count by excluding prisoners from the population of the village where they are incarcerated,[10] this formulation of population is clearly limited to the General Assembly's provision for the "method of transition" of a municipality from one class to the other. Ohio Const. art. XVIII, § 1. An entirely different statutory formulation is used to establish population for purposes of distributing the moneys in the ULGF and ULGRAF.

As noted above, the populations of the county and municipal corporations are, for purposes of R.C. 5747.51(H) and R.C. 5747.62(H), those shown "in the reports on population in Ohio by the department of development (DOD) as of the twentieth day of July of the year in which the tax budget is filed with the budget commission." The source of DOD's population information is the U.S. Census Bureau, 2003 Op. Att'y Gen. No. 2003-014, which is required, "to the extent feasible," to publish annually between each decennial census[11] "current data on total population and population characteristics" for "each State, county, and local unit of general purpose government which has a population of fifty thousand or more." 13 U.S.C. § 181(a).[12] In

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[9] The decision of the Census Bureau to include prisoners as residents of where they are incarcerated has not been without controversy. *See* Eric Lotke & Peter Wagner, *The Modern American Penal System: Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From,* 24 Pace L. Rev. 587 (2004); Taren Stinebrickner-Kauffman, Article, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote,"* 11 Va. J. Soc. Pol'y & L. 229 (2004); Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the "Usual Residence" Principle,* 152 U. Pa. L. Rev. 431 (2003); Elizabeth D. Mehling, Comment, *Where do Prisoners Live: Do Taxpayers have a Valid Legal Claim for Lost Federal Funds Resulting from the Census Bureau's Enumeration Standards Pertaining to Prisoners?,* 32 U. Tol. L. Rev. 47 (2000).

[10] Even though the U.S. Census Bureau includes prisoners as residents of the location where they are incarcerated, nothing precludes the State from excluding them for purposes of determining the classification of a municipality under Ohio Const. art. XVIII, § 1 and R.C. 703.01. States are not bound to use federal decennial census figures except for congressional reapportionment. U.S. Const. art. I, § 2. *See Burns v. Richardson,* 384 U.S 73 (1966); *Borough of Bethel Park v. Stans,* 449 F.2d 575 (3rd Cir. 1971); *District of Columbia v. United States Department of Commerce,* 789 F. Supp. 1179 (D.D.C. 1992).

[11] Annual estimates released by the Census Bureau reflect the population as of July 1 of the preceding year. www.census.gov/popest.

[12] Although the figures are provided by the Census Bureau, an annual estimate conducted pursuant to 13 U.S.C. § 181 is not itself a census; it is not an "enumeration" but consists of "merely rough or approximate calculations." 1999 Op. Att'y Gen. No. 99-033 at 2-220. *See also* 2003 Op. Att'y Gen. No. 2003-014. Note that R.C. 5747.51 and R.C. 5747.62, unlike R.C. 703.01, make no reference to a "census." *Cf.* R.C. 703.201(D) ("[f]or purposes of this section,

addition, the Census Bureau provides DOD with annual estimates for local units of government with a population of less than fifty thousand, although there is no requirement that the Bureau publish these figures.

As with the decennial census, the Bureau's annual estimates include prisoners and other residents of "group quarters" in the population of the location where the prison or other facility is located. Unlike R.C. 703.01, however, R.C. 5747.51 and R.C. 5747.62 do not exclude prisoners, students, or other residents of group quarters from the annual estimates. The General Assembly is obviously aware that indicia of population sometimes include prisoners (especially if such indicia come from the U.S. Census Bureau), and where it has intended to exclude prisoners from a population count, it has explicitly done so, as in R.C. 703.01. The General Assembly has not explicitly done so in R.C. 5747.51 or R.C. 5747.62, thus evidencing an intent that prisoners *not* be excluded when determining municipal population under R.C. 5747.51(H) and R.C. 5747.62(H). *See generally Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) ("[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"); *Lake Shore Electric Railway Co. v. Public Utilities Commission*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other connections). Because R.C. 5747.51 and R.C. 5747.62 have their own method for determining population, and because this method does not explicitly exclude prisoners from the population count provided by the U.S. Census Bureau, in contrast to R.C. 703.01, we conclude that prisoners are not to be excluded from municipal population counts for purposes of determining the percentage of a county's population residing in municipalities and establishing the limit on a county's share of the ULGF and ULGRAF.

Residents of Dual Jurisdictions

Your second question is whether residents of "dual jurisdiction territories" should be counted as municipal residents for the purpose of calculating the proportion of a county's population residing within municipal corporations. By "dual jurisdiction territories" you mean territory comprising part of a township that has been annexed to a municipal corporation but remains part of the original township.

If a municipal corporation annexes territory that comprises part of a township, the municipality's legislative authority may petition the board of county commissioners for a change of township lines "in order to make them identical, in whole or in part, with the limits of the

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[providing for the dissolution of a village] the population of a village shall be the population determined *either* at the last preceding federal decennial census *or* according to population estimates certified by the department of development between decennial censuses" (emphasis added)).

municipal corporation." R.C. 503.07. A municipality is not required, however, to initiate the process to change township boundaries, and boundary adjustment is not automatic. *See* 2005 Op. Att'y Gen. No. 2005-024. Furthermore, certain annexation proceedings do not allow for exclusion of the annexed territory from the township under R.C. 503.07. *See, e.g.,* R.C. 709.023; R.C. 709.024.[13] When, under these circumstances, township boundaries are not adjusted upon annexation, and the township's and municipality's boundaries overlap, "the inhabitants of the overlapping territory are considered residents of both the municipality and the township with all of the benefits and obligations attendant thereto." 1977 Op. Att'y Gen. No. 77-031 at 2-114. *Accord* 2005 Op. Att'y Gen. No. 2005-024.

R.C. 5747.51(H) and R.C. 5747.62(H) state simply that, a county's maximum share of the ULGF and ULGRAF is based on the percentage of the county's municipal population in relation to the county's total population. The statute makes no exception to exclude from the total municipal population those residents who reside in an area that is part of a township as well as a municipal corporation—and to read such an exception into R.C. 5747.51(H) and R.C. 5747.62(H) would violate basic canons of statutory construction. *See, e.g., Columbus-Suburban Coach Lines, Inc. v. Public Utilities Commission,* 20 Ohio St. 2d 125, 127, 254 N.E.2d 8 (1969) ("[i]n determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used"). *See also State ex rel. Celebrezze v. Board of County Commissioners,* 32 Ohio St. 3d 24, 27, 512 N.E.2d 332 (1987) ("it is a cardinal rule of construction that where a statute is clear and unambiguous, there is 'no occasion to resort to the other means of interpretation'"). If a person resides within a municipal corporation, the plain language of R.C. 5747.51 and R.C. 5747.62 call for that person to be included within the municipal population, regardless of whether his residence is also part of a township.

It is, therefore, my opinion, and you are hereby advised that:

1. Prisoners are included in the population of the municipal corporation where they are incarcerated for purposes of determining the percentage of a county's population residing in municipal corporations, and the cap on a county's share in the undivided local government fund pursuant to R.C. 5747.51(H) and the undivided local government revenue assistance fund pursuant to R.C. 5747.62(H).

2. When the boundaries of a municipal corporation and township overlap, the inhabitants of the overlapping territory are considered to be municipal residents for purposes of determining the percentage of a county's population residing in municipal corporations, and the cap on a county's share in the undivided local government fund pursuant to R.C. 5747.51(H)

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[13] 2005 Op. Att'y Gen. No. 2005-024 provides an extensive discussion of the adjustment of boundary lines upon annexation.

and the undivided local government revenue assistance fund pursuant to R.C. 5747.62(H).

Respectfully,

JIM PETRO
Attorney General