March 31, 2005

The Honorable Scott W. Nusbaum
Ross County Prosecuting Attorney
72 North Paint Street
Chillicothe, Ohio 45601-2418

SYLLABUS: 2005-011

1. If, pursuant to voter approval under R.C. 718.01(C), a non-charter municipal corporation has levied an income tax for specified purposes at a rate in excess of one percent, the municipal corporation may subsequently submit to the voters an amendment that would change the permissible uses of part of the proceeds of the income tax, and the county board of elections may properly place that issue on the ballot.

2. If the voters reject a ballot issue to amend a municipal income tax to change the permissible uses of part of the proceeds of that tax, then the municipal income tax remains in effect without amendment.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

Opinions Section
30 E. Broad St., 15th Floor
Columbus, OH 43215-3400
Telephone: (614) 752-6417
Facsimile: (614) 466-0013
www.ag.state.oh.us

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OPINION NO. 2005-011

The Honorable Scott W. Nusbaum
Ross County Prosecuting Attorney
72 North Paint Street
Chillicothe, Ohio 45601-2418

Dear Prosecutor Nusbaum:

We have received your request for an opinion concerning issues that a county board of elections may properly place on the ballot. Your request raises the following questions regarding a possible ballot issue relating to a municipal income tax:

1. If a non-charter municipal corporation, by vote of the electorate pursuant to R.C. 718.01(C), has levied an income tax in excess of one percent for specified purposes, may the municipal corporation subsequently submit to the voters an amendment that would change the permissible uses of part of the proceeds of the income tax?

2. If the voters reject the proposed amendment, what is the effect on the existing levy?

For the reasons below, we reach the following conclusions: (1) if, pursuant to voter approval under R.C. 718.01(C), a non-charter municipal corporation has levied an income tax for specified purposes at a rate in excess of one percent, the municipal corporation may subsequently submit to the voters an amendment that would change the permissible uses of part of the proceeds of the income tax, and the county board of elections may properly place that issue on the ballot; and (2) if the voters reject a ballot issue to amend a municipal income tax to change the permissible uses of part of the proceeds of that tax, then the municipal income tax remains in effect without amendment.

Background

Your questions have arisen in connection with a matter currently at issue in the City of Chillicothe, which is a non-charter municipality.[1] In 1984, the voters of Chillicothe approved a ballot issue for an additional income tax in excess of one percent, as authorized by R.C. 718.01(C). The additional income tax so approved was known as the Safety Levy and was codified as follows:

> 163.16(d) Safety Levy 0.4% allocated to a special fund for the purpose of operating and maintaining the police and fire departments of the City of Chillicothe and all things necessary and incidental thereto, including debt service. Provided, however, that one-fourth of said amount be set aside and used only for capital expenditures, including debt service, in the police and fire departments.

Thus, the Safety Levy is an income tax at the rate of 0.4%, allocated to a special fund for the purpose of operating and maintaining the police and fire departments, with the exception that one-fourth of the Safety Levy (an income tax at the rate of 0.1%) may be used only for capital expenditures (including debt service) in the police and fire departments.

It has been proposed that the Safety Levy be amended to allow the proceeds set aside for capital expenditures to be used "for purposes of payment of salaries and fringe benefits within the police and fire departments if layoffs within those departments are imminent due to budget concerns." The basic question is how to achieve the amendment of the Safety Levy to allow this additional use of that portion of the proceeds.

Municipal income tax

The authority of a municipal corporation to adopt a tax is derived from the Ohio Constitution, which grants a municipal corporation general home rule powers, including the ability to "exercise all powers of local self-government." Ohio Const. art. XVIII, § 3 ("[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws"). The powers of local self-government encompass the power of taxation, including the authority to adopt an income tax. *See Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950) (municipal power to levy and collect income taxes); *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 227, 124 N.E. 134 (1919) ("[t]here can be no

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[1] Ohio Const. art. XVIII, § 7 authorizes a municipality to adopt a charter and exercise its powers of local self-government under the charter, subject to the provisions of Ohio Const. art. XVIII, § 3. Because your questions pertain to a non-charter municipality, this opinion does not address Ohio Const. art. XVIII, § 7, or the powers of chartered municipalities. *See generally* 1982 Op. Att'y Gen. No. 82-057.

doubt that the grant of authority to exercise all powers of local government includes the power of taxation"); *see also Cincinnati Bell Tel. Co. v. City of Cincinnati*, 81 Ohio St. 3d 599, 602, 693 N.E.2d 212 (1998); 1999 Op. Att'y Gen. No. 99-025 at 2-162; 1996 Op. Att'y Gen. No. 96-012 at 2-47 n.1.

The Ohio Constitution also provides, however, that the General Assembly may limit municipal taxing authority. Under Ohio Const. art. XIII, § 6, the General Assembly is empowered to provide for the organization of cities and incorporated villages, and to "restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power." Under Ohio Const. art. XVIII, § 13, the General Assembly may pass laws "to limit the power of municipalities to levy taxes and incur debts for local purposes." Hence, the General Assembly is empowered to enact laws that impose limits on municipal taxing authority. *See Angell v. City of Toledo*; 1999 Op. Att'y Gen. No. 99-025 at 2-162; 1996 Op. Att'y Gen. No. 96-012 at 2-47 n.1. The Ohio Supreme Court has held, however, that "[t]he taxing authority of a municipality may be preempted or otherwise prohibited only by an express act of the General Assembly." *Cincinnati Bell Tel. Co. v. City of Cincinnati* (syllabus).[2]

Pursuant to its constitutional powers, the General Assembly has enacted R.C. Chapter 718, which imposes limits upon the municipal power of income taxation. R.C. 718.01 requires that any municipal income tax be imposed at a uniform rate and imposes various other limitations, including the requirement that voters approve any percentage levied in excess of one percent. R.C. 718.01(B) and (C); *see also Thompson v. City of Cincinnati*, 2 Ohio St. 2d 292, 208 N.E.2d 747 (1965).[3] Pursuant to R.C. 718.01, the voters of Chillicothe approved the Safety Levy in the amount of 0.4%, making it part of a total income tax rate of 1.4%.

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[2] In *Cincinnati Bell Telephone Co. v. City of Cincinnati*, 81 Ohio St. 3d 599, 693 N.E.2d 212 (1998), the Ohio Supreme Court overruled several older cases and held that any limitation of a municipality's taxing power undertaken by the General Assembly must be accomplished expressly. The court thus rejected the long-established doctrine that preemption or restriction of the municipal taxing power may be implied, a result that seems appropriate in light of the fact that the municipal taxing power is derived from the Ohio Constitution.

[3] R.C. 718.01(C) states:

> No municipal corporation shall levy a tax on income at a rate in excess of one per cent without having obtained the approval of the excess by a majority of the electors of the municipality voting on the question at a general, primary, or special election. The legislative authority of the municipal corporation shall file with the board of elections at least seventy-five days before the day of the election a copy of the ordinance together with a resolution specifying the date the election is to be held and directing the board of elections to conduct the election. The

When a municipal income tax is approved by the voters as required by R.C. 718.01(C), the proceeds of the levy may be used only for the purposes specified on the ballot. R.C. 718.01(C); *see also, e.g.,* 1999 Op. Att'y Gen. No. 99-025 at 2-162 to 2-163. Therefore, the Safety Levy may be expended only for the purposes, and in the percentages, specified in the ballot language approved by the voters.

No provision of R.C. Chapter 718 addresses the matter of revising a voter-approved municipal income tax, either to change the purpose for which the proceeds may be used or in any other respect. Where the statutes are silent with regard to a matter of municipal taxation, the municipal corporation may act under its constitutional powers of local self-government. *See Thompson v. City of Cincinnati*; 1976 Op. Att'y Gen. No. 76-016 (syllabus) ("R.C. 718.01 does not prohibit a municipality from levying an income tax at specified but varying rates for definite terms under the municipality's power to levy income taxes as conferred by Section 3 and 7 of Article XVIII of the Ohio Constitution"). [4]

In the instant case, the municipality's constitutional powers clearly enable the municipality to take action pertaining to its income tax, provided that no express act of the General Assembly preempts or otherwise prohibits the action. *See Cincinnati Bell Tel. Co. v. City of Cincinnati* (syllabus). R.C. Chapter 718 does not address the authority of a municipal corporation to modify the purposes for which voter-approved municipal income tax proceeds may be used and, therefore, does not limit that authority. Accordingly, a municipal corporation may take action to modify those purposes pursuant to its constitutional powers. However, the municipal corporation remains subject to the provisions of R.C. 718.01(C) that restrict the use of income tax proceeds from a voter-approved levy to the purposes specified in the ballot language. Therefore, it is necessary for any change in purposes to be submitted to the voters and approved

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> ballot shall be in the following form: "Shall the Ordinance providing for a _____ per cent levy on income for (Brief description of the purpose of the proposed levy) be passed?
>
> FOR THE INCOME TAX
> AGAINST THE INCOME TAX"
>
> In the event of an affirmative vote, the proceeds of the levy may be used only for the specified purpose.

[4] Even apart from constitutional powers, it may be argued that, absent statutory directive, the power to adopt a tax implies the power to modify or terminate that tax. It has been found in various instances that, if a public body is authorized to adopt a tax, it must also have the authority to terminate or modify the tax. *See, e.g.,* 1973 Op. Att'y Gen. No. 73-031 (implied power for a board of county commissioners to repeal a sales tax comes from the board's implied power to amend or repeal any legislation it was empowered to enact); *see also* 2001 Op. Att'y Gen. No. 2001-022.

in the same manner in which the initial levy was approved – that is, in the manner set forth in R.C. 718.01(C).

County board of elections

The county board of elections is the body with responsibility for holding elections within the county. *See* R.C. 3501.06; R.C. 3501.11. The board of elections consists of four qualified electors of the county, who are appointed by the Secretary of State and serve for four-year terms. R.C. 3501.05(A): R.C. 3501.06. By statute, the board is responsible for providing places for voting and for providing equipment and supplies for the elections process. R.C. 3501.11(B), (C), (F), (H), (I); 2005 Op. Att'y Gen. No. 2005-006.

"[I]t is the duty of a county board of elections to make all the necessary arrangements for the submission of issues to the electors." 1990 Op. Att'y Gen. No. 90-084 at 2-363 (footnote omitted); *see* R.C. 3501.01(M) ("[q]uestion or issue" means "any question or issue certified in accordance with the Revised Code for placement on an official ballot at a general or special election to be held in this state"); R.C. 3501.02(F); R.C. 3501.11. Questions and issues are placed on the questions and issues ballot described in R.C. 3505.06. Each question or issue is accompanied by "a brief title descriptive of the question or issue," together with a brief statement of the percentage of affirmative votes required for passage. R.C. 3505.06(D); *see also* R.C. 3505.06(A) and (E); *Beck v. City of Cincinnati*, 162 Ohio St. 473, 124 N.E.2d 120 (1955). The board of elections is required to "[g]ive approval to ballot language for any local question or issue and transmit the language to the secretary of state for the secretary of state's final approval." R.C. 3501.11(W); *see also* R.C. 3505.06(E).

The statutes governing municipal income taxes provide for the approval of amounts in excess of a rate of one percent to be submitted to the voters at a general, primary, or special election. R.C. 718.01(C). Pursuant to R.C. 718.01(C), the legislative authority of the municipal corporation "shall file with the board of elections at least seventy-five days before the day of the election a copy of the ordinance together with a resolution specifying the date the election is to be held and directing the board of elections to conduct the election." *See also* R.C. 3501.02(F).

Provided that the municipality has complied with relevant procedures and has properly submitted an issue to the board of elections, it is the duty of the board of elections to place the issue on the ballot and conduct the election. *See* R.C. 3501.11(W) (approval of ballot language); R.C. 3505.06 (questions and issues ballot); 1990 Op. Att'y Gen. No. 90-084 at 2-364 ("a county board of elections is not required to make a determination as to the merits" of an issue submitted for inclusion on the ballot, "but rather is statutorily charged with the limited duty of properly presenting these issues to the electors"); 1974 Op. Att'y Gen. No. 74-006 at 2-24; see *also State ex rel. Schultz v. Bd. of Elections*, 50 Ohio App. 2d 1, 6, 361 N.E.2d 477 (Cuyahoga County 1976) (board of elections properly scrutinizes procedural requirements of a matter submitted for inclusion on the ballot, but "has no power to determine that an issue should not be placed on the ballot because if passed it would be unconstitutional or otherwise illegal"), *aff'd per curiam*, 48 Ohio St. 2d 173, 357 N.E.2d 1079 (1976); *State ex rel. McGovern v. Bd. of Elections*, 24 Ohio

Misc. 135, 263 N.E.2d 586 (C.P. Cuyahoga County 1970) (syllabus, paragraph 1) ("[t]he powers of a board of elections as prescribed by R.C. 3501.11 do not include the authority to refuse to place on the ballot an issue submitted by lawful procedures for a vote of the electors of a municipality, because of the board's determination that the resulting charter amendment would be illegal"). Thus, when a municipality submits to its local board of elections an ordinance and resolution adopted in accordance with R.C. 718.01(C), the board of elections may properly place that issue on the ballot.

Proposal for electors to change permissible uses of municipal income tax proceeds

Your first question concerns a situation in which a charter municipality has, by vote of the electorate pursuant to R.C. 718.01, levied an income tax in excess of one percent for purposes specified in the ballot language. You ask whether the municipal corporation may subsequently submit to the voters an amendment that would change the permissible uses of part of the proceeds of the income tax. Because existing statutes do not address this matter, the municipal corporation is empowered to take action pursuant to its constitutional home rule powers, as discussed above, to present the voters with an opportunity to change the purposes for which the income tax proceeds may be used.

The legislative authority of the municipal corporation may present the issue of a change in the permitted uses of municipal income tax proceeds to the voters in the manner prescribed by statute – that is, by filing with the board of elections a copy of its ordinance on the matter, together with a resolution specifying the date the election is to be held and directing the board of elections to conduct the election. R.C. 718.01(C). Provided that relevant procedural requirements were met before the submission to the board of elections, the board of elections is required to place the issue on the ballot and conduct the election. *See State ex rel. McGovern v. Bd. of Elections*, 24 Ohio Misc. at 136 ("[i]f … procedural requirements were met before its submission to the board of elections, the board was duty bound to put it on the ballot for a vote of the people"); 1974 Op. Att'y Gen. No. 74-006 at 2-24 ("the primary concern of a board of elections is to insure that the issues are properly presented on the ballot and that the election is conducted efficiently"). If, pursuant to voter approval under R.C. 718.01(C), a non-charter municipal corporation has levied an income tax for specified purposes at a rate in excess of one percent, the municipal corporation, thus, may subsequently submit to the voters an amendment that would change the permissible uses of part of the proceeds of the income tax, and the county board of elections may properly place that issue on the ballot.

You have also asked about the consequences if the voters should reject the proposal to change the permissible uses of a portion of the income tax. Because R.C. 718.01(C) requires that the voters who approve an income tax in excess of one percent also approve the purposes for which the proceeds may be used, no change in the purposes for which those proceeds may be used is effective without the approval of the voters. A vote against a proposal to change the permissible uses of a portion of the income tax is, in effect, a vote to retain the income tax in its

current form, and a ballot issue that the voters reject is of no effect. Therefore, if the voters reject a ballot issue seeking to change the permissible uses of a portion of the income tax, both the tax and the permissible uses of the tax proceeds remain in effect as if no change had been proposed. We conclude, accordingly, that if the voters reject a ballot issue to amend a municipal income tax to change the permissible uses of part of the proceeds of that tax, then the municipal income tax remains in effect without amendment.

Conclusions

For the reasons set forth above, it is my opinion, and you are advised, as follows:

1. If, pursuant to voter approval under R.C. 718.01(C), a non-charter municipal corporation has levied an income tax for specified purposes at a rate in excess of one percent, the municipal corporation may subsequently submit to the voters an amendment that would change the permissible uses of part of the proceeds of the income tax, and the county board of elections may properly place that issue on the ballot.

2. If the voters reject a ballot issue to amend a municipal income tax to change the permissible uses of part of the proceeds of that tax, then the municipal income tax remains in effect without amendment.

Respectfully,

JIM PETRO
Attorney General