OPINION NO. 2011-002

Syllabus:

2011-002

1. Absent formal action consistent with statute to change the boundaries of Hamilton Township, territory of the township annexed to an adjacent municipal corporation pursuant to R.C. 709.023 remains subject to the special levy for police protection services under R.C. 5705.19(J) that was submitted to township electors in 2003 by the board of township trustees as taxing authority of Hamilton Township and approved by a majority of the township electors voting thereon.

2. If the board of trustees of Hamilton Township, acting as taxing authority of the township, hereafter submits to the electors of the township the question of approving a special levy for police protec-

tion services under R.C. 5705.19(J), and if such proposal is approved by a majority of the electors voting thereon, such special levy will apply to township territories that have been annexed to adjacent municipal corporations pursuant to the expedited procedures of R.C. 709.023, absent formal action consistent with statute to change the boundaries of Hamilton Township as a result of those annexations.

3. If the board of trustees of Hamilton Township, acting as taxing authority of the township, hereafter submits to the electors of the township the question of approving a special levy for police protection services under R.C. 5705.19(J), persons residing in those township territories annexed to adjacent municipal corporations pursuant to the expedited procedures of R.C. 709.023 are entitled to vote upon such special levy, absent formal action consistent with statute to change the boundaries of Hamilton Township as a result of those annexations.

To: Warren J. Ritchie, Hamilton Township Law Director, Mason, Ohio
By: Richard Cordray, Ohio Attorney General, January 6, 2011

Hamilton Township, a limited home rule township under R.C. Chapter 504, in 1995 formed a township police district under R.C. 505.48 encompassing the entire unincorporated territory of the township. In 2003, the voters of Hamilton Township approved a continuing tax levy to pay for police protection services under R.C. 5705.19(J). You have explained that the levy was placed on the ballot by the board of township trustees in its capacity as taxing authority of Hamilton Township, not the township police district. Subsequent to 2003, various territories in Hamilton Township have been annexed to adjacent municipal corporations pursuant to R.C. 709.023. In this context, you have asked for an opinion on the following questions:

1. If township territory subject to a preexisting and ongoing police levy is annexed to a municipal corporation pursuant to R.C. 709.023, is the territory still subject to the levy?

2. Is territory annexed to a municipal corporation pursuant to R.C. 709.023 subject to future police levies that may be approved by the voters?

3. If the answer to question two is in the affirmative, should residents of the territory that has been annexed to a municipal corporation pursuant to R.C. 709.023 be able to vote on any proposed, future levies?

We begin with a brief discussion of annexation law. Under the Revised Code, territory may be annexed to a municipal corporation in a variety of ways. *See generally* R.C. 709.01 ("[t]erritory may be annexed to, merged with, or detached

from, municipal corporations, in the manner provided in'' R.C. Chapter 709). Annexation of territory to a municipal corporation upon the application of landowners is governed by R.C. 709.02-.11. Annexation of territory to a municipal corporation upon the application of that municipal corporation is governed by R.C. 709.13-.21. Annexation of territory from one municipal corporation to another municipal corporation is governed by R.C. 709.22-.34. Merger of territory is governed by R.C. 709.43-.48. *See also generally* 2005 Op. Att'y Gen. No. 2005-024, at 2-241 (noting that a merger results in ''the annexation of the entire unincorporated area of a township with one or more municipal corporations,'' while ''[o]ther forms of annexation may permit all or less than all . . . of the unincorporated area of a township to be added to a municipal corporation'').

The territories at issue in the present opinion were annexed to adjacent municipal corporations pursuant to R.C. 709.023, which was enacted in 2001-2002 Ohio Laws, Part I, 621 (Am. Sub. S.B. 5, eff. Mar. 27, 2002).

> With the passage of Am.Sub.S.B. No. 5 . . . , the General Assembly accomplished a comprehensive reform of Ohio's laws regarding annexation, principally through amendments to R.C. Chapter 709. One of the major innovations of Senate Bill 5 was the establishment of three new specific procedures that allow for expedited annexations when all the property owners within a parcel to be annexed sign an annexation petition.
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> Prior to Senate Bill 5, all annexations in Ohio initiated by private property owners followed a single basic procedure, with the requirement that ''a majority of the owners'' in a specific parcel sign the petition to initiate an annexation. See former R.C. 709.02. 137 Ohio Laws, Part II, 3313. There were no special procedures to expedite the process, and no special procedures existed to govern situations in which all property owners desired annexation.
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> The three additional, expedited procedures all apply only when ''all of the owners of real estate'' within a particular territory request annexation by signing the petition. R.C. 709.021(A) and (B). The first, established by R.C. 709.022, commonly called an expedited type-1 annexation, applies when ''all parties,'' including the township and the municipality, agree to the annexation of property. The second, established by R.C. 709.023, is commonly called an expedited type-2 annexation and applies when the property to be annexed to the municipality will remain within the township despite the annexation. The third type of special annexation, established by R.C. 709.024, is commonly called an expedited type-3 annexation and applies when the property to be annexed has been certified as ''a significant economic development project.''

State ex rel. Butler Twp. Bd. of Trs. v. Montgomery County Bd. of County Comm'rs, 112 Ohio St. 3d 262, 2006-Ohio-6411, 858 N.E.2d 1193, at ¶3-5 (internal footnotes omitted).

The Revised Code provides several procedures for redrawing township

boundaries following annexation. R.C. 503.07 permits the legislative authority of a municipal corporation to petition the board of county commissioners to change a township's boundary lines "in order to make them identical, in whole or in part, with the limits of the municipal corporation." Similarly, R.C. 503.09 permits a "majority of the freehold electors owning land" in the *unincorporated* portion of a township to petition a board of county commissioners to create a new township excluding incorporated territory from the original township. It is well established, however, that territory may simultaneously be part of both a township and a municipal corporation. *See, e.g.*, R.C. 503.07; R.C. 503.09; 2005 Op. Att'y Gen. No. 2005-024, at 2-239 to 2-240. Thus, absent formal action pursuant to either R.C. 503.07 or R.C. 503.09, township territory that has been annexed to a municipal corporation "becomes part of the municipal corporation and also remains part of the township," and "persons residing in the annexed township territory are residents of both the municipal corporation and the township." *Id.* at 2-244; *see also State ex rel. Halsey v. Ward*, 17 Ohio St. 543 (1867); 2003 Op. Att'y Gen. No. 2003-023, at 2-178; 2002 Op. Att'y Gen. No. 2002-033, at 2-216 to 2-217; 1990 Op. Att'y Gen. No. 90-048, at 2-203.

A critical ramification of an annexation under R.C. 709.023 is that a municipal corporation may not seek to have township boundary lines redrawn pursuant to R.C. 503.07. Division (H) of R.C. 709.023 declares as follows:

> Notwithstanding anything to the contrary in section 503.07 of the Revised Code, unless otherwise provided in an annexation agreement entered into pursuant to section 709.192 of the Revised Code or in a cooperative economic development agreement entered into pursuant to section 701.07 of the Revised Code, territory annexed into a municipal corporation pursuant to this section shall not at any time be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes.

See also State ex rel. Butler Twp. Bd. of Trs., 112 Ohio St. 3d 262 at ¶5 (an expedited type-2 annexation under R.C. 709.023 is typically used "when the property to be annexed to the municipality will remain within the township despite the annexation"); 2005 Op. Att'y Gen. No. 2005-024, at 2-242 (territory "annexed pursuant to a special annexation procedure under R.C. 709.023 . . . may not be excluded from the township under R.C. 503.07 unless . . . an annexation agreement or a cooperative economic agreement provides for such exclusion" (citing 2002 Op. Att'y Gen. No. 2002-023, at 2-150 n.4)).

Based on prior discussions between you and a member of my staff, it is my understanding that no annexation agreements or economic development agreements were executed in conjunction with the prior annexations of Hamilton Township territories under R.C. 709.023. It is also my understanding from these discussions that there has been no effort by the property owners in the unincorporated portion of Hamilton Township to redraw the township's boundaries pursuant to R.C. 503.09. Thus, the annexed territories remain part of Hamilton Township.

Further, as noted above, the 2003 levy was placed on the general election

ballot by the board of township trustees in its capacity as taxing authority of Hamilton Township. A township is a subdivision for taxation purposes, and the board of township trustees is the taxing authority of the township. R.C. 5705.01(A), (C). R.C. 5705.19(J) authorizes a board of township trustees to levy a tax for the purpose of police protection services described as follows:

> For the purpose of providing and maintaining motor vehicles, communications, other equipment, buildings, and sites for such buildings used directly in the operation of a police department, or the payment of salaries of permanent police personnel, including the payment of the police officer employers' contribution required under section 742.33 of the Revised Code, or the payment of the costs incurred by townships as a result of contracts made with other political subdivisions in order to obtain police protection, or the provision of ambulance or emergency medical services operated by a police department[.]

See also 1998 Op. Att'y Gen. No. 98-023, at 2-126 to 2-127 (discussing levies for police protection services generally).[1]

"When a township includes both territory that is incorporated into a city or village and territory that is unincorporated, the township is authorized to levy taxes on all of that territory, including the territory that is incorporated." 2003 Op. Att'y Gen. No. 2003-023, at 2-178; *see also* 2005 Op. Att'y Gen. No. 2005-024, at 2-244 ("persons residing in the annexed township territory are subject to taxation by both the municipal corporation and the township"). It is equally well established that, unless the specific tax statute provides to the contrary, residents of territory located in both a township and a municipal corporation "are entitled to vote on levies that are submitted to the electors of either of such entities and are subject to taxes that are imposed by either of such entities." 1990 Op. Att'y Gen. No. 90-048, at 2-203 (citations omitted); *see also* 1977 Op. Att'y Gen. No. 77-031, at 2-115 (incorporated township territory "remains subject to township tax levies, unless there is some exception in the statute providing for the specific tax," and "the owners of such property would clearly have the right to vote" on such levies). In addition, R.C. 709.023(H) provides that annexed township territory generally cannot "be excluded from the township under section 503.07 of the Revised Code and, thus, remains subject to the township's real property taxes." *See also State ex rel. Butler Twp. Bd. of Trs.*, 112 Ohio St. 3d 262 at ¶7 ("when property is annexed to a municipality

[1] You have provided us a copy of the resolution of the board of township trustees for Hamilton Township and the certificate of result of election for the November 2003 general election, both of which track the language of R.C. 5705.19(J) almost word-for-word. You have not mentioned, however, how the township police department is being operated or how the proceeds from the 2003 levy are currently being used. For the purpose of this opinion, therefore, we assume such proceeds are being used in a manner consistent with Ohio law. *See, e.g.*, 2010 Op. Att'y Gen. No. 2010-028, slip op. at 5 (special levies "are restricted by resolution or ballot language to a particular use" and "a tax levied for a specific purpose cannot be treated as a general levy" (citations omitted)).

under R.C. 709.023, the residents of the territory become residents of both the township and the municipality, subject to the taxes of both, and potentially able to receive services from either''); *Sugarcreek Twp. v. City of Centerville*, 184 Ohio App. 3d 480, 2009-Ohio-4794, 921 N.E.2d 655, at ¶135-40 (Greene County) (consistent with prior law, territory annexed pursuant to R.C. 709.023 remains subject to taxation by both the township and the municipal corporation).

Your opinion request notes a concern on the part of the county auditor that the 2003 levy may not apply to territory of Hamilton Township once that territory is annexed to a municipal corporation pursuant to R.C. 709.023. The auditor's concern may be premised on the fact that R.C. 505.51 authorizes a board of township trustees, acting in its capacity as taxing authority of a township police district, to levy a tax under R.C. 5705.19(J) upon ''all of the taxable property in the township police district.'' A board of township trustees ''may create a township police district comprised of all or a portion of the unincorporated territory of the township.'' R.C. 505.48(A). Township territory annexed to a municipal corporation, while remaining a part of the township, no longer constitutes *unincorporated* territory of the township. Thus, if such territory were originally part of a township police district, the territory's annexation arguably would remove it from the township police district. *See* 1964 Op. Att'y Gen. No. 1255, p. 2-271 (syllabus, paragraph 2) (''[w]hen there is located within a township a municipality or part thereof, the portion of the township in which the municipality is located may not be located in the township police district''). From this it further follows that such territory would no longer be subject to a tax levied by a board of township trustees under R.C. 505.51. *Id.* at 2-275 (''any levy enacted pursuant to the provisions of Sections 505.51, 5705.19 and 5705.25, Revised Code, can only apply to the property within'' the township police district).

In this instance, though, the board of township trustees placed the 2003 levy on the ballot in the board's capacity as taxing authority of Hamilton Township. Townships and township police districts are separate subdivisions for taxation purposes. *See* R.C. 5705.01(A); *see also* 2003 Op. Att'y Gen. No. 2003-023, at 2-179 n.4 (a ''taxing district [such as a township police district] is a subdivision separate from the township that creates it''); 1977 Op. Att'y Gen. No. 77-097, at 2-322 (a ''township police district is a taxing authority separate from the township'').[2] The 2003 levy, unlike a levy under R.C. 505.51, applies to all township territory, incorporated as well as unincorporated, absent a lawful change of

[2] While townships and township police districts are separate subdivisions for taxation purposes, the taxing authority of a township police district is the ''the board of township trustees of the township in which the district is located,'' R.C. 5705.01(C), and the members of the board of township trustees are also the trustees of the township police district. 1993 Op. Att'y Gen. No. 93-039, at 2-207 n.6; 1964 Op. Att'y Gen. No. 1255, p. 2-271, at 2-275. Thus, the members of the board of township trustees serve in a dual capacity, and when analyzing the board's actions, one must always be cognizant of the capacity in which it is acting. 1993 Op. Att'y Gen. No. 93-039, at 2-207 n.6 (''[w]hen the township trustees act in their capacity as the

township boundaries. Consequently, territory of Hamilton Township annexed to an adjacent municipal corporation pursuant to the expedited procedures of R.C. 709.023 remains subject to the tax levied in 2003.

In answer to your first question, therefore, absent formal action consistent with statute to change the boundaries of Hamilton Township, territory of the township annexed to an adjacent municipal corporation pursuant to R.C. 709.023 remains subject to the special levy for police protection services under R.C. 5705.19(J) that was submitted to township electors in 2003 by the board of trustees as taxing authority of Hamilton Township and approved by a majority of the township electors voting thereon.

You also have asked whether subsequent tax levies under R.C. 5705.19(J) for police protection services will apply to Hamilton Township territory that is annexed to adjacent municipal corporations pursuant to the expedited procedures of R.C. 709.023, and whether persons residing in territories so annexed will be entitled to vote on those later levies. We cannot advise definitively upon prospective actions by the board of township trustees in which the facts and circumstances cannot at present be known and may differ from those described in your opinion request. Accordingly, we limit our remarks to a special levy under R.C. 5705.19(J) that the board of township trustees proposes in its capacity as taxing authority of Hamilton Township. The answers to these questions follow from what we have already set forth in this opinion about the law and its application.

If the board of trustees of Hamilton Township, acting in its capacity as taxing authority of the township, hereafter submits to the electors of the township the question of approving a special levy for police protection services under R.C. 5705.19(J), and if such proposal is approved by a majority of the electors voting thereon, such special levy will apply to township territories that have been annexed to adjacent municipal corporations pursuant to the expedited procedures of R.C. 709.023, absent formal action consistent with statute to change the boundaries of Hamilton Township as a result of those annexations. Persons residing in those township territories annexed to adjacent municipal corporations pursuant to the expedited procedures of R.C. 709.023 are entitled to vote upon a special levy for police protection services under R.C. 5705.19(J) that is submitted to the township electors by the board of trustees of Hamilton Township, absent formal action consistent with statute to change the boundaries of Hamilton Township as a result of those annexations.

In sum, it is my opinion, and you are hereby advised, as follows:

1. Absent formal action consistent with statute to change the boundaries of Hamilton Township, territory of the township annexed to an adjacent municipal corporation pursuant to R.C. 709.023 remains subject to the special levy for police protection services under R.C.

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governing board of the police district . . . as opposed to in their capacity as the governing board of the township, their actions affect only that part of the township comprising the police district'').

5705.19(J) that was submitted to township electors in 2003 by the board of township trustees as taxing authority of Hamilton Township and approved by a majority of the township electors voting thereon.

2. If the board of trustees of Hamilton Township, acting as taxing authority of the township, hereafter submits to the electors of the township the question of approving a special levy for police protection services under R.C. 5705.19(J), and if such proposal is approved by a majority of the electors voting thereon, such special levy will apply to township territories that have been annexed to adjacent municipal corporations pursuant to the expedited procedures of R.C. 709.023, absent formal action consistent with statute to change the boundaries of Hamilton Township as a result of those annexations.

3. If the board of trustees of Hamilton Township, acting as taxing authority of the township, hereafter submits to the electors of the township the question of approving a special levy for police protection services under R.C. 5705.19(J), persons residing in those township territories annexed to adjacent municipal corporations pursuant to the expedited procedures of R.C. 709.023 are entitled to vote upon such special levy, absent formal action consistent with statute to change the boundaries of Hamilton Township as a result of those annexations.