

OPINION NO. 2006-006**Syllabus:**

Pursuant to R.C. 5705.31 and R.C. 5705.341, a county budget commission may not disapprove or modify a tax levy in excess of the ten-mill limitation for the general operation of a city board of health even though the board of health has been abolished, provided that the tax levy was properly authorized, approved by the electors of the city, and the amounts to be levied are clearly required by the city's budget or other information submitted by the city.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio

By: Jim Petro, Attorney General, March 13, 2006

You have requested an opinion concerning the authority of a county budget commission to disapprove or modify a tax levy in excess of the ten-mill limitation.¹ You state that the electors of the City of Shelby approved two health levies in excess of the ten-mill limitation for the general operation of the Shelby Board of Health.² The legislative authority of the City of Shelby, by Substitute Ordinance No. 38-

¹ Ohio Const. art. XII, § 2 mandates that no property may be taxed in excess of one percent of its true value in money for all state and local purposes, except when approved by the voters or provided for by a municipal charter. 2005 Op. Att'y Gen. No. 2005-002 at 2-11 n.1; 1999 Op. Att'y Gen. No. 99-015 at 2-115 n.2; *see* R.C. 5705.02; R.C. 5705.07; R.C. 5705.18. This is known as the "ten-mill limitation." 2001 Op. Att'y Gen. No. 2001-019 at 2-107 n.1; *see* R.C. 5705.02; R.C. 5705.03; R.C. 5705.07. For the purpose of paying current operating expenses, the taxing authority of a subdivision is authorized to levy property taxes within the ten-mill limitation. R.C. 5705.03(A); 2001 Op. Att'y Gen. No. 2001-019 at 2-107.

² According to information provided in conjunction with your letter, only one of the two levies was approved by the electors of the City of Shelby. The certificate of result of election on tax levy in excess of the ten-mill limitation for Issue 11, which was "[a] replacement of 1 mill of an existing levy and an increase of 0.5 mill, to constitute a tax for the benefit of the City of Shelby for the purpose of the GENERAL OPERATION OF THE SHELBY BOARD OF HEALTH at a rate not exceeding 1.5 mills for each one dollar of valuation," indicates that Issue 11 was rejected by the City of Shelby electors by a vote of 2,341 to 2,072 on November 2, 2004. The certificate of result of election on tax levy in excess of the ten-mill limitation for Issue 4, which was "[a] replacement of a tax for the benefit of the City of Shelby for the purpose of GENERAL OPERATION OF THE SHELBY BOARD OF HEALTH at a rate not exceeding 1 mill for each one dollar of valuation,"

2005, thereafter abolished the Shelby Board of Health and established in its place a division of health in the city's department of public safety:

**REPEALING CHAPTER 276 (BOARD OF HEALTH) OF
THE CODIFIED ORDINANCES OF THE CITY OF SHELBY.**

....

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL
FOR THE CITY OF SHELBY, OHIO, A MAJORITY ELECTED
THERE TO CONCURRING.

Section 1: That Chapter 276 (Board of Health) of the Codified Ordinances of the City of Shelby be amended to read as follows:

CHAPTER 276

DIVISION OF HEALTH

276.01 ESTABLISHMENT

In accordance with Section 50 of the Charter of the City of Shelby,³ there is hereby established a Division of the Department of Public Safety hereafter referred to as the Division of Health. The Mayor shall make all rules and regulations as are necessary and required for the government of this Division as prescribed by local ordinance or the gen-

indicates that the electors of the City of Shelby approved the passage of this replacement tax levy by a vote of 1,908 to 1,334 on May 3, 2005.

³ Section 50 of the Charter of the City of Shelby states:

The Mayor as Director of Public Safety shall appoint a Director of Public Welfare who shall be the Health Commissioner of the City and shall, under the direction and control of the Mayor enforce all ordinances and laws relating to the health of the public, and shall perform all duties and have all powers relative to the public health exercised in municipalities by health officers. He shall have charge of and manage all charitable, correctional and recreational agencies belonging to the Municipality. He shall have charge of the inspection and supervision of all public amusements and entertainments. He shall have charge of the sanitary inspection and supervision of the production, transportation, storage and sale of foods and foodstuffs. He shall have charge of the preservation and promotion of the public health, the prevention and restriction of disease, the prevention, abatement and suppression of nuisances, the enforcement of isolation and quarantine regulations. He shall enforce and prosecute all laws, ordinances and regulations, relative to the public welfare for the violation of which penalties are imposed now in force or which may hereafter be established or enacted by Council or general law. The Mayor shall make all needful rules and regulations for the government of this Department of Public Safety as prescribed by ordinance or the general laws of the State, and in cases of epidemic or other emergency, such additional rules as may be necessary for the public health.

eral laws of the State of Ohio. The Mayor, as head of this Division, shall be responsible for and succeed to all of the duties and responsibilities which prior hereto were the obligation of the Board of Health. The Director of Finance and Public Record shall be charged with the management, control, and budgeting of any and all funds previously managed by the Board of Health (including, but not limited to, any and all monies collected or to be collected as the result of any ballot issues previously voted upon and passed for the benefit of the Shelby Board of Health).⁴ (Footnotes added.)

In light of this action by the legislative authority of the City of Shelby, you wish to know whether the county budget commission may disapprove or modify the tax levy for the general operation of the city board of health insofar as the board of health has been abolished. Based on the following, the county budget commission may not disapprove or modify a tax levy in excess of the ten-mill limitation for the general operation of a city board of health even though the board of health has been abolished, provided that the tax levy was properly authorized, approved by the electors of the city, and the amounts to be levied are clearly required by the city's budget or other information submitted by the city.

In order to properly address your question, it is helpful to outline the procedures established by statute for the levying of real property taxes in excess of the ten-mill limitation. Pursuant to R.C. 5705.07, "[t]he taxing authority of any subdivision may make tax levies authorized in excess of the ten-mill limitation by a vote of the people under the law applicable thereto, irrespective of all limitations on the tax rate." For purposes of R.C. Chapter 5705 (tax levy law), a municipal corporation that has adopted a charter is a "subdivision," R.C. 5705.01(A)-(B), and the municipal corporation's legislative authority is its "taxing authority," R.C. 5705.01(C). A municipal corporation that has adopted a charter thus may impose a tax in excess of the ten-mill limitation with voter approval. *See* R.C. 5705.19 (permitting the taxing authority of a subdivision, other than a school district or a county school financing district, to declare by resolution the necessity of levying a tax in excess of the ten-mill limitation for specific purposes).

Although a tax levy in excess of the ten-mill limitation has been approved by the voters of a city, the legislative authority of the city in levying the tax is subject to the following restriction set forth in R.C. 5705.341: "Nothing in this section or any section of the Revised Code shall permit or require the levying of any rate of taxation, whether within the ten-mill limitation or . . . in excess of such ten-

⁴ Prior to the enactment of Substitute Ordinance No. 38-2005, section 276.01 of the Codified Ordinances of the City of Shelby provided that, "[p]ursuant to Ohio R.C. 3709.05, there is hereby established a Board of Health for the City Health District, to be constituted, and its members appointed, in accordance with Ohio R.C. 3709.05." *See generally* R.C. 3709.05(A) ("[u]nless an administration of public health different from that specifically provided in this section is established and maintained under authority of its charter ..., the legislative authority of each city constituting a city health district shall establish a board of health").

mill limitation, unless such rate of taxation for the ensuing fiscal year is clearly required by a budget of the taxing district or political subdivision properly and lawfully adopted under this chapter, or by other information that must be provided . . . if a tax budget was waived.” See *Wise v. Summit Cty. Budget Comm’n*, 36 Ohio St. 2d 114, 304 N.F.2d 390 (1973); 2005 Op. Att’y Gen. No. 2005-002 at 2-14. This means that a tax in excess of the ten-mill limitation “may not be levied unless a need for the proceeds of the tax is demonstrated.” 2005 Op. Att’y Gen. No. 2005-002 at 2-14.

The duty of ensuring that there exists a need for the proceeds of a tax levy in excess of the ten-mill limitation rests with the county budget commission. Under R.C. 5705.28-.31, the county budget commission receives from the county auditor tax budgets and other information submitted by the various subdivisions and taxing authorities within the county, including cities. 2005 Op. Att’y Gen. No. 2005-002 at 2-18. The county budget commission is responsible for reviewing the budgets and information, R.C. 5705.31, adjusting tax levies as required by law, R.C. 5705.31; R.C. 5705.32, and certifying appropriate taxes for collection, R.C. 5705.34. 2005 Op. Att’y Gen. No. 2005-002 at 2-18. When the county budget commission has completed its work, taxing authorities, such as city legislative authorities, authorize the necessary tax levies and certify them to the county auditor. R.C. 5705.34.

Let us now turn to your specific question, which asks whether a county budget commission may disapprove or modify a tax levy in excess of the ten-mill limitation for the general operation of a city board of health when the board of health has been abolished. It is a paramount principle that the county budget commission, as a creature of statute, has only the authority granted by law. 2005 Op. Att’y Gen. No. 2005-002 at 2-18; see 1987 Op. Att’y Gen. No. 87-009 at 2-51.

With respect to the authority of a county budget commission to disapprove or modify a tax levy in excess of the ten-mill limitation, R.C. 5705.31 provides, in pertinent part:

The [county budget] commission shall ascertain that the following levies have been properly authorized and, if so authorized, shall approve them without modification:

(A) *All levies in excess of the ten-mill limitation*[.]

....

[(E)] Divisions (A) to (E) of this section *are mandatory and commissions shall be without discretion to reduce such minimum levies except as provided in such divisions.* (Emphasis added.)

See also R.C. 5705.32(A) (a county budget commission shall bring tax levies within limitations specified by statute, “but no levy shall be reduced below a minimum fixed by law”). R.C. 5705.341 also prohibits a county budget commission from approving any tax levy in excess of the ten-mill limitation unless the amount to be levied is “clearly required” by the budget or other information submitted by the subdivision or taxing unit.

The Ohio Supreme Court has addressed the authority of a county budget commission under R.C. 5705.31 and R.C. 5705.341 to approve or modify tax levies in excess of the ten-mill limitation:

Currently, the phrase “properly authorized,” as employed in R.C. 5705.31, requires the budget commission to determine that such tax is one which the taxing authority had the power to impose, either by its own action or by vote of the people, and that the enactment of the measure imposing the tax was in compliance with statutory requirements. Additionally, the term encompasses the requirement that the budget commission determine whether any rate of taxation is clearly required by the budget of the taxing district or the political subdivision. We hold this latter consideration to include the determination of whether the funds to be derived from a levy approved for a specific purpose are indeed budgeted for that purpose.

....

... Under this section of the tax levy law [R.C. 5705.341], the phrase “clearly required by a budget” does not require, nor grant, the authority to a budget commission to make a judgment call on the desirability of programs of the health district, or in this sense to determine the “need” of the district for the sums as set forth in the budget as submitted. The review of the budget commission of tax levies is one basically of whether there has been excessive taxation, *i.e.*, will the tax generate more funds than shown to be needed within the budget of the district or subdivision, and whether the funds are budgeted for the appropriate purpose as voted by the electorate.

Village of South Russell v. Geauga Cty. Budget Comm'n, 12 Ohio St. 3d 126, 132, 465 N.E.2d 876 (1984); *see Village of Waite Hill v. Budget Comm'n of Lake Cty.*, 46 Ohio St. 2d 543, 350 N.E.2d 411 (1976); *State ex rel. Bd. of Cty. Comm'rs of Lucas Cty. v. Austin*, 158 Ohio St. 476, 480-81, 110 N.E.2d 134 (1953); 2005 Op. Att'y Gen. No. 2005-002 at 2-19; *see also* 1966 Op. Att'y Gen. No. 66-144 at 2-293 through 2-296.

Similarly, 2005 Op. Att'y Gen. No. 2005-002 at 2-19, which examined the authority of the county budget commission to disapprove or modify a school district's tax levy in excess of the ten-mill limitation under R.C. 5705.31 and R.C. 5705.341, explained:

Thus, the county budget commission is responsible for assuring that a tax is not levied unless it is properly authorized in accordance with statutory requirements. Further, the county budget commission may not permit a school district to levy a tax that will generate more money than the amount clearly required by the school district's budget, and must make certain that a tax levied for a particular purpose is budgeted for that purpose. However, the county budget commission is not empowered to

evaluate the wisdom of the school district's budget or to exercise judgment regarding the desirability of the expenditures included in the budget.

Accordingly, pursuant to R.C. 5705.31 and R.C. 5705.341, a county budget commission is required to approve without modification a city's tax levy in excess of the ten-mill limitation for the general operation of a city board of health unless the tax levy was not properly authorized in accordance with statutory requirements or approved by the electors of the city, or the amounts to be levied are not clearly required by the city's budget or other information submitted by the city. *See, e.g., Village of South Russell v. Geauga Cty. Budget Comm'n*, 12 Ohio St. 3d at 132, 465 N.E.2d 876; *Village of Waite Hill v. Budget Comm'n of Lake Cty.*; *State ex rel. Bd. of Cty. Comm'rs of Lucas Cty. v. Austin*, 158 Ohio St. at 480-81, 110 N.E.2d 134; *State ex rel. Bd. of Educ. of Steubenville City Sch. Dist. v. Hamrock*, 11 Ohio Misc. 36, 225 N.E.2d 795 (C.P. Jefferson County 1967); 2005 Op. Att'y Gen. No. 2005-002 at 2-19; 1986 Op. Att'y Gen. No. 86-021 at 2-113 n.5; 1979 Op. Att'y Gen. No. 79-016 at 2-51 and 2-52; 1938 Op. Att'y Gen. No. 2100, vol. I, p. 559 (syllabus); 1935 Op. Att'y Gen. No. 4559, vol. II, p. 1058, at 1060; 1932 Op. Att'y Gen. No. 4779, vol. III, p. 1308 (syllabus); *see also State ex rel. Fairfield Cty. Bd. of Mental Retardation and Developmental Disabilities v. Fairfield Cty. Budget Comm'n*, 10 Ohio St. 3d 123, 461 N.E.2d 1297 (1984); *Kinsey v. Bower*, 147 Ohio St. 66, 68 N.E.2d 317 (1946); 1966 Op. Att'y Gen. No. 66-144 at 2-293 through 2-296; 1927 Op. Att'y Gen. No. 1325, vol. III, p. 2398, at 2402.

This is the case even if the legislative authority of the city has abolished the board of health. In such a situation, if a city tax levy in excess of the ten-mill limitation for the general operation of the city's board of health was properly authorized, approved by the electors of the city, and the amounts to be levied are clearly required by the city's budget or other information submitted by the city, the county budget commission has a duty under R.C. 5705.31 and R.C. 5705.341 to approve without modification the levy because it is "not within the province of the [county] budget commission to determine whether the use to be made of funds comes within the purpose of the enactment of the tax." 1979 Op. Att'y Gen. No. 79-016 at 2-52; *accord State ex rel. Bd. of Cty. Comm'rs of Lucas Cty. v. Austin*, 158 Ohio St. at 480-81, 110 N.E.2d 134. Instead, any determination as to the use to be made of proceeds of a city tax levy in excess of the ten-mill limitation for the general operation of the city's board of health must be made by the city's legislative authority. *See State ex rel. Bd. of Cty. Comm'rs of Lucas Cty. v. Austin*, 158 Ohio St. at 481, 110 N.E.2d 134; 1979 Op. Att'y Gen. No. 79-016 at 2-52. In exercising its discretion with respect to the use to be made of proceeds of a city tax levy in excess of the ten-mill limitation for the general operation of the city's board of health, the city's legislative authority has a duty to act in good faith and to use its best judgment with due regard to the circumstances and interest of the city at the time it submits its budget or other information to the county budget commission. 1979 Op. Att'y Gen. No. 79-016 at 2-52.

Accordingly, if the legislative authority of a city that has abolished its board of health reasonably determines that the proceeds of a city tax levy in excess of the ten-mill limitation for the general operation of the city's board of health may be

used for a purpose within the contemplation of the tax levy,⁵ the legislative authority may inform the county budget commission that the amounts to be levied are clearly required by the city's budget or other information submitted by the city.⁶ *See generally State ex rel. Bd. of Cty. Comm'rs of Lucas Cty. v. Austin*, 158 Ohio St. at 481, 110 N.E.2d 134 (“since the relator [board of county commissioners] found and concluded that the county-home building was inadequate before such authorized tax levy was exhausted and further determined that it was within the purpose and contemplation of the levy to permit the expansion of such building, the relator had the authority to levy the tax for such expansion and should prevail in this action”). If this occurs, the county budget commission is required by R.C. 5705.31 and R.C. 5705.341 to approve without modification the city levy for the general operation of the city's board of health even though the board of health has been abolished, provided that the tax levy was properly authorized and approved by the electors of the city.

In conclusion, it is my opinion, and you are hereby advised that, pursuant to R.C. 5705.31 and R.C. 5705.341, a county budget commission may not disapprove or modify a tax levy in excess of the ten-mill limitation for the general operation of a city board of health even though the board of health has been abolished, provided that the tax levy was properly authorized, approved by the electors of the city, and the amounts to be levied are clearly required by the city's budget or other information submitted by the city.

⁵ The Ohio Constitution declares 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.” Ohio Const. art. XII, § 5; *see* R.C. 5705.10. It is thus a fundamental principle in Ohio law that money that is derived from a particular tax levy must be expended only for the purpose for which that levy was adopted. 1997 Op. Att’y Gen. No. 97-030 at 2-176; 1992 Op. Att’y Gen. No. 92-027 at 2-101. *See generally* 1977 Op. Att’y Gen. No. 77-097 at 2-323 (“the purpose set forth in the levy resolution, as in the case of any taxing statute, must be strictly construed, and may not be enlarged to embrace subjects not specifically enumerated therein”).

⁶ It is beyond the scope of this opinion to determine whether the proceeds of the city tax levy in question will be used for a purpose within the contemplation of the tax levy. Any such determination in this regard requires findings of fact that exceed the capacity of the opinions function and are appropriately left to the city's legislative authority or to the judiciary. *See, e.g.*, 2005 Op. Att’y Gen. No. 2005-002 at 2-12 (“[w]e are not able, by means of this opinion, to make findings of fact or to determine the rights of particular parties”); 1991 Op. Att’y Gen. No. 91-016 at 2-82 n.2 (“[t]he opinion-rendering function of the Attorney General is not an appropriate forum for making findings of fact”); 1983 Op. Att’y Gen. No. 83-057 at 2-232 (“[t]his office is not equipped to serve as a fact-finding body; that function may be served by your office or, ultimately, by the judiciary”). *See generally* 1989 Op. Att’y Gen. No. 89-038 at 2-168 (the Attorney General has “no authority to exercise on behalf of another officer or entity of government discretion that has been bestowed upon that officer or governmental entity”).