

OPINION NO. 2008-035**Syllabus:**

2008-035

1. If a person is named as a candidate for township representative in a petition for a merger study commission that is submitted to the electors under R.C. 709.45 and, prior to the election, the candidate ceases to be a resident of the unincorporated area of the township, the candidate lacks the residency qualification required to serve in the position of township member of the merger study commission if the creation of the commission is approved by the electors. The board of township trustees has no authority to appoint a replacement candidate prior to the election, but if the creation of the commission is approved by the electors, the election of a township candidate who does not reside in the unincorporated area of the township will automatically create a vacancy on the commission to be filled by the board of township trustees under R.C. 709.46(B).
2. A community improvement corporation (CIC) that is established under R.C. Chapter 1724 and receives financial support from a municipal corporation and a township does not have authority to contribute funds or other resources to an entity established to support or oppose a ballot issue relating to the proposed merger of the municipal corporation and township.

To: Truman A. Greenwood, Sylvania Township Law Director, Toledo, Ohio

By: Nancy H. Rogers, Attorney General, October 24, 2008

We have received your letter, submitted at the request of the Sylvania Township Board of Trustees, for an opinion on issues pertaining to a ballot issue proposing the creation of a commission to study the merger of Sylvania Township and the City of Sylvania under R.C. 709.45. You have asked the following questions:

1. Will a vacancy under R.C. 709.46(B) occur automatically on October 3, 2008, when an identified candidate for a position on the merger commission no longer resides within the unincorporated area of the township? If not, when will a vacancy occur? How is the vacancy determined? When should the trustees appoint a person to fill the vacancy?
2. Can a community improvement corporation (CIC)

organized under R.C. Chapter 1724 contribute funds or other resources to an entity established to either support or oppose a ballot issue, specifically an issue relating to the proposed merger of a municipal corporation and a township, when the CIC receives general revenue funds from the affected city and township?

For the reasons discussed below, we reach the following conclusions:

1. If a person is named as a candidate for township representative in a petition for a merger study commission that is submitted to the electors under R.C. 709.45 and, prior to the election, the candidate ceases to be a resident of the unincorporated area of the township, the candidate lacks the residency qualification required to serve in the position of township member of the merger study commission if the creation of the commission is approved by the electors. The board of township trustees has no authority to appoint a replacement candidate prior to the election, but if the creation of the commission is approved by the electors, the election of a township candidate who does not reside in the unincorporated area of the township will automatically create a vacancy on the commission to be filled by the board of township trustees under R.C. 709.46(B).
2. A community improvement corporation (CIC) that is established under R.C. Chapter 1724 and receives financial support from a municipal corporation and a township does not have authority to contribute funds or other resources to an entity established to support or oppose a ballot issue relating to the proposed merger of the municipal corporation and township.

Replacing a Candidate for a Merger Study Commission

You have described a situation in which a private group proposing a merger between Sylvania Township and the City of Sylvania filed with the board of elections a petition under R.C. 709.45.¹ Copies of the petition were required to be filed with the board of township trustees and with the legislative authority of the city. R.C. 709.45(C). By statute, the petition was required to contain “the names of not

¹ Because you are counsel for the township, this opinion addresses only the powers of the township and does not consider the powers of the board of elections or of the private group that submitted the petition. See R.C. 109.14 (“[w]hen requested by them, the attorney general shall advise the prosecuting attorneys of the several counties respecting their duties in all complaints, suits, and controversies in which the state is, or may be a party, and shall advise the township law director of a township that has adopted a limited home rule government under [R.C. Chapter 504]”).

less than five electors of the unincorporated area of the township” and the names of not less than five electors of the city “to be nominated to serve as commissioners.” R.C. 709.45(A). You have informed us that the petition in fact contained the names of five electors of each of those areas. The ballot issue resulting from that petition will be submitted to the electors on November 4, 2008, asking whether a commission shall be chosen to draw up a statement of conditions for the merger. R.C. 709.45(B).

Under R.C. 709.45(B), “[p]rovision shall be made on the ballot for the election, from each of the component political subdivisions, of five electors who shall constitute the commission to draw up the statement of conditions for merger of the political subdivisions.” To be an elector of a particular subdivision, a person must reside within that subdivision. *See* R.C. 3503.01(A) (a citizen who meets statutory requirements, including being a resident of the county and precinct in which the citizen offers to vote, has the qualifications of an elector and may vote at all elections in the precinct in which the citizen resides); 1989 Op. Att’y Gen. No. 89-060, at 2-255 (“[a]s a general matter, . . . an individual must, *inter alia*, reside within a township in order to be considered a township elector”); *see also* 1992 Op. Att’y Gen. No. 92-048. To be a candidate for township representative on the merger study commission as provided in R.C. 709.45, a person must be an elector, and thus a resident, of the unincorporated area of the township.

Under R.C. 709.46(A), “[i]f the question of merging is approved by a majority of those voting on it in each political subdivision proposed to be merged and in the municipal corporation with which merger is proposed, the five candidates from each of those political subdivisions shall be elected to the commission to formulate the conditions of merging the political subdivisions.” These five candidates are the electors named in the petition.

Your question arises because it appears that one of the individuals named in the petition as an elector of the unincorporated area of the township might no longer be a resident of the unincorporated area of the township. That individual signed a petition requesting annexation of his township home to the City of Sylvania. The annexation petition was approved by the Lucas County Commissioners in July, 2008, and accepted/approved by the Sylvania City Council on September 3, 2008. Accordingly, as of October 3, 2008 (thirty days following the city’s acceptance of the annexed territory), the individual’s home was annexed to the city and, if the individual continues to reside there, the individual will not be a resident or elector of the unincorporated area of the township.

Neither R.C. 709.45 nor R.C. 709.46 addresses the question of what happens if an individual named in a petition as an elector of the unincorporated area of a township ceases to reside in the unincorporated area of the township. R.C. 709.46(B) does, however address the matter of a vacancy in the position of member of the merger study commission, as follows:

In case of a *vacancy on the commission*, the vacancy shall be filled by an appointee of the legislative authority of the municipal corporation, or the board of township trustees of the township, that the

prior commissioner represented. The *person appointed to fill the vacancy* shall be an elector of that political subdivision and, *if the person is representing a township, shall reside in the unincorporated area of that township.* (Emphasis added.)

You have suggested that a vacancy under R.C. 709.46(B) might have occurred automatically on October 3, 2008, when the identified individual ceased to reside within the unincorporated area of the township. This does not, however, appear to be the case. R.C. 709.46(B) applies “[i]n case of a vacancy on the commission.” However, no merger study commission was in existence on October 3, 2008. A merger study commission will not be created unless the ballot issue is approved by the electors on November 4, 2008. Prior to the election, there is only a pending ballot issue on the question whether a commission shall be created, with provision for the election of five members from each component political subdivision. Without the approval of the electors, there will be no commission. If the electors approve the issue, the commission will be created and the candidates named in the petition will be elected to the commission.

Under R.C. 709.45, residence in the unincorporated area of the township is a prerequisite for serving on the commission as a township representative, and a person who does not meet this qualification cannot serve in the position. *See State ex rel. Wilson v. Gulvas*, 63 Ohio St. 3d 600, 604, 589 N.E.2d 1327 (1992) (“noncompliance with a statutory prerequisite for holding office is a disqualification by operation of law and automatically creates a vacancy”); *State ex rel. Boda v. Brown*, 157 Ohio St. 368, 373, 105 N.E.2d 643 (1952) (an officer must be qualified to hold his office when he is elected or appointed and also throughout his term); 2002 Op. Att’y Gen. No. 2002-015, at 2-89 n.1. If the ballot issue for the merger study commission is approved by the electors and a commission is created, a candidate who is not qualified will not be able to serve and a vacancy on the commission will occur at that time. The vacancy may then be filled as provided in R.C. 709.46(B).²

Various statutes govern the determination as to whether a candidate qualifies to be placed on the ballot, and also the procedure for filling a vacancy if a candidate dies or withdraws prior to an election. In general, the county board of elections has the authority to judge the qualifications of a candidate for a township office. *See* R.C. 3501.11(K) (board of elections shall “[r]eview, examine, and certify the sufficiency and validity of petitions and nomination papers”); R.C. 3501.39 (grounds for rejection of a petition by the board of elections, including a finding that

² The situation in which a person lacks the qualifications to accept a position is somewhat different from the situation in which a person lawfully serving in a position ceases to possess the necessary qualifications. As your letter indicates, if an individual serving in a township office ceases to meet the residency requirement, a vacancy will be created. *See* R.C. 503.24-.241; *see also State ex rel. Wilson v. Gulvas*, 63 Ohio St. 3d 600, 603, 589 N.E.2d 643 (1992) (“a vacancy occurs automatically . . . when a member of a township board of zoning appeals moves to a residence outside the township he serves”).

the candidacy violates any requirements established by law); R.C. 3513.05 (authority of board of elections to conduct hearings on protests against certain candidacies); R.C. 3513.253 (nominations of candidates for election as officers of a township); 2002 Op. Att’y Gen. No. 2002-15, at 2-90 n.3; 2000 Op. Att’y Gen. No. 2000-033; *see also* R.C. 3501.39(B) (subject to limited exceptions, a board of elections shall not invalidate a declaration of candidacy or nominating petition after the fiftieth day prior to the election).³

Political parties may name candidates to fill vacancies when their candidates have withdrawn, died, or been disqualified under R.C. 3513.052 (containing prohibitions against seeking more than one office or position at the same election). R.C. 3513.30; 2006 Op. Att’y Gen. No. 2006-035, at 2-320 to 2-321 (a candidate’s withdrawal creates a vacancy in the party nomination for that office); *see also, e.g., State ex rel. Flex v. Gwin*, 20 Ohio St. 2d 29, 252 N.E.2d 289 (1969) (rejecting a literal reading of R.C. 3513.31, which applied only to vacancies caused by death or withdrawal, and finding authority for a political party to appoint a candidate to fill a vacancy on the ballot when a candidate for judge was declared ineligible because of his age); R.C. 3513.30(D) (providing for the withdrawal of “[a]ny person nominated in a primary election or by nominating petition as a candidate for election at the next general election”). In the case of independent or nonpartisan candidates, a vacancy resulting from withdrawal or certain types of disqualification may in some circumstances be filled by a majority of the committee of five, as designated on the candidate’s nominating petition. R.C. 3513.31(F), (K).

Our research has disclosed no statute or other provision of law granting the board of township trustees authority, prior to an election, to appoint a replacement candidate for the position of member of a merger study commission.⁴ The lack of authority to make such an appointment is consistent with the fact, as you have

³ “No alterations, corrections, or additions may be made to a petition after it is filed in a public office.” R.C. 3501.38(I)(1). Further, “[n]o declaration of candidacy, nominating petition, or other petition for the purpose of becoming a candidate may be withdrawn after it is filed in a public office,” though this does not prohibit a person from withdrawing as a candidate as otherwise provided by law. R.C. 3501.38(I)(2)(a); *see also* R.C. 3513.052 (disqualification or withdrawal of candidate in certain circumstances); R.C. 3513.30-.311 (withdrawal of certain candidates and filling of vacancies).

⁴ In general, boards of township trustees have only the powers expressly conferred by statute or necessarily implied from those express powers. *See, e.g., Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875); *see also State ex rel. Schramm v. Ayres*, 158 Ohio St. 30, 33, 106 N.E.2d 630 (1952) (“the question is not whether townships are prohibited from exercising such authority. Rather it is whether townships have such authority conferred on them by law”). As a township that has adopted a limited home rule government under R.C. Chapter 504, Sylvania Township is authorized to “[e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws,” and to “[a]dopt and enforce within the unincor-

indicated, that the petition was submitted by a private group (which presumably selected the candidates) and not by the board of township trustees. Further, the facts before us do not indicate that the candidate in question has withdrawn or that the candidate might not resolve the issue of residency by moving back into the unincorporated area of the township.⁵

We conclude, therefore, that if a person is named as a candidate for township representative in a petition for a merger study commission that is submitted to the electors under R.C. 709.45 and, prior to the election, the candidate ceases to be a resident of the unincorporated area of the township, the candidate lacks the residency qualification required to serve in the position of township member of the merger study commission if the creation of the commission is approved by the electors. The board of township trustees has no authority to appoint a replacement candidate prior to the election, but if the creation of the commission is approved by the electors, the election of a township candidate who does not reside in the unincorporated area of the township will automatically create a vacancy on the commission to be filled by the board of township trustees under R.C. 709.46(B).

Authority of a Community Improvement Corporation to Make Contributions to an Entity Established to Support or Oppose a Ballot Issue

Your second question is whether a CIC organized under R.C. Chapter 1724 may contribute funds or other resources to an entity established to either support or oppose a ballot issue, specifically an issue relating to the proposed merger of a municipal corporation and a township, when that CIC receives general revenue funds from the affected city and township.

A CIC organized under R.C. Chapter 1724 is a nonprofit corporation formed “for the sole purpose of advancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area.” R.C. 1724.01; *see also* R.C. 1724.02 (powers of a CIC). A CIC is not a political subdivision, *see* 1987 Op. Att’y Gen. No. 87-024 (syllabus, paragraph 1), but it may be designated

porated area of the township local police, sanitary, and other similar regulations that are not in conflict with general laws or otherwise prohibited by [R.C. 504.04(B)].” R.C. 504.04(A)(1), (2); 2002 Op. Att’y Gen. No. 2002-013, at 2-71 n.1. None of these powers authorize the township to appoint an individual to be a candidate in an election on a petition under R.C. 709.45-46.

⁵ *See State ex rel. Flynn v. Bd. of Elections*, 164 Ohio St. 193, 200, 129 N.E.2d 623 (1955), *overruled in part on other grounds by State ex rel. Schenck v. Shattuck*, 1 Ohio St. 3d 272, 439 N.E.2d 891 (1982); 2002 Op. Att’y Gen. No. 2002-015, at 2-90 (“a person is not eligible to be a candidate for elective office if he will not be qualified to assume that office if elected”); *see also State ex rel. Wolfe v. Lorain County Bd. of Elections*, 59 Ohio App. 2d 257, 258, 394 N.E.2d 321 (Lorain County 1978) (“[u]nder Ohio election laws, a candidate generally need not qualify for the prospective office in order to run for or be elected to that office,” but “must be qualified when he assumes that office”); 2002 Op. Att’y Gen. No. 2002-020, at 2-128 n.3.

as an agency of a county, township, municipal corporation, or more than one of those subdivisions, for the industrial, commercial, distribution, and research development in each subdivision and may, in that capacity, provide services to each subdivision pursuant to agreement. R.C. 1724.10. Thus, a township is authorized to agree to have the CIC act as its agent to carry out various types of activities. *See, e.g.,* R.C. 1724.10(A) (township may agree that the CIC will prepare a plan under which the CIC may incur debt to promote development within the subdivision); R.C. 1724.10(B) (township may agree that the CIC may sell or lease lands of the subdivision to promote the welfare, stabilize the economy, provide employment, and assist in development); R.C. 1724.10(C) (township may convey land to the CIC for purposes of development).

Counties, townships, and municipal corporations are authorized to contribute public money to a CIC to defray the expenses of the CIC. 1991 Op. Att’y Gen. No. 91-071. Under R.C. 505.701, a board of township trustees may “give financial or other assistance” to a CIC to defray its administrative expenses and may purchase real property for the purpose of transferring the property to the CIC. Any moneys contributed by the township to the CIC to defray administrative expenses “shall be drawn from the general fund of the township not otherwise appropriated.” R.C. 505.701. You have informed us that the CIC with which you are concerned receives general revenue funds from the city and township that are involved in the proposed merger, and that these funds are commingled with other funds that are generated or received by the CIC. *See* R.C. 505.701; 1991 Op. Att’y Gen. No. 91-071.⁶

The General Assembly has adopted legislation addressing the use of public funds to support or oppose ballot issues in certain circumstances. R.C. 9.03(C) states generally (with limited exceptions, *see* 2002 Op. Att’y Gen. No. 2002-001, at 2-2 to 2-3 n.3) that “no governing body of a political subdivision shall use public funds to . . . [p]ublish, distribute, or otherwise communicate information that does any of the following: . . . (e) Supports or opposes the nomination or election of a candidate for public office, the investigation, prosecution, or recall of a public official, or the passage of a levy or bond issue.” *See* 2007 Op. Att’y Gen. No. 2007-036, at 2-367 to 2-369. The ballot issue to which your question relates is the question of forming a merger study commission. This type of ballot issue is not mentioned in R.C. 9.03 and, therefore, is not governed by its terms. *See* 2002 Op. Att’y Gen. No. 2002-001, at 2-5. To answer your question, therefore, it is necessary to turn to other provisions of law.

Even before R.C. 9.03 was enacted in 1998, the firmly established background rule under Ohio law was that public moneys could not be expended to

⁶ If the creation of a merger study commission is approved by the electors, the costs of the commission are “divided among the participating political subdivisions in proportion to the population that each participating political subdivision bears to the total population of the territory proposed to be merged.” R.C. 709.46(C). It has been found that a board of township trustees is not empowered to donate township funds to a merger study commission established under R.C. 709.45-.46. 1994 Op. Att’y Gen. No. 94-003.

promote or oppose the passage of a ballot issue unless there was clear statutory authority for the expenditure. In this regard, 1994 Op. Att’y Gen. No. 94-041, at 2-209, states: “Prior opinions of the Attorney General that have considered the propriety of a public entity expending public moneys to promote the approval of a tax levy by the electorate have consistently concluded that, absent statutory authority, a public entity is prohibited from expending public moneys in the promotion of a ballot issue for the benefit of the entities promoting the levy.” *Accord* 1999 Op. Att’y Gen. No. 99-030; *see, e.g.*, 1992 Op. Att’y Gen. No. 92-029; 1979 Op. Att’y Gen. No. 79-022; 1968 Op. Att’y Gen. No. 68-124; 1937 Op. Att’y Gen. No. 1245, vol. III, p. 2142; 1920 Op. Att’y Gen. No. 1532, vol. II, p. 915. It has been stated that “[a] general grant of authority to carry out statutory functions is not sufficient to authorize an expenditure for the promotion of a tax levy.” 1999 Op. Att’y Gen. No. 99-030, at 2-200.

The principle that, absent clear statutory authority, public money may not be expended to promote or oppose ballot issues reflects the conviction that the right to approve or reject a ballot issue of any sort is bestowed upon the electors, and unauthorized public expenditures to influence their votes would interfere with that right. *See, e.g.*, 1920 Op. Att’y Gen. No. 1532, vol. II, p. 915, at 916 (“[t]he board of education in submitting a question to the electors of a school district is presumed, as a board of education, to submit such question to the electors without bias in the matter, because the board of education of the district is the board for all the electors in the district on whatever side of a particular question such electors might be”). This principle is based upon the understanding that public moneys are held in trust for the benefit of the public and may be expended only by clear authority of law. *See State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph 1). Any doubt as to the authority to expend public funds must be resolved in favor of the public trust and against the expenditure. *See State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917) (syllabus, paragraph 3); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916); 2007 Op. Att’y Gen. No. 2007-036, at 2-373.⁷

Applying this general principle, it must be concluded, in the instant case, that the CIC is not permitted to make a contribution of funds or other resources to an entity established to support or oppose a ballot issue pertaining to the proposed merger of the township and city, and that the township is not permitted to use the CIC as its agent for this purpose. Our research has disclosed no provision of law granting the board of township trustees authority to contribute funds or services to a

⁷ There is a distinction between the support or opposition of a ballot issue and the dissemination of information in a manner that neither promotes nor opposes the passage of the ballot issue. *See* R.C. 9.03(C)(2); 2007 Op. Att’y Gen. No. 2007-036; 2002 Op. Att’y Gen. No. 2002-001, at 2-3 n.4; 1999 Op. Att’y Gen. No. 99-030. You have stated that the contributions here under consideration would be made to an entity that supports or opposes the merger study commission ballot issue. This opinion does not address the use of resources for the dissemination of information in a manner that is not intended to influence the outcome of an election.

CIC for the purpose of having the CIC contribute funds or services to an entity established to support or oppose a merger study commission ballot issue. The purposes for which a township may use a CIC as its agent or may contribute funds or other resources to a CIC are established by statute and do not include the purpose of expending township funds to promote or oppose a merger study commission. Further, the township is not permitted to use public funds to promote or oppose the passage of a ballot issue absent clear authority, and no such authority is provided with regard to a ballot issue under R.C. 709.45-.46. *See* note 4, *supra* (Sylvania Township has only those powers that it is granted under Ohio law).

The CIC is similarly prevented from using funds or other resources of the township to support or oppose a merger study commission ballot issue. Moneys received by a CIC from a township under R.C. 505.701 may be used only to defray the administrative expenses of the CIC. *See* 1991 Op. Att’y Gen. No. 91-071, at 2-337. When acting as an agent for the township, the CIC is limited to the functions set forth in R.C. 1724.10 and designated by agreement, and these do not include contributing funds or other resources for the support or opposition of ballot issues. Further, because township funds are commingled with other funds of the CIC, the CIC is unable to use any of its funds for this purpose. *See* 2008 Op. Att’y Gen. No. 2008-009. The use of resources by the CIC to support or oppose a ballot issue pertaining to a merger study commission is inappropriate also because the boundaries of the political subdivisions served by the CIC may be affected. The CIC’s powers as agent of a township and a municipality pertain to planning and development as determined by agreement with those subdivisions, and do not extend to expenditures for the support or opposition of ballot issues affecting the boundaries of those subdivisions.⁸

We conclude, therefore, that a CIC that is established under R.C. Chapter 1724 and receives financial support from a municipal corporation and a township does not have authority to contribute funds or other resources to an entity established to support or oppose a ballot issue relating to the proposed merger of the municipal corporation and township.

⁸ Further, there may be constitutional issues regarding the question whether public moneys may be expended to support or oppose the passage of a ballot issue. *See, e.g., Kidwell v. City of Union*, 462 F.3d 620, 625 (6th Cir. 2006) (“where the government uses its official voice in an attempt to affect the identity of the people’s elected representatives, it can undermine its legitimacy as a champion of the people’s will and thereby subvert one of the principles underlying democratic society,” but governments may be permitted to advocate on matters within the scope of their governance functions), *cert. denied*, 127 S. Ct. 2258 (2007); 2007 Op. Att’y Gen. No. 2007-036, at 2-367 n.2; 1999 Op. Att’y Gen. No. 99-030, at 2-203 to 2-205; 1994 Op. Att’y Gen. No. 94-041, at 2-210 n.2; 1992 Op. Att’y Gen. No. 92-029, at 2-111 n.4. If authority were found for the township or CIC to use public funds to support or oppose a merger study commission ballot issue, it would be necessary to consider these constitutional issues.

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. If a person is named as a candidate for township representative in a petition for a merger study commission that is submitted to the electors under R.C. 709.45 and, prior to the election, the candidate ceases to be a resident of the unincorporated area of the township, the candidate lacks the residency qualification required to serve in the position of township member of the merger study commission if the creation of the commission is approved by the electors. The board of township trustees has no authority to appoint a replacement candidate prior to the election, but if the creation of the commission is approved by the electors, the election of a township candidate who does not reside in the unincorporated area of the township will automatically create a vacancy on the commission to be filled by the board of township trustees under R.C. 709.46(B).
2. A community improvement corporation (CIC) that is established under R.C. Chapter 1724 and receives financial support from a municipal corporation and a township does not have authority to contribute funds or other resources to an entity established to support or oppose a ballot issue relating to the proposed merger of the municipal corporation and township.