OPINION NO. 75-038

Syllabus:

A state chartered building and loan association is able, pursuant to R.C. 1151.292, to make real estate loans to home owners of a new community created pursuant to R.C. Chapter 349 even though the lien of the community development charge, as defined in R.C. 349.01(L), has been declared by a covenant, which has been duly adopted and recorded, to have priority over the mortgage lien.

To: Roger W. Tracy, Jr., Supt. Building and Loan Assoc., Dept. of Commerce, Columbus, Ohio

By: William J. Brown, Attorney General, May 27, 1975

I have your request for my opinion which reads in part as follows:

> "Chapter 349. of the Revised Code, which provides for the establishment of new community organizations, has presented a problem to this Division. The essence of the problem is that the nature of the community development charge as defined by Section 349.01(L) of the Revised Code and characterized as a covenant running with the land in Section 349.07 of the Revised Code is not clearly ascertainable from the wording of the statute. This lack of clarity has resulted in state-chartered building and loan associations failing to enter this lending market.
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> ". . . .
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> "Therefore, in order to administer properly the affairs of state-chartered building and loan associations it is this Division's desire to submit to you for Opinion the following questions involving Sections 349.07 and 1151.292 of the Revised Code:

"(1) Assuming that the covenant imposes a first lien, does that priority conflict with the requirements of division (A) of Section 1151.292 of the Revised Code, which requires that loans be made upon the security of liens which are first in priority except for taxes and assessments not then payable?

"(2) Is the new Community Authority created by Chapter 349. of the Revised Code an authority capable of taxing or assessing, and if so, does the Community Development Charge constitute a tax or assessment not then payable within the meaning of division (A) of Section 1151.292 of the Revised Code?

"(3) If the Community Development Charge imposes a lien which cannot be characterized as a tax or assessment, may the New Community Authority waive or subordinate the lien in favor of a building and loan association, to enable a loan upon the security of the real estate to qualify under division (A) of Section 115.292 of the Revised Code?

In 1972 the General Assembly enacted R.C. Chapter 349 for the purpose of encouraging well planned, diversified and economically sound new communities. R.C. 349.01, which sets forth the definition of various terms used in the chapter, provides in part as follows:

"As used in this chapter:

". . . .

"(D) 'New community authority' means a body corporate and politic in this state, established pursuant to section 349.03 of the Revised Code and governed by a board of trustees as provided in section 349.04 of the Revised Code.

"(E) 'Developer' means any person, organized for carrying out a new community development program and owns or controls, through leases of at least seventy-five years duration, options, or contracts to purchase, the land within a new community district, or any municipality or county which owns the land within a new community district, or has the ability to acquire such land, either by voluntary acquisition or condemnation in order to eliminate slum, blighted, and deteriorated or deteriorating areas and to prevent the recurrence thereof.

". . . .

"(K) 'Income source' means any and all sources of income to the community authority, including community development charges of which the new community authority is the beneficiary as provided in section 349.07 of the Revised Code, rentals, user fees and other charges received by the new community authority, any gift or grant received, any moneys received from any funds invested by or on behalf of the new community authority, and proceeds from the sale or lease of land and community facilities.

"(L) 'Community development charge' means a dollar amount which shall be determined on the basis of the assessed valuation of real property or interests in real property in a new community district sold, leased, or otherwise conveyed by the developer or the new community authority, the income of the residents of such property subject to such charge under section 349.07 of the Revised Code, if such property is devoted to residential uses or to the profits of any business, a uniform fee on each parcel of such real property originally sold, leased, or otherwise conveyed by the developer or new community authority, or any combination of the foregoing bases."

R.C. 349.06 which sets forth the powers of the new community authority, provides in part as follows:

"In furtherance of the purposes of this chapter, a new community authority may:

". . . .

"(E) Fix, alter, impose, collect and receive service and user fees, rentals, and other charges to cover all costs in carrying out the new community development program;

". . . .

"(Q) Enforce any covenants running with the land of which the new community authority is the beneficiary, including but not limited to the the collection by any and all appropriate means of any community improvement charge deemed to be a covenant running with the land and enforceable by the new community authority pursuant to section 349.07 of the Revised Code; and to waive, reduce, or terminate any community development charge of which it is the beneficiary to the extent not needed for any of the purposes provided in section 349.07 of the Revised Code, the procedure for which shall be provided in such covenants, and if new community authority bonds have been issued pledging any such community improvement charge, to the extent not prohibited in the resolution authorizing the issuance of such new community authority bonds or the trust agreement or indenture of mortgage securing the bonds."

R.C. 349.07, which provides that any covenant in a deed or conveyance from the developer or the community authority, by which the grantee agrees to pay a community development charge for the benefit of the community authority shall be deemed to be a covenant running with the land, provides as follows:

"Notwithstanding any other rule of law, any covenant or agreement in deeds, land contracts, leases and any other instruments or conveyance by which real estate or any interest in real estate is conveyed by the developer or by the new community authority to any person or entity whereby

such person or entity agrees, by acceptance of any such instrument of conveyance containing said covenant of agreement, to pay annually or semi-annually a community development charge for the benefit and use of the new community authority to cover all or part of the cost of the acquisition, construction, operation and maintenance of land, land development and community facilities, the debt service thereof and any other cost incurred by the authority in the exercise of the powers granted by Chapter 349. of the Revised Code shall be deemed to be a covenant running with the land and shall, in any event and without regard to technical classification, after such instrument has been duly recorded in the land records of the county, be fully binding on behalf of and enforceable by the new community authority against each such person or entity and all successors and assigns of the property conveyed by such instrument of conveyance.

". . . .

"No community development charge established pursuant to this chapter shall be construed as prohibiting or limiting the taxing power of municipal corporations.

Subsequent to your request you provided information as to Newfield's New Community of Montgomery County, and it is that information which is described hereafter and provides the factual basis for the analysis and conclusion which follows.

Pursuant to R.C. Chapter 349, a comprehensive scheme entitled Covenants, Conditions and Restrictions and Reservation of Easements for Newfield's New Community of Montgomery County, Ohio [hereinafter referred to as the Newfield's Covenants] has been adopted by both the community authority and the private developer. These covenants have been duly recorded in the proper county and have been recognized as binding on all parties in the form of covenants running with the land.

The community authority in question has chosen to impose a development charge in the form of an income charge. The covenants have also established an assessed valuation charge, but this is to be collected only in the event that the income charge is terminated. As defined in R.C. 349.01(L), however, the community development charge may take the form of an income charge, an assessed valuation charge, a uniform fee on each parcel, or any combination of the foregoing. Accordingly, the following discussion will not be limited to the income charge alone but will extend to every permissible form of development charge.

Article III, Section 3.01 of the Newfield's Covenants, which establishes the non-prepayable income charge, provides as follows:

"3.01. Establishment of Income Charge. There is hereby established for the benefit of the Community Authority as a charge on each Chargeable Parcel, an annual Income Charge based upon the Income of all Residents of such Parcel and in the amount of one and three-fourths percent of the annual Income of of all such Residents. Such Income Charge shall commence

on the date on which the Master Declaration is Recorded. In order to eliminate unnecessary expense, any Resident whose Income for any Income Charge Year is $1,000 or less shall be deemed to have no Income for such year."

Article III, Section 3.09 of the Newfield's Covenants which establishes the income charge lien, provides in part as follows:

"3.09. Income Charge Lien. The Income Charge established by Section 3.01, with respect to each Chargeable Parcel, together with any penalty and interest thereon, shall constitute a continuing lien in favor of the Community Authority on such Chargeable Parcel. If an installment of the Income Charge on any Parcel is not paid within the period provided in Section 3.07, the lien with respect to such delinquent installment shall be enforceable in the manner provided in Section 2.04. Such lien shall be prior to all other liens and encumbrances, whensoever perfected, on such Parcel except real estate taxes and assessments, liens of record in favor of the United States of America arising in connection with its guaranty of debentures pursuant to the Project Agreement and liens of the United States of America, the State of Ohio, and all other political subdivisions or governmental instrumentalities of the State of Ohio to the extent made superior by applicable law. Such lien shall continue until paid or released as provided in this Article, provided, however, that the amount of any lien existing on a Parcel at the time of conveyance thereof to a bona fide purchaser without actual notice of the lien shall be limited to the Income Charge, together with penalty and interest thereon, attributable to the Income of Residents thereof during the five preceding Income Charge Years of such Residents.

". . . .

"Notwithstanding the foregoing provisions of this Section, that part of the lien on any Parcel with respect to any Income Charge Year which is in excess of three percent of the Assessed Valuation thereof, shall be subordinate to any bona fide first mortgage on such Parcel. The Board may increase the percentage figure stated in the preceding sentence for any Income Charge Year in the manner and at the time provided for the waiver, reduction or termination of the Community Development Charge pursuant to Article V, provided that any such increase shall be effective only as to mortgages executed subsequent to the date of such increase. The lien provided in this Section shall be enforceable pursuant to the provisions of Section 2.04."

(Emphasis added.)

The existence of this lien has posed a rather formidable problem with respect to the lending restrictions of state chartered building and loan associations. R.C. 1151.292, which sets forth the procedures and limitations for real estate loans made by state chartered building and loan associations, provides in part as follows:

"A building and loan association shall observe the following procedures in making real estate loans:

"(A) The association may make loans upon obligations secured by a mortgage or deed of trust on real estate, which mortgage or deed of trust shall be made directly to the association. Except for taxes and assessments not then payable such obligations shall be first liens on real estate. This section does not prevent an association organized under Chapter 1151. of the Revised Code from accepting additional security when the primary and principal security is a first mortgage deed of trust on real estate." (Emphasis added.)

Inasmuch as R.C. 1151.292 proscribes loans by a building and loan association where anything but a tax or assessment would take priority over the mortgage, and inasmuch as the development charges in this case will, pursuant to the Newfield's Covenants, take such a priority, the issue here is whether the development charge may properly be considered along with taxes and assessments as an allowable priority obligation. Unless R.C. 1151.292 can be construed to allow a community development charge lien to take priority over the mortgage lien, state-chartered building and loan associations will be unable to make real estate loans on property in the community in question.

It will be noted that a development charge is not, in the strict and primary sense, a tax. The charge is not an involuntary obligation imposed by the sovereign. Rather, it is, in essence, a contractual obligation and cannot by definition constitute a tax. See Dayton v. Cloud, 30 Ohio St. 2d 295 (1972); The Columbus Citizens' Telephone Company v. Columbus, 88 Ohio St. 466 (1913).

Neither can this development charge be properly classified as an assessment. The power to levy special assessment is based upon the taxing power. The authority to levy special assessments for local improvements is conferred only by statute and the validity of such an assessment is conditioned upon compliance with the requirements of these statutes. Curry v. Lybarger, 133 Ohio St. 55 (1937). It is clear, therefore, that a development charge does not qualify as a special assessment.

The primary rule in construing any statute is to effectuate the intent of the General Assembly. Covert v. Industrial Commission 139 Ohio St. 401 (1942). The fact that the priority of the development charge lien was set forth by the covenants rather than by statute is certainly not dispositive of the issue of legislative intent. Here there is sufficient evidence to indicate that the General Assembly intended the development charge lien to have priority over a mortgage lien and the absence of a statute specifically providing for such priority is not a critical shortcoming.

As a general matter, it may be safely assumed that the General Assembly did not intend to foreclose state institutions from participating in loans to home owners of new communities created pursuant to R.C. Chapter 349. Neither an intention nor a rational basis to effect a preclusion of this sort is to be found in any of the pertinent legislation. This is especially true in light of R.C. 349.16 which specifically provides for the liberal construction of Chapter 349 to effect its purposes. Indeed, such a preclusion would seem to thwart the expressed intent of the legislature in enacting R.C. Chapter 349 that the initiative and partici-

pation of private enterprise is to be encouraged in the development of these new communities. R.C.349.02.

Yet, a restrictive interpretation of R.C. 1151.292 would have precisely this effect. The General Assembly, in enacting R.C. 349.07, clearly contemplated that the covenants providing for the development charge would be imposed before any mortgage was given to a purchaser of land in the new community. Since there would be no mortgages recorded prior to the covenants, the development charge would automatically have priority over all mortgages. Hence, there was no reason to specifically deal with the question of priority in R.C. Chapter 349. There is no support for any contention that the mortgage lien of the state chartered institution could ever take priority over the development charge lien once such charge is recorded. It is clear that the recordation of the income charge lien gives it irrevocable priority over the lien of a subsequent mortgage. Since this state has long adhered to the rule of "first in time--first in right," the recorded income charge lien will clearly be superior to later recorded mortgage liens. Metropolitan Securities Co. v. Orlow, 107 Ohio St. 583 (1923).

Of further significance is the failure of the General Assembly to specifically provide for the subordination of the development charge lien. R.C. 5311.18 provides that a condominium unit owners association shall have a lien upon the estate of any owner for unpaid common expenses from the time a certificate therefor is filed with the county recorder. It expressly provides, however, that the lien for common expenses shall be subordinate to the liens of first mortgages which are subsequently filed for record. R.C. 5311.18 thus represents a statutory modification of the rule that a recorded lien is superior to the lien of a subsequently recorded mortgage. Legislative intent that a recorded development charge lien be granted priority over a mortgage lien may be inferred from the absence in R.C. Chapter 349 of any provision calling for the subordination of the development charge lien.

Although a development charge of the type in question does not come within the letter of R.C. 1151.292, such a charge is so strikingly similar in its nature and object to both a tax and an assessment that it does clearly come within the spirit of the exception set forth in this statute.

The type of development charge authorized in R.C. Chapter 349 is unique in Ohio law. Although neither a tax nor an assessment, the development charge is the sole source of income for a public entity which is declared by statute to be a body both corporate and politic. The charge is payable pursuant to statutory authority and it is used exclusively for the benefit of a public body. In this respect the development charge is directly analogous to the revenue generating powers (taxes and special assessments) of municipal corporations. See generally Cleveland Metropolitan Housing Authority v. Lincoln Property Management Co., 22 Ohio App. 2d 157 (1970) where the court reasoned that a lien created to support improvement activity is equivalent in objective and effect to an assessment, and therefore had the same priority as a special assessment.

These development charges, like general taxes, represent a recurring, periodic expense. Like taxes, and unlike other liens, they are not for a sum certain. Rather, the charges are either a function of the owner's income or of the value of the property and are not prepayable. In addition, that portion of the income charge lien which has priority over a first mortgage is, like most taxes,

an extremely small percentage of the assessed valuation of the property. It is clear, therefore, that a development charge is substantially identical to a tax or an assessment and the inclusion of such a charge within the exception set forth in R.C. 1151.292 is wholly compatible with the operation of that statute.

In conclusion, therefore, it is clear that a community development charge as defined by R.C. 349.01(L) is in the nature of a tax or an assessment, and the priority of a development charge lien over that of the mortgage will not, pursuant to R.C. 1151.292, prevent a state chartered building and loan association from making real estate loans to home owners of a new community created pursuant to R.C. Chapter 349.

In specific answer to your request, it is my opinion and you are so advised that a state chartered building and loan association is able, pursuant to R.C. 1151.292, to make real estate loans to home owners of a new community created pursuant to R.C. Chapter 349 even though the lien of the community development charge, as defined in R.C. 349.01(L), has been declared by a covenant, which has been duly adopted and recorded, to have priority over the mortgage lien.