August 24, 2009

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

SYLLABUS: 2009-030

1. Before an "agency or authority," as described in the final sentence of R.C. 5705.03(B)(3), requests a taxing authority to submit a tax levy to the electors, the agency or authority is required by R.C. 5705.03(B) to request and receive a certification of tax valuation and millage from the county auditor. There is no need or authority for the taxing authority to request an additional or alternate certification.

2. An "agency or authority" authorized to request a taxing authority to submit a tax levy on its behalf within the meaning of R.C. 5705.03(B)(3) includes the board of library trustees of a county, municipal corporation, school district, or township public library under R.C. 5705.23 and the board of health of a general health district under R.C. 3709.29. It does not include a county MR/DD board, a county children services board, a community mental health board, an alcohol and drug addiction services board, or an alcohol, drug addiction, and mental health board.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

August 24, 2009

OPINION NO. 2009-030

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

Dear Prosecutor Will:

We have received your request for an opinion on the following questions:

1. When an agency or authority, as described in the final sentence of R.C. 5705.03(B)(3), seeks, through a separate taxing authority, to place a tax levy before the electorate, which entity or entities obtain the required certification of tax valuation and millage from the county auditor?

2. If the taxing authority desires a certification different from the one requested by the agency, does it then request the different certification from the county auditor, or must it direct the agency to obtain a new certification?

Your questions pertain to R.C. 5705.03(B), which states in part:

> (B)(1) When a taxing authority determines that it is necessary to levy a tax outside the ten-mill limitation[1] for any purpose authorized by the Revised Code, *the taxing authority shall certify to the county auditor a resolution or ordinance requesting that the county auditor certify to the taxing authority* the total current tax valuation of the subdivision, and the number of mills required to

[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, .18.

> generate a specified amount of revenue, or the dollar amount of revenue that would be generated by a specified number of mills. . . .
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> . . . .
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> (3) . . . *Before requesting a taxing authority to submit a tax levy, any agency or authority authorized to make that request shall first request the certification from the county auditor provided under this section.* (Emphasis and footnote added.)

R.C. 5705.03(B) requires that, before a real property tax levy is submitted to the electors for a vote, there must be a certification of tax valuation and millage from the county auditor. *See* R.C. 5705.03(B)(3) ("[t]he county board of elections shall not submit the question of the tax to electors unless a copy of the county auditor's certification accompanies the resolution or ordinance the taxing authority certifies to the board"). The taxing authority generally requests the auditor's certification of tax valuation and millage as provided in the portion of division (B)(1) quoted above.

However, the final sentence of division (B)(3), also quoted above, provides an exception to this general rule. This final sentence pertains to instances in which an entity (agency or authority) is empowered to request a taxing authority to submit a tax levy on the entity's behalf, and it states, plainly and redundantly, that *before requesting the taxing authority to submit the tax lev*y, the entity *shall first request the certification* from the county auditor. Because the entity (rather than the taxing authority) is required to request the certification, the county auditor must provide the certification to the entity, which then submits the certification to the taxing authority along with its request that the tax levy be submitted to the electors. The taxing authority thus uses the certification provided by the entity as the required certification from the county auditor, and has no need to make an independent request for the certification. R.C. 5705.03(B)(3). Therefore, before an "agency or authority," as described in the final sentence of R.C. 5705.03(B)(3), requests a taxing authority to submit a tax levy to the electors, the agency or authority described in the final sentence of R.C. 5705.03(B)(3) must request and receive the required certification of tax valuation and millage from the county auditor.

**Agency or Authority Authorized to Request a Taxing Authority to Submit a Tax Levy**

To fully understand the operation of R.C. 5705.03(B), it is necessary to determine what is meant by the portion of the final sentence of division (B)(3) of R.C. 5705.03 referring to "any agency or authority" *authorized to request a taxing authority to submit a tax levy*. Various bodies defined as taxing authorities are empowered by statute to submit to the electors the question of levying a tax in excess of the ten-mill limitation for a specified purpose. *See, e.g.*, R.C. 5705.01(C), .19. The final sentence of R.C. 5705.03(B)(3) refers to an entity (agency or authority) that is not itself empowered to act as a taxing authority, but is authorized by statute to request a taxing authority to submit a tax levy to the electors on its behalf. The procedure is governed by R.C. 5705.03 and by the statutes authorizing the submission of the particular levy.

Unless an entity has express statutory authority to request a taxing authority to submit a tax levy on its behalf, it does not come within the final sentence of division (B)(3) of R.C. 5705.03.[2]

Without attempting to provide a comprehensive list of entities that have been granted statutory authority to request a taxing authority to submit a tax levy on their behalf, we examine the bodies mentioned in your opinion request. As discussed below, school and municipal libraries and boards of health have statutory authority to request a taxing authority to submit a tax levy on their behalf. The other bodies mentioned in your request—county boards of mental retardation and developmental disabilities (MR/DD),[3] county children services boards, and county boards of mental health—do not have this authority.

R.C. 5705.23 authorizes the board of library trustees of any county, municipal corporation, school district, or township public library to declare by resolution that taxes available within the ten-mill limitation will be insufficient to provide for library requirements and that *the question of an additional tax levy shall be submitted to the electors by the taxing authority of the political subdivision to whose jurisdiction the board is subject*. Upon receipt of the board's resolution, the taxing authority must adopt, and certify to the board of elections, a resolution providing for the submission to the electors of a levy that conforms to the request from the board of library trustees. The taxing authority may not modify the terms of the requested tax levy. R.C. 5705.23; 1988 Op. Att'y Gen. No. 88-013; 1982 Op. Att'y Gen. No. 82-056, at 2-164 to 2-165 (under R.C. 5705.23, a board of library trustees must act through a separate taxing authority, but the taxing authority's function is merely ministerial). Thus, the taxing authority acts on behalf of the board of library trustees to submit to the electors the levy request prepared by the board of library trustees. *See also* R.C. 3375.43 (public library board of trustees may request taxing authority to submit to the electors the question of issuing bonds for library construction); R.C. 5705.28(B)(1).

Similar authority to request a taxing authority to submit a tax levy has been granted to the board of health of a general health district under R.C. 3709.29, which states that if taxes within the ten-mill limitation will be insufficient to meet the expenses of a general health district, "the board of health shall certify the fact of such insufficiency" to the board of county commissioners, which "is hereby ordained to be a special taxing authority for the purposes of this section only." The board of county commissioners has a mandatory duty under R.C. 3709.29 to pass a

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[2] Forms prepared by the Ohio Department of Taxation assist county auditors in complying with the certification required by R.C. 5705.03(B). The instructions to the forms state, in paragraph 2: "For purposes of this certification, 'subdivision' includes any agency, board, commission, or other authority authorized to request a taxing authority to submit a tax levy on its behalf." DTE Forms 130, 140M, 140R.

[3] Effective October 6, 2009, the name of a county MR/DD board will be changed to a county board of developmental disabilities. *See* Sub. S.B. 79, 128th Gen. A. (2009) (eff. Oct. 6, 2009).

resolution that it is necessary to levy a tax in excess of the ten-mill limitation and to file that resolution with the board of elections for placement on the ballot, so long as the certification of insufficiency of funds has been properly adopted by the board of heath and is otherwise lawful. 2001 Op. Att'y Gen. No. 2001-013; *see also* R.C. 5705.25, .31(E).

Your letter of request suggests that the authority to request a taxing authority to submit a tax levy is given also to various bodies of the county that may receive the proceeds of levies adopted for their purposes. However, the responsibility for funding county bodies rests with the board of county commissioners, which has discretion to determine how to fund the various functions of the county and when to seek levies. Therefore, county MR/DD boards and county children services boards are not authorized to request a taxing authority to submit a tax levy within the meaning of the final sentence of R.C. 5705.03(B)(3). *See, e.g.*, 2001 Op. Att'y Gen. No. 2001-013, at 2-77 (explaining why the board of health of a general health district is not a county body).[4]

You have asked also about boards of mental health. Mental health programs are organized on the basis of service districts that consist of one or more counties and are governed by boards appointed pursuant to statute. *See* 1999 Op. Att'y Gen. No. 99-030; 1997 Op. Att'y Gen. No. 97-036; 1988 Op. Att'y Gen. No. 88-045. R.C. Chapter 340 provides for boards of alcohol, drug addiction, and mental health services (ADAMH boards) and also for boards organized under prior law. In Lorain County, mental health services are provided by the Lorain County Board of Mental Health, which was created as a community mental health board under former R.C. 340.02. *See* R.C. 340.021; 1982 Op. Att'y Gen. No. 82-067; 1989-1990 Ohio Laws, Part III, 4170, 4188-4210, 4308-12 (Am. Sub. H.B. 317, eff. Oct. 10, 1989); 1979-1980 Ohio

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[4] The board of county commissioners is responsible for levying taxes and making appropriations sufficient to enable the county MR/DD board to perform its functions, and has authority to decide to submit to the electors a tax levy to fund MR/DD programs, services, and facilities under R.C. 5705.19(L) and R.C. 5705.222. R.C. 5126.05(G). The MR/DD board is an agency of the county without express statutory authority to request the board of county commissioners to submit a tax levy on its behalf. *See* 2001 Op. Att'y Gen. No. 2001-019; 1991 Op. Att'y Gen. No. 91-042; 1988 Op. Att'y Gen. No. 88-096; *see also* 2004 Op. Att'y Gen. No. 2004-008. The county MR/DD board may make a nonbinding request for the board of county commissioners to seek a levy under R.C. 5705.222, *see* 2001 Op. Att'y Gen. No. 2001-019, but this authority does not bring the county MR/DD board within the language of the final sentence of R.C. 5705.03(B)(3).

Similarly, the board of county commissioners is required to levy taxes and make appropriations sufficient to fund children services and the care and placement of children and may submit to the electors a levy for this purpose. R.C. 5705.24. However, there is no statutory requirement or authority for a county children services board (which is a county agency) to request the levy. R.C. 5153.15, .35; 2007 Op. Att'y Gen. No. 2007-016, at 2-152 to 2-153.

Laws, Part I, 499, 511-23, 581-88 (Am. Sub. S.B. 160, eff. Oct. 31, 1980); http://www.lcmhb.org/WhoWeAre.html. Lorain county has also created an alcohol and drug addiction services board. *See* R.C. 340.021; http://www.lorainadas.org. By statute, alcohol and drug addiction services boards and community mental health boards have all the powers, duties, and obligations of ADAMH boards with regard to their respective functions, and statutory references to ADAMH boards include these boards. R.C. 340.021(A); 1999 Op. Att'y Gen. No. 99-030, at 2-199 n.1. Thus, the analysis applicable to ADAMH boards applies also to alcohol and drug addiction services boards and community mental health boards.

ADAMH boards may receive financial support from property taxes approved by the electors and levied by the board of county commissioners (as taxing authority) under R.C. 5705.19, R.C. 5705.191, or R.C. 5705.221[5] or by a joint-county board (as taxing authority) under R.C. 5705.19 or R.C. 5750.191. R.C. 5705.01(C), (I); 1999 Op. Att'y Gen. No. 99-030, at 2-199 to 2-200; 1997 Op. Att'y Gen. No. 97-036, at 2-213 n.4; 1979 Op. Att'y Gen. No. 79-022, at 2-78. The board of county commissioners is responsible for providing sufficient resources to support a community mental health plan developed and submitted under R.C. 340.03 and 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). When a county, rather than a joint-county board, is the taxing authority, it is appropriate that there be communications between the board and the taxing authority with regard to the possibility of a levy. R.C. 340.011(B), .03, .033, .07; R.C. 5705.19, .191, .221; 1999 Op. Att'y Gen. No. 99-030; 1997 Op. Att'y Gen. No. 97-036. However, there is no statutory provision giving an ADAMH board express authority to request that the board of county commissioners submit a tax levy for the benefit of the ADAMH board. Rather, the county has discretion to determine how to fulfill its obligation to provide resources to fund its community mental health plan. *See* 1981 Op. Att'y Gen. No. 81-044, at 2-176 (board of county commissioners is not required by R.C. 340.07 to contribute to the community mental health board the amount requested by the board, and is not required by R.C. 5705.221 to request the voters to approve a levy to provide additional tax revenue for the board). Thus, an ADAMH board, alcohol and drug addiction services board, or community mental health board does not have the authority referenced in the final sentence of R.C. 5705.03(B)(3).

Your second question concerns a situation in which the taxing authority desires a certification different from the one requested by the agency or authority described in the final sentence of R.C. 5705.03(B)(3). Our review of entities to which R.C. 5705.03(B)(3) applies indicates, however, that the taxing authority is not empowered to request a certification different from the one requested by the agency or authority described in the final sentence of R.C. 5705.03(B)(3). As outlined above, when an entity has statutory authority to request a taxing authority to submit a tax levy as described in R.C. 5705.03(B)(3), the taxing authority is required

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[5] R.C. 5705.221 authorizes a board of county commissioners to certify to the board of elections a tax outside the ten-mill limitation to provide for the county's support of its ADAMH service district or the county's contribution to a joint-county district.

to submit the tax levy as requested by the entity and is not authorized to change its terms. Therefore, there is no need or authority for the taxing authority to request a certification different from that obtained by the requesting entity under R.C. 5705.03(B)(3). *See* 2001 Op. Att'y Gen. No. 2001-013; 1988 Op. Att'y Gen. No. 88-013; 1982 Op. Att'y Gen. No. 82-056, at 2-164 to 2-165. Of course, a different result could be reached if different legislation were enacted.

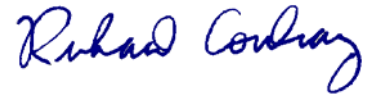
**Conclusion**

Therefore, it is my opinion, and you are advised, as follows:

1. Before an "agency or authority," as described in the final sentence of R.C. 5705.03(B)(3), requests a taxing authority to submit a tax levy to the electors, the agency or authority is required by R.C. 5705.03(B) to request and receive a certification of tax valuation and millage from the county auditor. There is no need or authority for the taxing authority to request an additional or alternate certification.

2. An "agency or authority" authorized to request a taxing authority to submit a tax levy on its behalf within the meaning of R.C. 5705.03(B)(3) includes the board of library trustees of a county, municipal corporation, school district, or township public library under R.C. 5705.23 and the board of health of a general health district under R.C. 3709.29. It does not include a county MR/DD board, a county children services board, a community mental health board, an alcohol and drug addiction services board, or an alcohol, drug addiction, and mental health board.

Respectfully,



RICHARD CORDRAY
Ohio Attorney General