

**OPINION NO. 89-075**

**Syllabus:**

1. An ordinance providing for transfer of moneys from the general fund to a special fund presents a question that, pursuant to R.C. 5705.14(E), a non-charter village is authorized to control by legislative action; therefore, pursuant to Ohio Const. art. II, §1f, such ordinance may be proposed by initiative petition.

2. When proposed legislation on a question subject to the right of initiative under Ohio Const. art. II, §1f is presented to a board of elections by an otherwise valid initiative petition, the board of elections is compelled to place that question on the ballot regardless of any question as to the legality of the proposed legislation.

To: Alan R. Mayberry, Wood County Prosecuting Attorney, Bowling Green, Ohio  
 By: Anthony J. Celebrezze, Jr., Attorney General, September 8, 1989

I have before me your request for my opinion regarding an initiative petition filed by the citizens of a non-charter village. The proposed ordinance requires that all interest earned from a "water capital improvement fund" established by the village in 1972 be transferred or paid into a designated line item in the general fund. The proposed ordinance further requires that, annually, all money allocated to that line item in the general fund be transferred into the "water capital improvement fund" for investment by the Board of Public Affairs. Specifically, you have asked that I address the following questions:

1. Can an ordinance be proposed by initiative petition providing that money allocated to a line item in the general fund be automatically transferred to a special fund every year in light of R.C. §5705.14 which requires the adoption of a resolution by council for each transfer?
2. Is the Board of Elections compelled to place an issue on the ballot which, if enacted by the electors, would establish a procedure for transferring money from the general fund to a special fund automatically every year as opposed to the methods set forth in R.C. §5705.14?

I note initially that the county board of elections has a duty to "review, examine and certify the sufficiency and validity of petitions." R.C. 3501.11(K); *see also State ex rel. Rose v. Ryan*, 119 Ohio App. 363, 376, 200 N.E.2d 668, 678 (Franklin County 1963) (the provisions of R.C. Title 35 "quite clearly and wisely" require a county board of elections to conduct a municipal election whenever authorized to do so). Pursuant to R.C. 309.09, you are designated as the legal advisor of the board of elections. You have no statutory responsibility to advise village officials, however, as R.C. 733.48 authorizes the legislative authority of a village to provide such legal counsel as deemed necessary. I may respond to your request, therefore, only with respect to the duties of the board of elections. R.C. 109.14 (attorney general shall advise county prosecutor with respect to statutory duties). *See also* 1988 Op. Att'y Gen. No. 88-008 (attorney general may advise requestors only to the extent of their statutory duties).

I turn now to your first question, which, in essence, asks whether R.C. 5705.14 prohibits the introduction of the ordinance you have described by the process of initiative. In Ohio, the power of initiative is a constitutional right of the residents of each municipality, which may be exercised on any matter subject to municipal legislative control. Ohio Const. art. II, §1f states:

The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law. (Emphasis added.)

*See also* R.C. 731.28 ("[o]rdinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition") (emphasis added);<sup>1</sup> *see, e.g., State ex rel. Rhodes v. Bd. of Elections*,

<sup>1</sup> R.C. 731.28-.41 are the implementing statutes governing the exercise of initiative in non-charter municipalities. *See Dubyak v. Kovach*, 164

12 Ohio St. 2d 4, 230 N.E.2d 347 (1967) (board of elections not required to place initiative resolution regarding Vietnam war on ballot, as it was not a question municipality "is authorized by law to control by legislative action").

Review of R.C. 5705.14 shows that it clearly authorizes municipalities to transfer money from the general fund by legislative action. R.C. 5705.14 states, in pertinent part:

No transfer shall be made from one fund of a subdivision to any other fund, by order of the court or otherwise, except as follows:

....  
 (E) Money may be transferred from the general fund to any other fund of the subdivision.

....  
 Except in the case of transfer pursuant to division (E) of this section, transfers authorized by this section shall only be made by resolution of the taxing authority passed with the affirmative vote of two thirds of the members. (Emphasis added.)

See also R.C. 5705.01(A) (definition of subdivision includes any municipal corporation); R.C. 5705.01(C) (definition of taxing authority includes "in the case of a municipal corporation, the council or other legislative authority of the municipal corporation"). The exception language regarding transfers from the general fund pursuant to division (E), first enacted by 113 Ohio Laws 670 (H.B. 426, approved April 27, 1929), has been construed to authorize the making of general fund transfers by a resolution adopted by a simple majority. See, e.g., 1986 Op. Att'y Gen. No. 86-082 at 2-461 ("[t]ransfers effected pursuant to R.C. 5705.14(E) and (F) may be made pursuant to resolution of the taxing authority passed with the affirmative vote of a majority of the members"); 1939 Op. Att'y Gen. No. 791, vol. II, p. 996, 999-1000.<sup>2</sup> Thus, R.C. 5705.14 authorizes the council or other legislative authority of the municipal corporation to effect a transfer of money from the general fund by resolution.

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Ohio St. 247, 129 N.E.2d 809 (1955) (Ohio Const. art II, §1f is not self-executing and the initiative power in a non-charter municipality without its own initiative provisions may be exercised only as provided by statute); *accord City of Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 133 N.E. 556 (1921) (syllabus, paragraph three). These statutes also set out requirements governing the form and filing procedures for initiative petitions. You have not raised any question regarding the sufficiency of the petitions with respect to these requirements. I assume, therefore, for purposes of this opinion, that the petitions are valid in this regard.

<sup>2</sup> This interpretation is consistent with the legislative history of R.C. 5705.14. Prior to the addition of the exception language, all transfers between funds required a three-fourths vote. The development of the General Code provisions preceding R.C. 5705.14 was summarized by the court in *City of Niles v. Union Ice Corp.*, 133 Ohio St. 169, 174-77, 12 N.E.2d 483, 485-87 (1938), as follows:

Section 3799, General Code, the parent statute of Section 5625-13a, General Code, provided:

"By the votes of three-fourths of all the members elected thereto, and the approval of the mayor, the council may at any time transfer all or a portion of one fund...to the credit of one or more funds...."

In 1927, Section 3799, General Code, was repealed (112 Ohio Laws, 391), and Section 5625-13, General Code (112 Ohio Laws, 397), was enacted to replace it, and read as follows:

"No transfers shall be made from one fund of a subdivision to any other fund, by order of court or otherwise, except that transfers may be made from the general to special funds.... Such transfers shall only be made by authority of an appropriation in the annual or supplemental appropriation measure, or by

I am aware that not every act of a municipal council is legislative in nature. In *Donnelly v. Fairview Park*, 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968), the court held, in paragraphs one and two of the syllabus, that:

1. A public body essentially legislative in character may act in an administrative capacity.
2. The test for determining whether the action of a legislative body is legislative or administrative is whether the action taken is one enacting a law, ordinance, or regulation, or executing or administering a law, ordinance or regulation already in existence.

See also *Myers v. Schlering*, 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971) (applying the *Donnelly* test for purposes of determining legislative action under Ohio Const. art. II, §1f). It is clear, however, that a resolution enacted pursuant to R.C. 5705.14(E) cannot be classified as the administration or execution of that statute.

R.C. 5705.14 directs only the procedure for transfers between funds. Whether such transfers should be made and the amount and purposes of such transfers are decisions which must be made by the municipality. See *State ex rel. Toledo v. Weiler*, 101 Ohio St. 123, 128 N.E. 88 (1920) (syllabus, paragraph three) ("[e]ach municipality assumes responsibility consonant with the authority conferred, and is not only permitted but required to determine for itself the portion of its taxing and debt incurring power which shall be used for any authorized municipal purpose"); see also *Bazell v. City of Cincinnati*, 13 Ohio St. 2d 63, 233 N.E.2d 864 (1968) (syllabus, paragraph two) (determination of public purpose for expenditure of funds is function of the legislative body of the municipality), *appeal dismissed sub nom. Fosdick v. Hamilton County*, 391 U.S. 601 (1968); R.C. 731.47 ("[t]he legislative authority [of a municipality] shall have the management and control of the finances"). Such municipal decisions regarding the expenditure and allocation of funds are inherently legislative. See *Incorporated Village of Hicksville v. Blakeslee*, 103 Ohio St. 508, 134 N.E. 445 (1921) (resolution authorizing payments from the sinking fund is legislative in nature, even though unenforceable because prohibited by statute); 1982 Op. Att'y Gen. No. 82-006 at 2-18 ("[i]n the aspect of appropriating money from the county treasury, a county governing body must be deemed as exercising a legislative power" (quoting *Morgan County Commission v.*

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resolution of the taxing authority adopted by a three-fourths vote...."

In 1929, Section 5625-13, General Code, was amended (113 Ohio Laws, 670, 673) to read as follows:

"No transfers shall be made from one fund of a subdivision to any other fund, by order of the court or otherwise, except as hereinafter provided:

....  
 "e. Moneys may be transferred from the general fund to the sinking fund or the bond retirement fund to meet a deficiency...."

"f. Moneys appropriated therefor may be transferred from the general fund of a subdivision to a fund authorized by Sections 5625-11 or 5625-12...."

"Except in the case of transfers in accordance with paragraphs (e) and (f) of the section, transfers herein authorized shall only be made by resolution of the taxing authority passed with the affirmative vote of two-thirds of the members thereof."

G.C. 5625-13 was recodified as R.C. 5705.14 in 1953. Am. H.B. 1, 100th Gen. A., (1953) (eff. Oct. 1, 1953). The portion of the statute quoted above remained substantially the same until 1989 when the current statutory language went into effect. At that time the statutory provisions regarding general fund transfers in division (f) were removed and division (e) was expanded to allow transfers from the general fund to any other fund. See S.B. 293, 117th Gen. A. (1988) (eff. Mar. 17, 1989).

*Powell*, 292 Ala. 300, 305, 293 So. 2d 830, 834 (1974))). Thus, the transfer of money from the municipal general fund is a question which the municipality is authorized under R.C. 5705.14(E) to control by legislative action. Therefore, such transfers are subject to the power of initiative under Art. II, §1f of the Ohio Constitution.

The language of R.C. 5705.14 providing that transfer "shall *only* be made by resolution of the taxing authority" (emphasis added) does not in any way conflict with this constitutional mandate. The right of initiative is the right of the voters themselves to exercise the legislative authority of the municipality directly on their own behalf. See *State ex rel. Sharpe v. Hitt*, 155 Ohio St. 529, 539, 99 N.E.2d 659, 664 (1951) ("Constitutional Convention and the electors who enacted the amendments of 1912 meant the voters themselves to have the power to enact legislation as a part of the legislative power, subject to no limitations excepting those specifically expressed in the Constitution") (quoting and expressly adopting the dissent of Allen, J. in *State ex rel. Smith v. City of Fremont*, 116 Ohio St. 469, 472, 157 N.E. 318, 319 (1927)); *Mihocka v. Ziegler*, 28 Ohio Misc. 105, 107, 274 N.E.2d 583, 585 (C.P. Summit County 1971) ("an initiated ordinance [citation omitted] has no greater sanctity than legislation adopted by a city council....the ordinance has the same standing as if council itself had passed it"). An ordinance enacted through the process of initiative constitutes an act of the legislative authority of the municipality in the most fundamental sense. R.C. 5705.01(C) defines "[t]axing authority" as the council or *other legislative authority*." (Emphasis added.) Thus, introduction of the proposed ordinance by initiative petition is in no way inconsistent with the language of R.C. 5705.14. Moreover, since the right of initiative with respect to matters subject to municipal legislative control is constitutionally guaranteed, Ohio Const. art. II, §1f, the language of R.C. 5705.14 must be construed to include the exercise of that right. See R.C. 1.47 ("[i]n enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended"); see also *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955) (syllabus, paragraph one). I conclude that an ordinance providing for transfer of moneys from the general fund to a special fund presents a question that a non-charter village is authorized by R.C. 5705.14(E) to control by legislative action and that, pursuant to Ohio Const. art. II, §1f, such ordinance may be proposed by initiative petition.

The remaining issues raised by your questions are concerned with the legality of the specific provisions of the proposed ordinance, particularly whether the ordinance may bind future councils by an annual automatic transfer procedure. It has long been the rule in Ohio that an ordinance proposed by an otherwise valid initiative petition must be submitted to the voters, regardless of questions regarding the ultimate validity or constitutionality of the ordinance if enacted. As stated by the court in *City of Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 133 N.E. 556 (1921) (syllabus, paragraph two):

This court has no authority to pronounce a judgment or decree upon the question whether a proposed law or ordinance will be valid and constitutional if enacted by a legislative body *or adopted by the electors*. And where the mandatory provisions of the constitution or statute prescribing the necessary preliminary steps to authorize the submission to the electors of an initiative statute or ordinance have been complied with the submission will not be enjoined. (*Pfeifer v. Graves, Secretary of State*, 88 Ohio St., 473, approved and followed.) (Emphasis added.)

The court in *Pfeifer v. Graves*, 88 Ohio St. 473, 487, 104 N.E. 529, 533 (1913) set out the reasoning behind this rule quite forcefully, as it explained its refusal to rule on the legality of legislation proposed in a state-wide initiative petition:

We can not intervene in the process of legislation....We have not even advisory jurisdiction to render opinions upon mooted questions about constitutional limitations of the legislative function, and we will *not presume to control the exercise of that function of government by the general assembly, much less by the people* in whom all power abides....We cannot enjoin the sovereign state of Ohio where the people have not in their constitution, clearly beyond reasonable doubt, limited

the exercise of their power to legislate directly by the initiative.  
(Emphasis added.)

See also *Drockton v. Bd. of Elections*, 16 Ohio Misc. 211, 240 N.E.2d 876 (C.P. Cuyahoga County 1968).<sup>3</sup> Thus, the authority of the board of elections is limited to determining the validity of the initiative petition itself, i.e., that it proposes legislation on a question subject to legislative control, Ohio Const. art. II, §1f, and that it complies with the form and procedure required by R.C. 731.28-.41. On the basis of my answer to your first question, therefore, I conclude that the board of elections is required to place the proposed ordinance you have described on the ballot, regardless of the issues raised in your letter with respect to the effectiveness of the ordinance if it should pass.

I recognize that the ultimate legality of the proposed ordinance is a question of great concern to the village council members, who must determine whether to follow the ordinance if passed, and to the citizens of the village, who must determine how to vote on the issue. No duty of the board of elections, however, depends upon the answer to this question. I am, therefore, unable to render an advisory opinion as to whether a village ordinance may require an annual automatic transfer of moneys from the general fund. See R.C. 109.14 (attorney general shall advise county prosecutor with respect to statutory duties); R.C. 309.09 (advisory duties of county prosecutor); R.C. 733.48 (authorizing village to acquire its own legal counsel); Op. No. 88-008 (attorney general may advise requestors only with regard to their statutory duties).

It is therefore, my opinion, and you are hereby advised that:

1. An ordinance providing for transfer of moneys from the general fund to a special fund presents a question that, pursuant to R.C. 5705.14(E), a non-charter village is authorized to control by legislative action; therefore, pursuant to Ohio Const. art. II, §1f, such ordinance may be proposed by initiative petition.
2. When proposed legislation on a question subject to the right of initiative under Ohio Const. art. II, §1f is presented to a board of elections by an otherwise valid initiative petition, the board of elections is compelled to place that question on the ballot regardless of any question as to the legality of the proposed legislation.

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<sup>3</sup> The courts may, of course, determine the validity of legislation subsequent to passage. See *City of Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 300, 133 N.E. 556, 560 (1921) ("[o]f course if the electors adopt legislation which violates the Constitution it will be invalid, and all parties injuriously affected thereby will be protected by the courts"); *Pfiefer v. Graves*, 88 Ohio St. 473, 488, 104 N.E. 529, 533 (1913) ("where the void law is about to be enforced against a citizen to his prejudice, we may enjoin execution of the law"). Several lower courts have noted that a determination of invalidity prior to submission to the voters would save the expense of an election and subsequent litigation, but have consistently held that *Hillenbrand* requires placement of the issue on the ballot. See, e.g., *State ex rel. Samuelson v. Conrad*, 25 Ohio Misc. 13, 265 N.E.2d 803 (C.P. Butler County 1968), appeal dismissed, Ohio Supreme Court (March 4, 1970); *Drockton v. Bd. of Elections*, 16 Ohio Misc. 211, 240 N.E.2d 896, 901 (C.P. Cuyahoga County 1968) ("[p]erhaps a reviewing court in its wisdom will find that a trial court in the first instance should consider the validity of a proposed ordinance...rather than confine the trial court to considering solely whether the proponent of a proposed ordinance complied with the statutory procedure. However, this court is compelled to follow the ruling in *Cincinnati v. Hillenbrand*"). For an example of a determination of validity after passage of the initiative, see *City of Middletown v. Ferguson*, 25 Ohio St. 3d 71, 495 N.E.2d 380 (1986). In *Middletown*, the court found an ordinance passed by initiative to be unconstitutional in an action brought after city council refused to implement the ordinance.