

OPINION NO. 2009-054**Syllabus:**

2009-054

R.C. 5705.05 permits a township to fund permanent improvements, including roads and bridges, with proceeds of a general levy for current expenses that is enacted under R.C. 5705.19(A) and is in excess of the ten-mill limitation. (2008 Op. Att’y Gen. No. 2008-009, overruled on the basis of legislative change to the extent that it is inconsistent with this opinion).

To: Ramona Francesconi Rogers, Ashland County Prosecuting Attorney, Ashland, Ohio

By: Richard Cordray, Ohio Attorney General, December 29, 2009

We have received your request for an opinion regarding a township’s authority to use revenue generated from a levy for current expenses in excess of the ten-mill limitation¹ for permanent improvements, including roads and bridges. You have asked the following questions:

1. Does R.C. 5705.05 or any other statute permit a township to use funds from a general levy for current expenses, which is enacted under R.C. 5705.19(A) and in excess of the ten-mill limitation, for permanent improvements, including roads and bridges?
2. If no statute authorizes such use, must the township separately identify the moneys from that particular levy so as to ensure that other moneys within the general fund may be used for roads and bridges?

Your first question concerns the meaning of “general levy for current expenses,” as used in R.C. 5705.05 and related provisions. This term clearly includes the “general levy for current expense within the ten-mill limitation” listed in R.C.

¹ The ten-mill limitation provides that no property may be taxed in excess of one percent (10 mills) of its true value in money for all state and local purposes, except with voter approval or as provided in a municipal charter. Ohio Const. art. XII, § 2; R.C. 5705.02; *see also, e.g.*, R.C. 5705.07, .18. Levies within the ten-mill limitation are commonly referred to as “inside millage.” Levies in excess of ten mills are commonly referred to as “outside millage” and must be specifically authorized. R.C. 5705.02; *see* R.C. 5705.07, .18.

5705.04(B) as one of the taxes levied by the taxing authority of a subdivision. The issue before us is whether the term “general levy for current expenses” also includes a tax outside the ten-mill limitation that is levied by voter approval under R.C. 5705.19(A).

R.C. 5705.05 states that the “purpose and intent of the general levy for current expenses is to provide one general operating fund derived from taxation from which any expenditures for current expenses of any kind may be made.” This section authorizes the taxing authority of a political subdivision, including a township, *see* R.C. 5705.01(A), to use moneys from the general levy for current expenses to carry into effect any of the general or special powers granted by law to the subdivision, including the acquisition or construction of permanent improvements, subject to certain exclusions. R.C. 5705.05. Prior to December 30, 2008, R.C. 5705.05 expressly prohibited townships or counties from using these moneys for the construction, reconstruction, resurfacing, or repair of roads and bridges. *See* 2008 Op. Att’y Gen. No. 2008-009, at 2-96 to 2-98. In 2008, R.C. 5705.05 was amended so that the prohibition against using the general levy for current expenses for road and bridge improvements no longer applies to townships. *See* Sub. H.B. 458, 127th Gen. A. (2008) (eff. Dec. 30, 2008).² Thus, townships are now permitted by R.C. 5705.05 to use proceeds of the general levy for current expenses for permanent improvements, including roads and bridges.³

² Sub. H.B. 458, 127th Gen. A. (2008) (eff. Dec. 30, 2008) also amended R.C. 5705.06. Division (F) of R.C. 5705.06 authorizes a township to adopt a special levy for road and bridge improvements within the ten-mill limitation and without the vote of the people. The final paragraph of R.C. 5705.06 was amended by Sub. H.B. 458 to state:

Except for the special levies authorized in divisions (A), (B), (C), (D), (E), and (G) of this section, any authority granted by the Revised Code to levy a special tax within the ten-mill limitation for a current expense shall be construed as authority to provide for such expense by the general levy for current expenses.

³ Prior to the enactment of Sub. H.B. 458, 127th Gen. A. (2008) (eff. Dec. 30, 2008), 2008 Op. Att’y Gen. No. 2008-009 concluded, on the basis of statutes then in effect, that a township could not use proceeds of the general levy for current expenses for road and bridge purposes. Because of amendments enacted in Sub. H.B. 458, 2008 Op. Att’y Gen. No. 2008-009 is not a valid analysis of current law and must be overruled on the basis of legislative change to the extent that it is inconsistent with the analysis set forth in this opinion.

2008 Op. Att’y Gen. No. 2008-009 considered the general levy for current expenses within the ten-mill limitation and did not address the question whether its analysis and conclusions applied also to a general levy for current expenses that was approved by voters under R.C. 5705.19(A) and was in excess of the ten-mill limitation. Thus, 2008 Op. Att’y Gen. No. 2008-009 provides no guidance with regard to your first question. *See also* 2008 Op. Att’y Gen. No. 2008-033; 2008 Op. Att’y Gen. No. 2008-014, at 2-153 n.9.

The terms “[c]urrent operating expenses” and “current expenses” are defined for purposes of R.C. Chapter 5705 to exclude expenditures for permanent improvements. R.C. 5705.01(F). However, R.C. 5705.05 authorizes the “general levy for current expenses” to be used for certain permanent improvements, including township roads and bridges. If R.C. 5705.05 does not apply to a levy for current expenses in excess of the ten-mill limitation, such as a levy under R.C. 5705.19(A), the general definition of “current expenses” applies, and proceeds of such a levy are not allowed to be used for township permanent improvements, including roads and bridges. *See* 1981 Op. Att’y Gen. No. 81-035, at 2-134; *see also* 2005 Op. Att’y Gen. No. 2005-002, at 2-12; 1984 Op. Att’y Gen. No. 84-024.

R.C. 5705.10(A) recognizes both the general levy for current expense within the ten-mill limitation and general levies for current expense outside the ten-mill limitation, stating:

(A) All revenue derived from the *general levy for current expense within the ten-mill limitation*, from any *general levy for current expense authorized by vote in excess of the ten-mill limitation*, and from sources other than the general property tax, unless its use for a particular purpose is prescribed by law, shall be paid into the general fund. (Emphasis added.)

Under this provision, the general fund receives proceeds of general levies for current expense whether those levies are within or outside the ten-mill limitation. *See also* R.C. 5705.04 (subdivisions, including townships, are required to divide property taxes into several categories of levies, including the general levy for current expense within the ten-mill limitation, R.C. 5705.04(B), and general levies in excess of the ten-mill limitation, authorized by law or by vote of the people, R.C. 5705.04(E)); R.C. 5705.09; 2008 Op. Att’y Gen. No. 2008-009 (contents and uses of the general fund); 1981 Op. Att’y Gen. No. 81-035, at 2-136 (reference to “the general property tax levies for current expenses”).

R.C. 5705.05 uses the term “general levy for current expenses” and does not limit that reference to a general levy within the ten-mill limitation. Therefore, the language of R.C. 5705.05 encompasses both inside and outside millage, and both voted and nonvoted levies, for current expenses.

This literal reading was adopted by the Ohio Legislative Service Commission (LSC) in its analysis of the 2008 legislation amending R.C. 5705.05 and R.C. 5705.06. *See* Sub. H.B. 458, 127th Gen. A. (2008) (eff. Dec. 30, 2008). The LSC analysis states, in relevant part:

Various local governments (“taxing authorities”) are authorized to impose property taxes to fund their general-purpose expenditures. Such “*general levies for current expenses*” may be imposed with voter approval, or without voter approval if the taxing authority has been allocated a share of the millage available within the ten-mill limitation on unvoted property taxes. Under current law, general levy revenue of a county or township may be expended for current expenses but may not

be expended for the construction, reconstruction, resurfacing, and repair of roads and bridges. (R.C. 5705.05.) Levies may be imposed specifically for road and bridge purposes, either with or without voter approval (R.C. 5705.06(D), (E), and (F); 5705.19(G).) Townships have the ability to transfer funds from the general fund to any other township fund under R.C. 5705.14(E), but because of the above-mentioned limitation, such funds may not be expended for road and bridge construction and repair. (See 1981 Op. Att’y Gen. No. 35.)

The bill authorizes townships to use revenue from a general levy for current expenses for road and bridge construction, reconstruction, resurfacing, and repair. The bill does not change existing authority to levy property taxes specifically for that purpose. (Emphasis added.)

LSC, Bill Analysis, 127th Gen. A., Sub. H.B. 458 (As Reported by S. Ways and Means and Economic Development). The analysis thus concludes that, under R.C. 5705.05 as amended, revenue from a general levy for current expenses that is approved by voters and in excess of the ten-mill limitation may be used for township road and bridge construction and repair.

Analyses by the Ohio Legislative Service Commission are not binding as a matter of law, but they may be reflective of the intention behind legislation and may serve as an aid to statutory construction. *See Meeks v. Papadopoulos*, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159 (1980); *Weiss v. Porterfield*, 27 Ohio St. 2d 117, 120, 271 N.E.2d 792 (1971); 2008 Op. Att’y Gen. No. 2008-025, at 2-269 to 2-270. In the instant case, the LSC analysis sheds light on the purpose of the legislation and is consistent with the statutory scheme.

R.C. 5705.19 authorizes a board of township trustees (or the taxing authority of various other subdivisions, *see* R.C. 5705.01(A), (C), excluding school districts and county school financing districts) to declare by resolution that the amount of taxes that may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the subdivision and that it is necessary to levy a tax in excess of that limitation for any of numerous stated purposes. The resolution is certified to the board of elections and the levy issue is submitted to the voters for approval. Your questions pertain to a levy under R.C. 5705.19(A), which is “[f]or current expenses of the subdivision.”⁴

A levy adopted under R.C. 5705.19(A) is a levy in excess of the ten-mill limitation that provides additional funds to meet the needs of the township to provide for its current expenses and, accordingly, is a general levy for current expenses.⁵ Revenue derived from the levy is paid into the general fund, as required

⁴ R.C. 5705.19(A) limits the total levy for current expenses that may be adopted for detention facility districts, districts organized under R.C. 2151.65, and combined districts organized under R.C. 2151.65 and R.C. 2152.41.

⁵ *See* 1990 Op. Att’y Gen. No. 90-069, at 2-288 n.1 (“[a] levy under R.C. 5705.19(A) is a levy for ‘current expenses’ of a subdivision. It may be used for any

by R.C. 5705.10(A), to assist in meeting the demands placed upon the general levy for current expenses within the ten-mill limitation. Thus, the proceeds of a levy under R.C. 5705.19(A) may be expended for the purposes for which a general levy for current expenses may be expended under R.C. 5705.05, including, in the case of a township, the acquisition and construction of permanent improvements and, in particular, the construction, reconstruction, resurfacing, or repair of roads and bridges.⁶ *See generally* 1962 Op. Att’y Gen. No. 2997, p. 337, at 339-40; 1957 Op. Att’y Gen. No. 1122, p. 504, at 507-08; 1955 Op. Att’y Gen. No. 5585, p. 339, at 341-42 (“[a] levy for current expenses [under R.C. 5705.19(A)] . . . must be paid into the general fund and is not earmarked as a special levy would be, so that each year the amounts for the support of [any particular purpose] must be appropriated from the general fund in the discretion of the board of county commissioners. This levy being paid into the general fund would be available, however, for all proper appropriations for current expenses’); *cf.* 1949 Op. Att’y Gen. No. 365, p. 99, at

current expenses of the subdivision, but it may not be restricted by ballot language to only certain types of current expenses’); 1988 Op. Att’y Gen. No. 88-101, at 2-498 n.1 (“[i]t is firmly established that a levy for current expenses of the subdivision under R.C. 5705.19(A) is to be paid into the general fund, *see* R.C. 5705.10, and must remain available for all current expenses of the subdivision, rather than being earmarked for a particular purpose’); 1962 Op. Att’y Gen. No. 2780, p. 66, at 68-69 (“[a] proposed tax levy to supplement the general fund to meet current expenses . . . cannot be ‘earmarked’ for any special purpose nor be identified for a special purpose on the ballot on which the issue of such levy is submitted to the electors’); *see also* 2007 Op. Att’y Gen. No. 2007-002, at 2-18 to 2-19 n.8; 1988 Op. Att’y Gen. No. 88-096, at 2-473 to 2-475; 1979 Op. Att’y Gen. No. 79-024 (a school levy for current operating expenses approved by voters under R.C. 5705.194 as outside millage is a general levy for current expense which is to be paid into the general fund under R.C. 5705.10); 1963 Op. Att’y Gen. No. 154, p. 240.

⁶ In contrast, all revenue derived from a special levy is credited to a special fund for the purpose for which the levy was made. R.C. 5705.10(C); *see* R.C. 5705.09; R.C. 5705.10(D); *see also* 2008 Op. Att’y Gen. No. 2008-009, at 2-106 (“[b]y its terms the general levy for current expenses is a general levy rather than a special levy. Nonetheless, it imposes a tax for specified purposes and thus is subject to the provisions of Ohio Const. art. XII, § 5 stating that ‘[n]o tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied’); 1999 Op. Att’y Gen. No. 99-015; 1992 Op. Att’y Gen. No. 92-058, at 2-239 n.1 (“‘[s]pecial levy’ is not expressly defined by statute for purposes of R.C. Chapter 5705. However, ‘special levy’ is the term applied to a levy for a specific purpose, as opposed to a general levy for current expenses’); 1979 Op. Att’y Gen. No. 79-024, at 2-84; 1965 Op. Att’y Gen. No. 65-187 (syllabus) (for a tax levy under R.C. 5705.19(A), “the term ‘current expenses’ must appear on the ballot, and additional words suggesting a limitation within the category of current expenses may not be added to the ballot’); 1963 Op. Att’y Gen. No. 154, p. 240, at 246-47 and 1962 Op. Att’y Gen. No. 2997, p. 337, at 340 (distinguishing a special levy from a general levy).

100-01 and 1945 Op. Att’y Gen. No. 394, p. 505, at 508-09 (referring to statutory definition of “current expenses,” which excludes permanent improvements, interest, sinking fund, and retirement of bonds, notes, and certificates of indebtedness).

This opinion is based upon R.C. 5705.05, as amended by Sub. H.B. 458, together with related statutory provisions. If a different result is sought, different legislation may be adopted. *See Bd. of Educ. v. Fulton County Budget Comm’n*, 41 Ohio St. 2d 147, 156, 324 N.E.2d 566 (1975); 2009 Op. Att’y Gen. No. 2009-006, at 2-47. Because we find that a township is permitted to use proceeds of a levy under R.C. 5705.19(A) to fund permanent improvements, including roads and bridges, it is not necessary to address your second question.

Conclusion

For the reasons discussed above, it is my opinion, and you are advised, that R.C. 5705.05 permits a township to fund permanent improvements, including roads and bridges, with proceeds of a general levy for current expenses that is enacted under R.C. 5705.19(A) and is in excess of the ten-mill limitation. (2008 Op. Att’y Gen. No. 2008-009, overruled on the basis of legislative change to the extent that it is inconsistent with this opinion).