January 6, 1997

OPINION NO. 97-001

The Honorable John Lawler
Adams County Prosecuting Attorney
Room 112, Courthouse
West Union, Ohio 45693

Dear Prosecutor Lawler:

I have before me your predecessor's opinion request in which he asked about the use of tax moneys levied under R.C. 5705.24. According to information provided to this office, moneys from the county general fund have been appropriated to the county children services board in an amount equal to one-half the salary of the board's executive director. The remaining portion of the executive director's salary and other expenses of the children services board and the county children's home, including maintenance and repair items for the county children's home, however, are paid from moneys derived from a levy approved under R.C. 5705.24. The concern expressed by the children services board is whether moneys derived from such a levy may be used for the purpose of paying a portion of the executive director's salary and for maintenance and repair of the children's home.

By way of background, I note that in each county, children services are provided either by a county children services board or a county department of human services. *See* R.C. 5153.02-.07; R.C. 5153.15 (the powers and duties enumerated in R.C. 5153.16-.19 with respect to the care of children in need of public care or services, is vested in a single county agency, either the county children services board or the county department of human services). In Adams County, this function is performed by a children services board, and for ease of discussion, I will refer to the entity with responsibility for providing children services as a children services board. Pursuant to R.C. 5153.10, each children services board "shall designate an executive officer known as the _executive director,_ who shall not be in the classified civil service." The executive director is responsible for administering the work of the children services board in accordance with the rules of the board. R.C. 5153.11. Included in the work of a children services board is the operation of a county children's home. *See* R.C. 5153.16(B)(10).

Within R.C. Chapter 5153 the General Assembly has provided for the funding of

county children services and county children's homes. Pursuant to R.C. 5153.35:

> The boards of county commissioners *shall* levy taxes and make appropriations sufficient to enable the county children services board ... to perform its functions and duties under [R.C. 5153.01-.42]....
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> In addition to making the usual appropriations, there *may* be allowed annually to the executive director an amount not to exceed one-half his official salary to provide for necessary expenses which are incurred by him or his staff in the performance of their official duties. Upon the order of the executive director, the county auditor shall draw his warrant on the county treasurer payable to the executive director or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for in this section, and to be *paid out of the general fund* of the county.... (Emphasis added.)

R.C. 5153.35 thus imposes upon the county commissioners a duty to levy taxes and make appropriations sufficient to enable the children services board to perform its functions. *See* 1958 Op. Att'y Gen. No. 1744, p. 98 (syllabus, paragraph one); 1947 Op. Att'y Gen. No. 1815, p. 214 (syllabus) ("[G.C. 3070-36 (analogous to R.C. 5153.35)], which provides that the County Commissioners shall, pursuant to law, levy taxes and make appropriations sufficient to enable the County Child Welfare Board to perform its functions under Section 3070-1 et seq., General Code [now at R.C. Chapter 5153], is mandatory, and in the proper discharge of this statutory obligation sufficient funds should be appropriated to pay the salary of the executive secretary and the necessary expenses of his office").[1] The decision as to what sum is sufficient to enable the children services board to perform its functions, however, is a matter left to the discretion of the board of county commissioners. 1990 Op. Att'y Gen. No. 90-069 at 2-290 ("[t]he question of what is necessary for the support of children services and the care and placement of children is a matter of fact, and its determination involves the exercise of judgment"); *see* 1958 Op. Att'y Gen. No. 1744, p. 98 (pursuant to former R.C. 335.35 (analogous to R.C. 5153.35), the board of county commissioners had discretion to determine amount to be budgeted to child welfare board, even though the county commissioners had a duty to provide a sufficient amount).[2]

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[1] *See generally Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction, the word _may_ shall be construed as permissive and the word _shall_ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage").

[2] The county commissioners' decision is, of course, subject to review for abuse of discretion. *See* 1958 Op. Att'y Gen. No. 1744, p. 98; *see generally State ex rel. Landis v. Bd. of Comm'rs*, 6 Ohio App. 440, 446-47 (Butler County 1916), *aff'd*, 95 Ohio St. 157, 115 N.E. 919 (1917) ("it would not be a proper exercise of the judicial powers of the court to interfere

by injunction with the legitimate discretion of the county commissioners so long as that discretion is being honestly exercised by them in good faith within the limits of the powers conferred by statute").

Specifically concerning the funding of the county children's home, R.C. 5153.37 states in pertinent part: "The board of county commissioners of any county having a children's home ... shall make annual assessments of taxes sufficient to support and defray all necessary expenses of such home." Thus, the General Assembly has imposed a separate duty upon the board of county commissioners to provide sufficient funds for the necessary expenses of the county children's home.

While R.C. 5153.35 and R.C. 5153.37 impose upon the county commissioners mandatory duties to provide the children services board and the children's home sufficient moneys, neither statute specifies or limits the particular sources from which the county commissioners may or must make such moneys available.[3] *See generally* 1990 Op. Att'y Gen. No. 90-069 (noting various types of tax revenues that may be available to fund the operations of a county children services board, *e.g.*, R.C. 5705.19(A) (levy for current expenses of a subdivision); R.C. 5705.191 (levy for any purpose specified in R.C. 5705.19 or for certain other purposes); R.C. 5705.24 (special levy for children services)). In the absence of a specific statutory requirement, the extent to which the county commissioners must appropriate money from the county general fund for particular expenses of the county children services board and the county children's home is within the discretion of the county commissioners.[4]

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[3] In contrast, R.C. 5153.35 specifies that, where the county commissioners choose to allow the executive director of the children services board an amount for necessary expenses, that amount is to be paid out of the county general fund.

[4] It is also necessary to bear in mind that, in making appropriations from the various

The method by which the county commissioners may provide funds for children services is further confused by the language of R.C. 5705.24, which states in pertinent part:

> The board of county commissioners of any county, at any time and in any year, *after providing the normal and customary percentage of the total general fund appropriations for the support of children services and the care and placement of children*, by vote of two-thirds of all the members of said board may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide an adequate amount for the support of such children services, and that it is necessary to levy a tax in excess of the ten-mill limitation *to supplement such general fund appropriations* for such purpose. Taxes collected from a levy imposed under this section may be expended for any *operating or capital improvement expenditure* necessary for the support of children services and the care and placement of children.

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county funds, *see generally* R.C. 5705.09 (types of funds), the county commissioners, as the county's taxing authority, must take into account various restrictions upon the appropriation and expenditure of funds. *See, e.g.*, R.C. 5705.10 (stating in part: "Money paid into any fund shall be used only for the purposes for which such fund is established); R.C. 5705.38(C) (requiring appropriation measures to be classified as to separate amounts for each department, office, and division, and the amount for personal services for each); R.C. 5705.39 (appropriation from each fund limited by total of estimated revenue available from fund); R.C. 5705.41(A) (prohibiting the appropriation of any money except as provided in R.C. Chapter 5705); 1941 Op. Att'y Gen. No. 3681, p. 299 (syllabus, paragraph one) ("[w]hen considering and passing an annual appropriation measure the county commissioners are required to make provision first for those expenditures made mandatory by statute").

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> If the majority of the electors voting on a levy *to supplement general fund appropriations* for the support of children services and the care and placement of children vote in favor thereof, the board may levy a tax within such county at the additional rate outside the ten-mill limitation during the period and for the purpose stated in the resolution *or at any less rate or for any of the said years*. (Emphasis added.)

The wording of R.C. 5705.24 thus appears to contemplate that the county commissioners will propose a tax levy under that statute only *after* having provided "the normal and customary percentage of the total *general fund appropriations*" for the support of children services and finding that moneys raised within the ten-mill limitation will be insufficient to

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The moneys placed in the general fund may come from a number of sources. R.C. 5705.10. Among such sources is the general levy for current expenses, the purpose of which is "to provide one general operating fund derived from taxation from which any expenditures for current expenses of any kind may be made," and the county commissioners "may include in such levy the amounts required for carrying into effect any of the general or special powers granted by law" to the county, "including the acquisition or construction of permanent improvements and the payment of judgments, but excluding the construction, reconstruction, resurfacing, or repair of roads and bridges in counties and townships and the payment of debts charges." R.C. 5705.05. One item that shall be included within a county's general levy for current expenses is "the amount necessary for the maintenance, operation, and repair of public buildings." R.C. 5705.05(E). *See generally* 1981 Op. Att'y Gen. No. 81-035 (discussing county general fund moneys).

Ohio Const. art. XII, § 2 and R.C. 5705.02 establish a limitation on the taxation of property within a subdivision. The court in *Bennett v. Evatt*, 145 Ohio St. 587, 62 N.E.2d 345 (1945) (syllabus, paragraph three), explained the limitations of Ohio Const. art. XII, § 2 as follows:

> The provision in Section 2, Article XII, that "no 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," restrains state and local governments from levying taxes beyond the established limitation, without special authority from the voters, or from the charter of a municipal corporation.

See also R.C. 5705.07 ("[t]he taxing authority of any subdivision may make tax levies authorized in excess of the ten-mill limitation by a vote of the people under the law

adequately support children services and the care and placement of children. The implication is that the county commissioners normally appropriate a sum of money from the county general fund for these purposes. In fact, R.C. 5705.24 expressly states that moneys levied under that statute are "to supplement general fund appropriations" for the support of children services. Nothing in R.C. 5704.24, however, imposes a clear duty upon the county commissioners to make a particular appropriation from the county general fund for these purposes.

As further specified in R.C. 5705.24, moneys generated by a tax levied under that section may be used "for any operating or capital improvement expenditure." Thus, R.C. 5705.24 does not prohibit the use of revenue derived from such a levy for payment of the salary of the children services board director or the costs of maintenance and repair to the

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applicable thereto, irrespective of all limitations on the tax rate").

According to information provided, the county commissioners have regularly appropriated to the children services board from the county general fund an amount equal to one-half the salary of the board's executive director.

The children services board's concern as to the use of revenue derived from a tax levied under R.C. 5705.24 to pay the salary of the executive director of the children services board may have been prompted by the result reached in 1962 Op. Att'y Gen. No. 3335, p. 810, which concluded in the syllabus that the salary of the executive officer of a county child welfare board, appointed pursuant to R.C. 5153.10, should be paid out of the county general fund and not from "funds of a special levy imposed for the education and training of retarded children ... even though part of the duties of the executive secretary may be with the retarded children program." Based upon the portion of R.C. 5153.35 specifying that the expense allowance paid the executive director was to be paid from the county general fund, the opinion simply concluded that the salary paid to the executive director must also be paid from the county general fund. The opinion did not, however, consider the numerous possible sources of funding for the activities of a child welfare (now children services) board, *see* 1990 Op. Att'y Gen. No. 90-069; 1947 Op. Att'y Gen. No. 1815, p. 214 (noting that moneys from the county general fund could be appropriated to the board for payment of the executive secretary's salary, but also noting that
other funds might, depending on the condition of such other funds, be used to pay for such salary), nor the possibility that revenue from a special levy placed in a special fund, rather than in the county general fund, might be available for the payment of the salary of the executive director of the children services board. *See generally* R.C. 5705.10 (stating in part, "[a]ll revenue derived from a special levy shall be credited to a special fund for the purpose for which the levy was made"). R.C. 5705.24 states that revenues derived therefrom may be used "for any operating or capital improvement expenditure necessary for the support of children services and the care and placement of children," which would include the salary of the executive director of the children

county children's home, *see* 1990 Op. Att'y Gen. No. 90-069 (syllabus, paragraph two) (stating in part, "[m]oneys derived from a levy under R.C. 5705.24 may be used for any purpose within the language of the resolution and ballot adopting the tax").

In response to the specific concerns raised by the children services board, I find that revenue derived from a tax levy under R.C. 5705.24 may be used for the payment of the salary of the executive director of the county children services board and for maintenance and repairs to the county children's home. (1962 Op. Att'y Gen. No. 3335, p. 810,

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services board. Accordingly, I find it necessary to overrule 1962 Op. Att'y Gen. No. 3335, p. 810.

The children services board's concern with using moneys from the tax levied under R.C. 5705.24 for certain maintenance and repairs to the children's home may have arisen from several prior Attorney General opinions concerning payment for such expenses. For example, 1963 Op. Att'y Gen. No. 154, p. 240, concluded, in part, that the proceeds of a tax levied under R.C. 5705.191 for "the purpose of supplementing the General Fund for current expenses ... for the purpose of making an appropriation for Child Welfare Services" could be used only for services for children, and not for the construction of permanent improvements. The opinion found the tax levy to be a special levy the revenue from which, pursuant to R.C. 5705.10, could be used only for the purpose stated in the resolution and ballot to levy the tax. Because the stated purpose for the levy was children services, the opinion found that the construction of permanent improvements, not falling within "services" for children, was not within the purpose of the levy. Although the rationale is unclear, this conclusion appears to have been based, in part, upon the fact that the levy was for current expenses, which does not include permanent improvements. Similarly, 1951 Op. Att'y Gen. No. 455, p. 200, concluded that revenue from a levy under G.C. 5625-15 (now at R.C. 5705.19) for "current expenses" of the county could not be used for permanent improvements to the county children's home, such improvements falling outside the category of current expenses. Both of these opinions are distinguishable from the situation described by your predecessor, however, because the opinions addressed the proper payment for permanent improvements, not for repairs or maintenance, as is the situation described by your predecessor. In addition, the two earlier opinions dealt with the use of moneys levied under provisions other than R.C. 5705.24, which expressly authorizes the use of revenues derived therefrom "for any operating or capital improvement expenditure necessary for the support of children services and the care and placement of children," which purpose clearly includes the cost of maintenance and repair of the county children's home.

Part of the children services board's concern may be that because the children's home is county property, the board of county commissioners, having management and control of county property, has a duty to maintain and repair the home. *See Fromm v. State*, 36 Ohio App. 346, 349, 173 N.E. 201, 203 (Cuyahoga County 1930) ("[t]he

overruled.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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statutes of Ohio make it the duty of the county commissioners to have charge and supervision of all the public buildings belonging to the county, in such county, and to erect, furnish, and maintain those buildings"); 1989 Op. Att'y Gen. No. 89-029 at 2-122 ("[c]ustody and control of county property carries the duty of care and maintenance. The duty of the commissioners to manage and control county property includes the duty to provide cleaning and janitorial services" (various citations omitted)). In the exercise of its duty to manage and control county property, however, the board of county commissioners has broad discretion as to the manner in which it carries out such responsibilities. *See id*.; 1988 Op. Att'y Gen. No. 88-058 (county commissioners' decision to pay cost of utilities furnished to sheriff's living quarters in county jail); *see generally* 1956 Op. Att'y Gen. No. 6462, p. 314 (syllabus) (county commissioners may, but are not required to, expend county funds in the maintenance of a memorial building erected under R.C. Chapter 345). Whether the Adams County commissioners have appropriately and adequately provided for the repair and maintenance of the county children's home is, however, a question of fact that cannot be resolved by means of an Attorney General opinion.

January 6, 1997

The Honorable John Lawler
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West Union, Ohio 45693

SYLLABUS: 97-001

Revenue derived from a tax levy under R.C. 5705.24 may be used for the payment of the salary of the executive director of the county children services board and for maintenance and repairs to the county children's home. (1962 Op. Att'y Gen. No. 3335, p. 810, overruled.)