March 28, 2001

OPINION NO. 2001-013

The Honorable W. Duncan Whitney
Delaware County Prosecuting Attorney
15 West Winter Street
Delaware, Ohio 43015

Dear Prosecutor Whitney:

You have asked whether a board of county commissioners has a mandatory duty under R.C. 3709.29 to place a special tax levy on the ballot once the board of health of a general health district certifies an insufficiency of funds to the board of county commissioners, or whether such action is discretionary. Your question relates to the Delaware City/County Health Department, which is a combined general health district formed by the union of the city health district of the City of Delaware and the general health district of Delaware County. *See* 1999 Op. Att'y Gen. No. 99-048. *See also* R.C. 3709.07 (a combined district constitutes a general health district and its board has all of the powers and duties of a board of health of a general health district).

Funding of a General Health District

In order to respond to your question, we must first examine the manner in which general health districts are funded. Briefly stated, a board of health must annually adopt an itemized appropriation measure that includes the amounts for the current expenses of the district. R.C. 3709.28. The board must certify the appropriation measure and an estimate of sources of revenue to the county auditor, who in turn submits the appropriation measure and estimate of revenue to the county budget commission. *Id.* The county budget commission may reduce, but not increase, any item in the appropriation measure. *Id.*

The appropriation, as fixed by the county budget commission, is reduced by the amounts available to the health district from its various sources of revenue, R.C. 3709.28, and then apportioned between the city and original general health district according to the contract that created the combined general health district, R.C. 3709.07. The portion of the appropriation attributed to the original general health district is then apportioned among the townships and villages composing the health district on the basis of taxable valuations. R.C. 3709.28.

If, however, the money available from the city, villages, and townships within the ten-mill limitation will be insufficient to meet the district's expenses,[1] the board of health must, pursuant to R.C. 3709.29, certify the insufficiency to the board of county commissioners of the county in which the health district is located. R.C. 3709.29 further provides in part:

> Such board of county commissioners is hereby ordained to be a special taxing authority for the purposes of this section only, and, notwithstanding any other law to the contrary, the board of county commissioners of any county in which a general health district is located is the taxing authority for such special levy outside the ten-mill limitation. *The board of county commissioners shall thereupon*, in the year preceding that in which such health program will be effective, by vote of two-thirds of all the members of that body, *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 necessary requirements of such district within the county, *and that it is necessary to levy a tax in excess of such limitation* in order to provide the board of health with sufficient funds to carry out such health program. *Such resolution shall be filed with the board of elections* not later than four p.m. of the seventy-fifth day before the day of election.
>
> Such resolution shall specify the amount of increase in rate which it is necessary to levy and the number of years during which such increase shall be in effect, which shall not be for a longer period than ten years. (Emphasis added.)

See also R.C. 5705.01(C) (defining "[t]axing authority"); 2000 Op. Att'y Gen. No. 2000-048; 1958 Op. Att'y Gen. No. 2294, p. 397.

The Term "Shall" Connotes a Mandatory Duty

We turn now to examine whether the language of R.C. 3709.29 imposes a mandatory or discretionary duty upon the board of county commissioners to place a special levy on the ballot once the board of health has certified an insufficiency of funds. Upon certification of a deficiency by the board of health, R.C. 3709.29 states that the board of county commissioners "shall" declare by resolution that the amount of taxes that may be raised within the ten-mill limitation will be insufficient and that it is necessary to levy a tax in excess of the ten-mill limitation in order to provide the board of health with sufficient funds. R.C. 3709.29 also states that such resolution "shall" be filed with the board of elections for placement on the ballot. The statutory use of the word "shall" generally connotes a mandatory duty. *See Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971). Thus, the use of the word "shall" in R.C. 3709.29 to describe the board of county commissioners' duties indicates that the

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[1] Ohio Const. art. XII, § 2 prohibits the taxation of property "in excess of one per cent of its true value," unless approved by a majority of the electors of the taxing district voting on the question. This is known as the "ten-mill limitation." *See* R.C. 5705.02; R.C. 5705.03; R.C. 5705.07.

board of county commissioners has a mandatory duty, upon certification of a deficiency by the board of health, to pass a resolution that the amount of taxes within the ten-mill limitation is insufficient and it is necessary to levy a tax in excess of the ten-mill limitation, and to file such resolution with the board of elections for placement on the ballot at the next election that occurs more than seventy-five days after the resolution is filed with the board of elections.

Comparison to Analogous Statutory Language

Similar statutory language has, in other contexts, been consistently interpreted as imposing a mandatory duty upon the board of county commissioners or other taxing authority to submit the question of a tax levy to the voters. For example, 1988 Op. Att'y Gen. No. 88-013 so interpreted R.C. 5705.23, which authorizes a board of library trustees to declare by resolution that the amount of taxes that may be raised within the ten-mill limitation will be insufficient and that it is necessary to levy a tax in excess of the ten-mill limitation. R.C. 5705.23 further states that "the question of such additional tax levy shall be submitted by the taxing authority of the political subdivision to whose jurisdiction the [library] board is subject," and that, "[u]pon receipt of the resolution, the taxing authority of the political subdivision to whose jurisdiction the board is subject shall adopt a resolution providing for the submission of such additional tax levy to the electors." 1988 Op. Att'y Gen. No. 88-013 concluded that R.C. 5705.23 "requires the taxing authority to put the question of a tax levy before the electors if it receives a requesting resolution from an appropriate library board," and "the taxing authority may not exercise any discretion in determining whether or not to submit a tax levy to the electorate." *Id.* at 2-51 and 2-52.

1988 Op. Att'y Gen. No. 88-013 cites with approval 1982 Op. Att'y Gen. No. 82-056, which explains R.C. 5705.23 as follows:

> Pursuant to this statute, a board of public library trustees cannot independently cause a tax levy to be submitted to the electors in its district; it must act through a separate taxing authority. Yet, the taxing authority's function is merely ministerial; the board may require the taxing authority to submit the question of the levy to the electors…. While the taxing authority of a subdivision must perform the administrative function of submitting the question to the electors, all discretionary decisions concerning the need for the tax, the level of the tax, and the timing and duration must be made by the board of public library trustees….

Id. at 2-164 to 2-165. Although 1982 Op. Att'y Gen. No. 82-056 at 2-164 describes R.C. 5705.23 as "unique," the relationship it establishes between a board of public library trustees and taxing authority is analogous to that established in R.C. 3709.29 between a board of health and board of county commissioners.

An interpretation of R.C. 3709.29 as imposing a mandatory duty upon the board of county commissioners to submit the question of a levy to the voters is further supported by a line of Ohio court decisions and opinions of the Attorney General interpreting R.C. 5901.11, which

provides for the funding of county veterans service commissions. It is instructive to examine these cases and opinions, and the various amendments of R.C. 5901.11 by the General Assembly in response thereto.

In *State ex rel. Binder v. Soldiers' Relief Comm'n*, 174 Ohio St. 23, 186 N.E.2d 476 (1962), the court examined R.C. 5901.11, which, as it read at the time, required the soldiers' relief commission (now called the veterans service commission) to determine and certify to the board of county commissioners the probable amount necessary for the aid of persons in need for the upcoming year. R.C. 5901.11 further provided that upon such certification, the board of county commissioners "shall make the necessary levy," not to exceed five-tenths of a mill per dollar on the assessed value of the property of the county. The court interpreted this language as "a mandatory duty of the Board of County Commissioners to provide the sum certified for the use of the Soldiers' Relief Commission." 174 Ohio St. at 23, 186 N.E.2d at 476. In so concluding the court noted that the soldiers' relief commission had acted in a proper manner in determining and certifying to the board of county commissioners the probable amount necessary. 174 Ohio St. at 24, 186 N.E.2d at 476.

In *State ex rel. Semetko v. Board of Comm'rs*, 30 Ohio App. 2d 130, 283 N.E.2d 648 (Lucas County 1971), however, the court was faced with a situation where the soldiers' relief commission had failed to follow the statutory procedures for determining the probable amount necessary for aid, and the board of county commissioners had voted to appropriate a lower sum than that certified by the commission. Rejecting the argument of the soldiers' relief commission that any certification within the five-tenths of a mill ceiling required the county commissioners to levy a comparable amount, the court concluded that the commission could not ignore the statutory scheme of R.C. Chapter 5901 "and merely assign an arbitrary amount within the statutory limitation as the sum needed for the relief of indigent persons." 30 Ohio App. 2d at 134, 283 N.E.2d at 651. The court distinguished the *Binder* decision, noting that in that case the Ohio Supreme Court "was not called upon to decide the legal effect of a commission's failure to follow the statutory procedure," and had explicitly limited its holding to the facts of the case where the certification had been made in a proper manner. 30 Ohio App. 2d at 133 n.2, 283 N.E.2d at 651 n.2. Ruling in favor of the county commissioners, the court determined that it would "not expand [the *Binder*] holding to encompass the situation in the case at bar where the commission's failure to comply with the statutes is manifest." *Id.*

Subsequent to the *Binder* and *Semetko* decisions, the General Assembly amended R.C. 5901.11 to require the veterans service commission, after determining the probable amount necessary for aid and the operation of the veterans service office, to "prepare and submit a budget" to the board of county commissioners, "which may review and revise the budget requests," and then make the necessary levy "to raise the amount that the board approves." 1987-1988 Ohio Laws, Part III, 4685, 4689 (Am. Sub. H.B. 626, eff. Sept. 14, 1988). In *State ex rel. Veterans Service Office v. Board of County Comm'rs*, 61 Ohio St. 3d 461, 575 N.E.2d 206 (1991), the court found that, while under the former law, the board of county commissioners "had to appropriate the amount certified" by the veterans service commission, under the law as amended, "the board makes the necessary levy to raise the amount that the board approves." 61

Ohio St. 3d at 462-63, 575 N.E.2d at 207. The court concluded that "R.C. 5901.11 grants the board of county commissioners discretion to review, revise, and appropriate the amount, not to exceed five-tenths of a mill, that the board approves for veterans commission needs." 61 Ohio St. 3d at 463, 575 N.E.2d at 207.

Am. Sub. H.B. 626 was similarly interpreted in 1991 Op. Att'y Gen. No. 91-008 to mean that the board of county commissioners was "no longer required to make a levy necessary to raise the amount determined" by the veterans service commission. 1991 Op. Att'y Gen. No. 91-008 (syllabus, paragraph 1). As the opinion explains:

> The words "review and revise" indicate that the board may examine and modify the budget requests submitted by the commission. The directive that the board of county commissioners make such levy (not to exceed five-tenths of a mill) as is necessary to raise the amount that the board approves indicates that the amount approved by the board may be different from the amount requested by the commission. It is clear that, as currently in effect, R.C. 5901.11 authorizes the board of county commissioners to examine the budgetary requests submitted by the veterans service commission, to revise those requests, and to levy a tax in accordance with the board's determination of the amounts that will be required for the purposes of the veterans service commission.

1991 Op. Att'y Gen. No. 91-008 at 2-41. *See Lynch v. Gallia County Bd. of Comm'rs*, 79 Ohio St. 3d 251, 255, 680 N.E.2d 1222, 1225 (1997) (the General Assembly's amendment of R.C. 5901.11 in 1988 "expressed a clear departure from the *Binder* decision and manifested an intent to give the board [of county commissioners] discretion over the veterans service commission budget," and the court in *State ex rel. Veterans Service Office v. Board of County Comm'rs* "confirmed this intention").

R.C. 5901.11 was amended once again in 1994 to provide that, after the veterans service commission determines the probable amount necessary and prepares and submits a budget to the board of county commissioners, the board "may review the proposed budget and shall appropriate funds to the commission pursuant to Title III, section 5705.05, and sections 5705.38 to 5705.41 of the Revised Code." 1993-1994 Ohio Laws, Part IV, 6089, 6094-6095 (Am. Sub. H.B. 448, eff. July 22, 1994). While the board of county commissioners retained the authority under the amendment to "review" the budget of the veterans service commission, Am. Sub. H.B. 448 deleted its authority to "revise" the commission's budget request, and added to R.C. 5901.11 language that the board of county commissioners "shall appropriate funds." Also added was language authorizing the veterans service commission to request a hearing before the board of county commissioners to discuss the budget request. In *Lynch v. Gallia County Bd. of Comm'rs*, the court interpreted these statutory changes to mean that, while the board of county commissioners may review the budget of the veterans service commission, such review is limited to detecting any mathematical errors and to ensuring that the budget comports with all statutory requirements, such as those governing its format, time of submission, and the inclusion of items mandated by law. Citing *Semetko* with approval, the court concluded that, under R.C. 5901.11,

as amended by Am. Sub. H.B. 448, the review by the board of county commissioners "can, and should, result in rejection of an unlawful budget request, but not revision of a lawful request." 79 Ohio St. 3d at 257, 680 N.E.2d at 1226.

The language of R.C. 3709.29 is analogous to the version of R.C. 5901.11 interpreted in the *Binder* and *Semetko* decisions. The consistent use of the word "shall" throughout the description of the board of county commissioners' duties, together with the board's lack of authority to "revise" or otherwise modify or disregard the board of health's certification leads to the conclusion that the board of county commissioners has a mandatory duty, upon certification of an insufficiency of funds by the board of health, to submit the question of a tax levy in excess of the ten-mill limitation to the voters.

Relationship Between Board of County Commissioners and General Health District

This interpretation is consistent with the relationship between a board of county commissioners and a general health district generally. Although the board of health of a general health district is not itself a taxing authority, and must act through the board of county commissioners in order to place the question of a tax levy in excess of the ten-mill limitation before the voters,[2] the health district is not a county body and is not under the operational or fiscal control of the board of county commissioners.[3] *See* 1945 Op. Att'y Gen. No. 629, p. 790, 791 ("[g]eneral health districts are not county functions or agencies, but are separate and distinct departments or branches of the state sovereignty for which the county commissioners are in no way responsible," apart from any statutory responsibility expressly imposed). Like the duty of a taxing authority pursuant to R.C. 5705.23, as described above, the board of county commissioners' function under R.C. 3709.29 is "ministerial" or "administrative."[4] *Cf.* R.C.

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[2] The board of county commissioners is also authorized to issue securities pursuant to R.C. Chapter 133 to provide funds for a general health district's acquisition of real property, if the health district agrees pursuant to contract to pay the county the amount of the debt charges on the securities on or before the date the charges fall due. R.C. 3707.55. *See generally* 2000 Op. Att'y Gen. No. 2000-048.

[3] Additional evidence of a general health district's independence from the board of county commissioners is its ability to submit its appropriation measure for funding within the ten-mill limitation to the county budget commission without first submitting it to the county commissioners, R.C. 3709.28, unlike departments, offices, and agencies of the county, which must submit their estimates of expenses and revenue to the board of county commissioners for inclusion in the tax budget submitted by the board to the county budget commission. *See* R.C. 5705.28; R.C. 5705.29.

[4] Even the county budget commission, which is considered to be "the county financial coordinating body" for the budgets of the local taxing authorities, 1937 Op. Att'y Gen. No. 997, vol. II, p. 1744, 1747, lacks authority to modify a tax levy deemed necessary by the board of

5705.03(B) (taxing authority determines the necessity for levying a tax outside the ten-mill limitation for any purpose authorized by law); 1979 Op. Att'y Gen. No. 79-016 at 2-51 (the board of county commissioners is the taxing authority for a county mental health and retardation service district and as such, "it is the entity responsible for determining the tax needs of the district").

Application of R.C. 5705.191

You have asked about the application of R.C. 5705.191 to the issue at hand. R.C. 3709.29 states that the resolution filed by the board of county commissioners with the board of elections placing the question of a tax levy on the ballot must conform to R.C. 5705.191. R.C. 5705.191 authorizes the taxing authority of a subdivision to pass a resolution placing before the voters the question of levying a tax in excess of the ten-mill limitation when "the amount of taxes that may be raised within the ten-mill limitation by levies on the current tax duplicate will be insufficient to provide an adequate amount for the necessary requirements of the subdivision." *See* R.C. 5705.01(A) (defining "[s]ubdivision" to include any county).

Although one purpose for which such levy may be made is to supplement the subdivision's general fund to make appropriations for "health" purposes, the tax is not levied for the benefit of the general health district. A tax levy proposed and approved under R.C. 5705.191 by a board of county commissioners is to provide adequate funding for the *county* and, if levied for health purposes, is intended to "supplement the general fund" of the county. The revenue derived from such a levy is not credited to, or for the use of, the general health district. Although R.C. 3709.29 requires the county commissioners' resolution to "conform" to R.C. 5705.191, and thus meet the requirements of R.C. 5705.191 as to form, timing, and notice (where not otherwise specified by R.C. 3709.29), a resolution approved by the board of county commissioners for the benefit of the general health district is one adopted by the authority granted in R.C. 3709.29, not R.C. 5705.191.

As discussed above, a county has very limited and clearly defined responsibilities with regard to the support of a general health district. *See* 1945 Op. Att'y Gen. No. 629, p. 790, at 791-92 ("county commissioners have only such authority in financial affairs as is given them by statute … [and] are without authority to appropriate county funds for the use of the board of health of the general health district in paying its operating expenses"). The board of county commissioners has no authority to provide the health district with funds generally nor with funds derived from a tax levied under R.C. 5705.191 in particular. As you state in your opinion request, the authority of a board of county commissioners or other taxing authority to propose a tax levy under R.C. 5705.191 is discretionary. However, upon receipt of a board of health's

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health pursuant to R.C. 3709.29. R.C. 5705.31(E) requires the budget commission to approve without modification a district's levy under R.C. 3709.29, so long as the levy has been properly authorized. *See Village of South Russell v. Budget Commission*, 12 Ohio St. 3d 126, 465 N.E.2d 876 (1984) (interpreting the phrase, "properly authorized," as used in R.C. 5705.31).

certification of insufficiency of funds, a board of county commissioners acts pursuant to the authority granted by R.C. 3709.29, not R.C. 5705.191, and such duty is mandatory.

Certification of Board of Health Must be Lawful

As emphasized in *Semetko* and *Lynch*, however, even though the board of county commissioners has no authority to revise or reject a board of health's certification of insufficient funds that has been properly adopted and is otherwise lawful, the board of county commissioners does have the ability to reject such certification where the board of health has not acted in accordance with all relevant statutory requirements.[5] For example, the board of county commissioners would have no duty, and indeed no authority, to pass a resolution submitting the question of the tax levy to the voters if there were no insufficiency of funds within the ten-mill limitation to meet the expenses of the health district. *See* 1953 Op. Att'y Gen. No. 2569, p. 163 (the only purpose of the levy is to supply the deficiency in the health district's budget, and absent such insufficiency, neither the board of health nor the board of county commissioners acting for it had the authority to submit the proposed tax levy to the electors). Thus, the duty of the board of county commissioners to submit the question of a tax levy to the voters under R.C. 3709.29 is contingent upon the receipt of a certification of insufficiency that has been properly adopted by the board of health and is otherwise lawful. Once the board of county commissioners has determined, however, that the certification is lawful, it has a mandatory duty to submit the question of a tax levy to the voters.

Additional Funding to Prevent the Spread of an Epidemic

As a final matter, it is our understanding that, in this instance, the budget deficiency has resulted from an outbreak of cryptosporidiosis in the county. R.C. 3709.30 specifically authorizes a board of health to apportion the expenses necessary to prevent the spread of an epidemic or "unusual prevalence of a dangerous communicable disease" if current funding is insufficient to defray such expenses. The required amount is apportioned among the townships and municipal corporations in which the condition exists on the basis provided in R.C. 3709.28. *Id.* Thus, in this instance, the board of health may have a second method by which to remedy the deficiency of funds.

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[5] Unlike the language of R.C. 5901.11 that was examined in *Lynch v. Gallia County Bd. of Comm'rs*, 79 Ohio St. 3d 251, 680 N.E.2d 1222 (1997), R.C. 3709.29 contains no explicit authority for the board of county commissioners to "review" the board of health's certification. Authority to review the board of health's certification for the purpose of ensuring it is lawful may be implied, however, as part of the proper performance of the board of county commissioners' statutory duties. Such implied authority was found in *State ex rel. Semetko v. Board of Comm'rs*, 30 Ohio App. 2d 130, 283 N.E.2d 648 (Lucas County 1971), even though the board of county commissioners had no express authority under R.C. 5901.11, as it read at the time, to "review" the certification of the soldiers' relief commission.

Conclusion

It is, therefore, my opinion, and you are hereby advised, that when the board of health of a general health district certifies to the board of county commissioners of the county in which the health district is located that the taxes within the ten-mill limitation will not provide sufficient funds to meet the district's expenses, the board of county commissioners has a mandatory duty under R.C. 3709.29 to pass a resolution that it is necessary to levy a tax in excess of the ten-mill limitation and to file such resolution with the board of elections for placement on the ballot, so long such certification of insufficiency has been properly adopted by the board of health and is otherwise lawful.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 28, 2001

The Honorable W. Duncan Whitney
Delaware County Prosecuting Attorney
15 West Winter Street
Delaware, Ohio 43015

SYLLABUS: 2001-013

When the board of health of a general health district certifies to the board of county commissioners of the county in which the health district is located that the taxes within the ten-mill limitation will not provide sufficient funds to meet the district's expenses, the board of county commissioners has a mandatory duty under R.C. 3709.29 to pass a resolution that it is necessary to levy a tax in excess of the ten-mill limitation and to file such resolution with the board of elections for placement on the ballot, so long such certification of insufficiency has been properly adopted by the board of health and is otherwise lawful.