

December 14, 2022

The Honorable James R. Flaiz
Geauga County Prosecuting Attorney
231 Main Street, 3rd Floor
Chardon, OH 44024

SYLLABUS: 2022-017

1. As a taxing unit, a park-district board is not authorized under R.C. 5705.13, or any other statute, to create a reserve fund; instead, it may establish a replacement fund only, pursuant to R.C. 1545.28.
2. As a taxing unit, a park-district board derives authority to levy or replace taxes under R.C. 1545.20–.21, not R.C. Chapter 5705.
3. A park-district board is authorized to modify the language of a replacement, or replacement and additional tax levy, under R.C. 1545.21.
4. Commissioners of a park-district board established under R.C. Chapter 1545 are not required to reside in the territory of the park district, regardless of their ability to levy taxes.



DAVE YOST

OHIO ATTORNEY GENERAL

Opinions Section
Office (614) 752-6417
Fax (614) 466-0013

30 East Broad Street, 25th Floor
Columbus, Ohio 43215
www.ohioattorneygeneral.gov

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OPINION NO. 2022-017

The Honorable James R. Flaiz
Geauga County Prosecuting Attorney
231 Main Street, 3rd Floor
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Dear Prosecutor Flaiz:

You requested an opinion regarding various aspects of the taxing authority of, and residency requirements for, park-district boards. I have framed your questions as follows:

1. Is a park-district board established under R.C. Chapter 1545, and as a “taxing unit” under R.C. 5705.01(H), authorized to create a reserve fund under R.C. 5705.13? If not, can it establish one under a different provision?
2. Which sections of the Revised Code authorize a park-district board to levy taxes, renew tax levies, or replace tax levies?
3. Can a park-district board established under R.C. Chapter 1545 modify the language of a replacement, or replacement and additional tax levy, under R.C. 1545.21?

4. Do commissioners of a park-district board established under R.C. Chapter 1545 have to live in the territory of the park district, and does the answer turn on the park board's ability to levy taxes?

I

A park-district board established under R.C. Chapter 1545 is a creature of statute, and accordingly “may exercise only those powers that the General Assembly confers on it.” *In re Icebreaker Windpower, Inc.*, 2022-Ohio-2742, ¶ 56, *citing In re Black Fork Wind Energy, L.L.C.*, 156 Ohio St.3d 181, 2018-Ohio-5206, 124 N.E.3d 787, ¶ 20; *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 471, 166 N.E. 407 (1929) (“There can be no question of the power of the General Assembly to establish park districts and boards of park commissioners, and to define their powers.”); *see, e.g.*, 2016 Op. Att’y Gen. No. 2016-006, Slip Op. at 1; 2-61; 2017 Op. Att’y Gen. No. 2017-025, Slip Op. at 2; 2-253.

The power to levy taxes derives from R.C. Chapter 5705. For purposes of R.C. Chapter 5705, the park district here is considered a “metropolitan park district”. *See, e.g.*, R.C. 5705.01(D) (“metropolitan park districts” appoint treasurers under R.C. 1545.07). Can a metropolitan park district levy taxes?

Yes, Under R.C. 5705.01, “subdivisions” with a “taxing authority,” have taxing authority. So do “taxing units.” These three terms have separate definitions. R.C. 5705.01(A); R.C. 5705.01(C); R.C. 5705.01(H). Neither park districts nor their boards are listed in the

definitions of a “subdivision” or “taxing authority”. R.C. 5705.01(A); R.C. 5705.01(C). The Revised Code is silent as to park-district boards, but the park districts do qualify as taxing units. *Warren Cty. Park Dist. v. Warren Cty. Budget Comm.*, 37 Ohio St.3d 68, 69, 523 N.E.2d 843 (1988); 2022 Op. Att’y Gen. No. 2022-006, Slip Op. at 7.

R.C. 5705.01(H) defines “taxing unit” as:

any subdivision or other governmental district *having authority to levy taxes on the property in the district* or issue bonds that constitute a charge against the property of the district, including conservancy districts, *metropolitan park districts*, sanitary districts, road districts, and other districts.

(emphasis added). Thus, metropolitan park districts are taxing units, and they may levy taxes pursuant to statute.

II

You first ask whether a park-district board established under R.C. Chapter 1545, as a taxing unit, is authorized to create a reserve fund under R.C. 5705.13; and, if not, whether it can establish one under a different provision. Under the plain language of the statutes, park-district boards lack authority to create a reserve fund.

R.C. 5705.13 states that “a *taxing authority of a subdivision*...may establish reserve balance accounts.” (emphasis added) R.C. 5705.13(A). The reserve balance account is to be used for stabilizing budgets and paying for elements of self-insurance. R.C. 5705.13(A)(1)-(3). Because this section does not use the term “taxing unit,” it does not enable taxing units to establish reserve balance accounts. *Compare with* R.C. 5705.02 (using the phrase “subdivision or other taxing unit”); *see also* 1985 Op. Att’y Gen. No. 85-010 (“The difference in language between...two provisions of the same chapter of the Revised Code, clearly indicates that the General Assembly intended different meanings to be attached to the different language”). Because the park-district board is a taxing unit, not a subdivision, it is not authorized to establish a reserve balance account under R.C. 5705.13.

No other provision empowers a park-district board to establish a reserve fund to stabilize the budget and cover self-insurance costs. The only fund that a park-district board is statutorily authorized to create is a “replacement fund.” R.C. 1545.28; *Akron Metro Park Dis.*, 120 Ohio St. 464, 471 (park-district board powers established by statute). This fund comprises money set aside from annual revenue for the purpose of rebuilding, restoring, or repairing property that is deemed unfit. R.C. 1545.28. This money can be used for its stated purposes only, however, and it cannot be used for the same purposes as the reserve fund. *Id.*; R.C. 5705.13(A)(1)-(3); *see also* R.C. 5705.10(I) (“Money paid into any fund shall be used only for the purposes for which such fund is established”).

III

You next ask which sections of the Revised Code authorize a park-district board to levy taxes, renew tax levies, or replace tax levies. I will address each action individually.

A

First, the authority to levy taxes.

A park-district board may exercise only those powers conferred by the General Assembly. And only R.C. 1545.20–21 gives it any taxing power; that statute says park districts “levy taxes upon all the taxable property within the park district.” *See In re Icebreaker Windpower, Inc.*, 2022-Ohio-2742, ¶ 56.

You ask if the park-district board is able to levy taxes under R.C. 5705.19 generally or under R.C. 5705.19(H), and it is not. The reason is simple: both statutes apply only to the taxing authority of a subdivision. R.C. 5705.19 (“The taxing authority of any subdivision...may declare by resolution...”); *see also* 1991 Op. Att’y Gen. No. 91-042, at 2-228 (a county MR/DD board is not the taxing authority of a subdivision that may submit tax levies under R.C. 5705.19). Because these sections confer no power on “taxing unit[s],” as opposed to political subdivisions, they give taxing units like park-district boards no power to levy taxes.

B

Now consider the power to renew tax levies.

Under R.C. 5705.25, taxing authorities may renew resolutions they adopted and certified previously. R.C. 5705.25(A)(1)–(2). This section references resolutions adopted under R.C. 5705.19, which, as stated above, does not apply to taxing units and therefore does not apply to park-district boards. As a result, levies imposed by park-district boards pursuant to R.C. 1545.20–.21 cannot be renewed under R.C. 5705.25.

Further, no provision in R.C. Chapter 1545 permitting park-district boards to renew existing levies. Instead, Ohio law provides that an existing levy is canceled by the passage of a new levy. R.C. 1545.21(B). If the new levy millage does not exceed the original millage of the levy canceled, it is called a “replacement levy”; and, if it exceeds the original millage of the levy canceled, it is called a “replacement and additional levy.” *Id.*

In sum, to effectively “renew” an existing park-district board levy, it would have to be placed on the ballot as a replacement, or as a replacement and additional levy. *Id.*

C

Finally, I consider the power to issue replacement levies.

Generally, R.C. 5705.192 governs replacement levies. For the purposes of only R.C. 5705.192, the definition of “taxing authority” is expanded to include *township* boards of park commissioners established under R.C. 511.18. R.C. 5705.192(A). Significant is that the definition of taxing authority is expanded in this section

only. And it refers *only* to township park districts, not to metropolitan park districts. 2003 Op. Att’y Gen. No. 2003-018, at 2-141, citing *Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) (“having used certain language in one instance and wholly different language in the other, it will rather be presumed that different results were intended”); see also 2022 Op. Att’y Gen. No. 2022-004, Slip Op. at 7 (“different language connotes different meaning”). Therefore, R.C. 5705.192 does not apply to park-district boards established under R.C. Chapter 1545, and the only way that these boards can replace levies is to follow the procedure set forth in R.C. 1545.21.

IV

Your third question asks whether a park-district board established under R.C. Chapter 1545 can modify the language of a replacement or replacement and additional levy under R.C. 1545.21. The answer here is “yes.”

A park-district board tax levy cannot be renewed, it can only be replaced. R.C. 1545.21(B). When replaced, the existing levy is canceled. *Id.*

It follows that the replacement levy is essentially a new item for voters to consider, not a continuation of the existing levy, and the language describing the replacement levy may therefore be different than the language describing the existing levy. *Id.* Regardless of whether it is a “replacement” or “replacement and additional” levy, the details of a levy on the ballot “shall set forth the purpose for which the taxes shall be

levied, the levy's estimated annual collections, the annual rate of levy, expressed in mills for each dollar of taxable value and in dollars for each one hundred thousand dollars of the county auditor's appraised value, and the number of years of such levy." *Id.* There is nothing indicating that the details for the new levy on the ballot must remain the same as those of the existing levy.

While you have expressed a concern as to whether the language of a replacement levy is misleading to electors, this a question of fact for the courts that I cannot resolve in an Attorney General opinion. 2014 Op. Att'y Gen. No. 2014-007, Slip Op. at 15; 2004 Op. Att'y Gen. No. 2004-022, at 2-186 ("it is inappropriate to use a formal opinion of the Attorney General to make findings of fact or to attempt to determine rights between particular parties"); *see, e.g., State ex rel. Thomas v. Conkle*, 5th Dist. Holmes No. CA 308, 1978 Ohio App. LEXIS 9767, at *6 (Mar. 30, 1978) (a levy was determined to be misleading because it did not indicate that it increased the existing levy instead of just renewing it).

V

Your final question concerns the residency requirements for commissioners of a park-district board established under R.C. Chapter 1545. Specifically, must members live in the territory of the park district? You also ask whether this determination is impacted by the park-district board's ability to levy taxes. I find the answer to both questions is "no."

A

The park-district board is a public body, and its members, the commissioners, are public officers. *Chernin v. Geauga Park Dist.*, Ct. of Cl. No. 2017-00922PQ, 2018-Ohio-1579, ¶ 17; *State ex rel. AG v. Brennan*, 49 Ohio St. 33, 38, 29 N.E. 593 (1892) (“And in *Bradford v. Justices* [***9], 33 Ga. 332; “Where an individual has been appointed or elected, in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded as a public officer. Whether he has been commissioned in form can make no difference; the commission is but evidence of title to the office.”); *State ex rel. Landis v. Bd. of Commrs.*, 95 Ohio St. 157, 159, 115 N.E. 919 (1917); 1999 Op. Atty Gen. No. 99-027, at 2-172. As public officers, the commissioners of a park-district board are members of the unclassified service and appointed by the probate judge. *See generally* 2000 Op. Att’y Gen. No. 2000-025; R.C. 1545.05.

R.C. Chapter 1545 does not list criteria for commissioner eligibility. *See generally* R.C. 1545.05. Thus, to determine who might be eligible for appointment as a park-district board commissioner, we look to other provisions in the Ohio Constitution and the Revised Code.

The Ohio Constitution states that “no person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector”. The term “qualifications of an elector” is defined as “[e]very citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be

provided by law, and has been registered to vote for thirty days, has the qualifications of an elector.” Article XV, Section 4, Ohio Constitution; Article V, Section 1, Ohio Constitution.

There is nothing in the Ohio Constitution requiring that a person be a county resident, only that the person be an elector in the State of Ohio. *State ex rel. Addis v. McClenen*, 119 Ohio St.3d 500, 2008-Ohio-4924, 895 N.E.2d 532, ¶ 24. In fact, the Ohio Constitution of 1851 removed county-residency requirements. *State ex rel. Jeffers v. Sowers*, 171 Ohio St. 295, 296, 170 N.E.2d 428 (1960) (the Ohio Constitution of 1802 had a requirement for appointed persons in a county to be a citizen of that county, but this requirement was removed in 1851 and the “only geographical area or political unit there mentioned is the state, and when the term “elector” is employed it would logically seem to connote an elector of the only political territory mentioned, namely, the state”).

Looking to the Revised Code, R.C. 3.15(A) addresses residency for public officials and requires that a person be a resident of the district represented. R.C. 3.15(A)(1)-(4). But, R.C. 3.15(B) qualifies R.C. 3.15(A), noting that the latter statute “applies to persons who have been either elected or *appointed to an elective office*,” so this does not apply to the appointed commissioners on the park-district board, who are appointed to appointment-only positions. R.C. 3.15(B).

In a previous opinion considering whether the county board of commissioners could impose a county

residency requirement for classified and unclassified positions in the county, it was determined that no statute or rule “restricts to county residents those individuals who are eligible for appointment to positions in the unclassified county service or restricts the power of county appointing authorities to appoint individuals of their choosing, regardless of county of residence, to positions in the unclassified service of the county,” and the board of county commissioners is not authorized to impose those restrictions. 2003 Op. Att’y Gen. No. 2003-033, at 2-278; *see also Geauga Cty. Bd. of Commrs. v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E. 2d 696 (1993) (counties are creatures of statute and “may exercise only those powers affirmatively granted by the General Assembly”).

Ultimately, the board of county commissioners cannot require county residency for the position and the only requirement for public office that is relevant to the park-district board is that the person be an elector in the State of Ohio. 2003 Op. Att’y Gen. No. 2003-033, at 2-278; Article XV, Section 4, Ohio Constitution; Article V, Section 1, Ohio Constitution.

The commissioners of the park-district board, therefore, do not need to reside within the park district territory to be eligible for appointment.

B

The next question is whether the power to levy taxes impacts my answer to the residency requirement question. For the following reasons, I conclude that it does not.

Article II, Section 27 of the Ohio Constitution states that “all officers not provided for by the Constitution may be either elected or appointed, as the Legislature may direct.” *Akron Metro. Park Dist.*, 120 Ohio St. 464, 483-484. The Ohio Constitution does not establish the park-district board; instead, it was created by statute by the General Assembly and its members are appointed by the probate judge. R.C. 1545.05; *see also* Article X, Section 4, Ohio Constitution. The Ohio Supreme Court has held that there is no constitutional provision “which limits the power to levy taxes to elected officials, as distinguished from those who are appointed to office.” *Akron Metro. Park Dist.*, 120 Ohio St. 464, 483. Thus, as long as a person is lawfully appointed to a position, he or she may levy taxes. *Id.*, at 484 (though taxes used to be levied only by officers elected by the people, since public offices may be created by the General Assembly via statute and filled by appointment, they may exercise the same powers).

In sum: the ability to levy taxes is dependent upon eligibility for office; the eligibility for office is not dependent upon ability to levy taxes. And, since eligibility for office is not dependent upon residency, there is no residency requirement for levying taxes.

Conclusions

Accordingly, it is my opinion, and you are hereby advised that:

1. As a taxing unit, a park-district board is not authorized under R.C. 5705.13, or any other statute, to create a reserve fund; instead, it may establish a replacement fund only, pursuant to R.C. 1545.28.
2. As a taxing unit, a park-district board derives authority to levy or replace taxes under R.C. 1545.20–.21, not R.C. Chapter 5705.
3. A park-district board is authorized to modify the language of a replacement, or replacement and additional tax levy, under R.C. 1545.21.
4. Commissioners of a park-district board established under R.C. Chapter 1545 are not required to reside in the territory of the park district, regardless of their ability to levy taxes.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping initial "D".

DAVE YOST
Ohio Attorney General