OPINION NO. 2000-048

Syllabus:

1. The board of health of a combined general health district has authority pursuant to R.C. 3707.55, which became effective in 1999, to purchase real property in order to provide office space for the health district.

2. Because the board of health of a combined general health district had no statutory authority to purchase real property until 1999, it is not bound by an option to purchase agreed to in 1997 as part of a lease of office space, nor may it enforce such option to purchase agreement against the lessor.

3. The board of health of a combined general health district may not use revenue derived from a tax levied pursuant to R.C. 3709.29 to purchase real property, regardless of whether the tax was levied before or after the enactment of R.C. 3707.55.

To: Edwin A. Pierce, Auglaize County Prosecuting Attorney, Wapakoneta, Ohio
By: Betty D. Montgomery, Attorney General, December 29, 2000

You have asked about the ability of the Auglaize County Board of Health to purchase the building in which it is currently housed.

In November 1995 the voters passed a special one mill levy under R.C. 3709.29 for the purpose of providing sufficient funds for the board of health to carry out its health programs. The levy was for a period of ten years. The board of health entered into a 15-year lease agreement for office space in June 1997, using proceeds from the 1995 levy to make rental payments. The lease included an option to purchase the premises. It was not until 1999, however, that boards of health were given the statutory authority to acquire real property, other than by gift or devise.

Your questions about this matter are as follows:

1. May the board of health proceed to acquire real property for office space, either under the option to purchase clause in the 1997 lease agreement or otherwise? Does the fact that the board entered into the agreement with the option to purchase prior to the time it had the statutory authority to purchase real property have an effect on its ability to purchase the building under the agreement?

2. May the board of health use revenue derived from the 1995 tax levy to purchase real property?

We begin by noting that the health district in question is a combined general health district that was created pursuant to R.C. 3709.07 by the union of a general health district encompassing the townships and villages within Auglaize County and two city health districts within the county. *See* 1991 Op. Att'y Gen. No. 91-016. R.C. 3709.07 states that when a general health district and one or more city health districts combine, the chair of the general health district's advisory council and the chief executive of each city must enter into a contract for the administration of the combined district, and thereby provide for the proportion of expenses to be paid by the cities and original general health district. The combined district is considered to be a general health district, and its board of health "shall have, within the combined district, all the powers granted to, and perform all the duties required of, the board of health of a general health district." *Id.*

Authority to Purchase Real Property

In your first question you ask about the ability of the board to purchase real property, specifically its ability to acquire the building in which it is currently housed under the existing option to purchase. You wish to know whether the fact that the board entered into a lease agreement with an option to purchase prior to the time it had the authority to purchase real property has an effect on the rights and obligations of the board under the agreement.[1]

[1]We have traditionally declined to issue an opinion interpreting a particular agreement or contract because only the judiciary is empowered to ultimately determine the respective rights of the parties to a contract in cases of dispute. 1983 Op. Att'y Gen. No. 83-087. However, as set forth below, the law regarding the effect that a public agency's lack of authority to agree to a matter will have on its rights and obligations under an agreement purporting to cover such matter is virtually axiomatic, and our opinion as to the application

It will be useful to first discuss the statutory scheme under which boards of health may obtain office space.

R.C. 3709.34 states that, "[t]he board of county commissioners or the legislative authority of any city may furnish suitable quarters for any board of health or health department having jurisdiction over all or a major part of such county or city." The ability of a general health district to procure suitable quarters pursuant to R.C. 3709.34 has been the subject of a long line of Attorney General opinions. *See, e.g.*, 1989 Op. Att'y Gen. No. 89-038; 1986 Op. Att'y Gen. No. 86-037; 1985 Op. Att'y Gen. No. 85-003; 1983 Op. Att'y Gen. No. 83-081; 1980 Op. Att'y Gen. No. 80-086; 1976 Op. Att'y Gen. No. 76-066; 1972 Op. Att'y Gen. No. 72-098; 1954 Op. Att'y Gen. No. 3499, p. 47; 1949 Op. Att'y Gen. No. 1085, p. 737. Most recently, 1991 Op. Att'y Gen. No. 91-015 and 1991 Op. Att'y Gen. No. 91-016 concluded that, if office space was not furnished to a combined general health district by the county or a city pursuant to R.C. 3709.34, the health district could rent office space and apportion the cost thereof in the same manner as any other operating expense under the contract creating the district; however, the district had no authority to purchase real property to use as office space and could not enter into a lease-purchase agreement for that purpose. *See generally* 1982 Op. Att'y Gen. No. 82-018 (the power to lease does not imply the power to purchase real property).

In 1999, however, boards of health of general health districts were given the authority to purchase real property with the enactment of R.C. 3707.55. This statute authorizes a board of health of a general health district to "acquire, convey, lease, or enter into a contract to purchase, lease, or sell real property for the district's purposes, and [to] enter into loan agreements, including mortgages, for the acquisition of such property." R.C. 3707.55(A). *See* Sub. H.B. 581, 122nd Gen. A. (1998) (eff. March 30, 1999).

As a creature of statute, the board of health of a combined general health district has only those powers conferred by statute, either expressly or by necessary implication. *See* 1989 Op. Att'y Gen. No. 89-032; 1983 Op. Att'y Gen. No. 83-067. Nonetheless, prior to the enactment of Sub. H.B. 581 authorizing boards of health to purchase real property, the Auglaize County board of health entered into a lease agreement that provided the board with the option to purchase the building it was leasing. Thus, at the time the board of health entered into the lease, it had no power to agree to that part of the agreement providing the option to purchase.

It has long been established that any contract made by a public entity that is in violation of statute or beyond the power of the entity to make is void and binding on neither party. *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406, 54 N.E. 372 (1899); *Jones v. Commissioners of Lucas County*, 57 Ohio St. 189, 48 N.E. 882 (1897); *State ex rel. Baen v. Yeatman*, 22 Ohio St. 546 (1872); *CADO Business Systems of Ohio, Inc. v. Board of Education*, 8 Ohio App. 3d 385, 457 N.E.2d 939 (Cuyahoga County 1983). Furthermore, a party that contracts with a public body is deemed to have knowledge of the limitations on that body's powers. *See Ohio Asphalt Paving, Inc. v. Ohio Dept. of Industrial Relations*, 63 Ohio St. 3d 512, 589 N.E.2d 35 (1992); *State ex rel. Allen v. Lutz*, 111 Ohio St. 333, 145 N.E. 483 (1924); *Frisbie Co. v. City of East Cleveland*, 98 Ohio St. 266, 120 N.E. 309 (1918); *McCloud & Geigle v. City of Columbus*, 54 Ohio St. 439 (1896). As stated in *Lathrop Co. v. City of Toledo*, 5 Ohio St. 2d 165, 173, 214 N.E.2d 408, 413 (1966): "A thread running throughout the many cases the court has reviewed is that the contractor [dealing with a public body]

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of pertinent law to the contract in question is intended merely to guide the general health district as it pursues the acquisition of real property for office space.

must ascertain whether the contract complies with the Constitution, statutes, charters, and ordinances so far as they are applicable. If he does not, he performs at his peril..." (citations omitted).

In this instance, the board of health was without authority to agree to that part of the lease providing the option to purchase. Thus, the option to purchase is unenforceable as to either party. However, because the board of health now has the authority under R.C. 3707.55 to acquire real property, the parties may re-negotiate their agreement, or the board of health may look elsewhere for real property to acquire for office space.[2]

In response to your first question, because the board of health had no statutory authority to purchase real property until 1999, it is not bound by the terms of its 1997 agreement providing an option to purchase, nor may it enforce the terms of the option against the lessor. The parties may re-negotiate an agreement to purchase the office building or the board of health may seek other real property to purchase for office space.

Use of Tax Proceeds to Purchase Real Property

We begin our analysis of your second question, whether the board of health may use the proceeds of a 1995 tax levy to purchase real property, with a discussion of the manner in which a combined general health district is funded. In doing so, we must read the pertinent provisions of R.C. Chapter 3709, governing health districts, *in pari materia* with R.C. Chapter 5705, the uniform tax levy law. *See* 1946 Op. Att'y Gen. No. 1210, p. 689; 1933 Op. Att'y Gen. No. 1545, vol. II, p. 1389.

The board of health of a general health district must annually adopt an itemized appropriation measure, setting forth the district's current expenses for the next fiscal year, along with an estimate of available sources of revenue. R.C. 3709.28. In the case of a combined general health district, the expenses are apportioned among the cities and the original general health district according to the contract creating the combined district. R.C. 3709.07. The portion of the appropriation attributed to the original general health district is then apportioned among the townships and villages composing the district, based on taxable valuations. R.C. 3709.28.

The funds received from the political subdivisions composing the district, along with all other revenue available to the district, are placed in a fund known as the "district health fund." *Id. See also* R.C. 3709.32(D) (payment of state health district subsidy funds shall not be made unless "[t]he municipal corporations and townships composing the health district have provided adequate local funding for public health services"); R.C. 5705.05(C) (a political subdivision's general levy for current expenses within the ten-mill limitation shall include "[t]he amounts necessary for boards and commissioners of health, and other special or district appropriating authorities deriving their revenue in whole or part from the subdivision"); R.C. 5705.28(C)(1); 1951 Op. Att'y Gen. No. 934, p. 803, 808 (general health districts are financed in part from the general tax levies of the municipalities and townships included

[2]The lease has a "severability clause" providing that, if any term of the lease is invalid or unenforceable, the remainder of the lease "shall not be affected thereby and each term, covenant or condition of this lease shall be valid and be enforced to the fullest extent permitted by law." Thus, even though the option to purchase provision is unenforceable, the parties remain bound by the other terms of the lease. This obligation will, of course, be relevant to the board's determination whether to look to a party, other than the lessor, for the purchase of property for office space prior to the expiration of the lease.

therein); 1933 Op. Att'y Gen. No. 1545, vol. II, p. 1389, 1393 (the language of (what is now) R.C. 3709.28, R.C. 5705.05, and R.C. 5705.28 "does not contemplate a levy of tax [by a township or village] for the particular purpose of a general health district, but rather makes it a part of the levy of the subdivision for the general operating fund of the subdivision").

If, however, the revenue contributed by the member political subdivisions will be insufficient to meet the district's estimated expenses, the board of health must certify this insufficiency to the board of county commissioners, which is "ordained to be a special taxing authority" for the health district for purposes of submitting to the voters a special levy outside the ten-mill limitation.[3] R.C. 3709.29. *See also* R.C. 5705.31(E) (the county budget commission must ascertain that a levy prescribed by R.C. 3709.29 has been properly authorized, and if so, must approve it without modification). *See generally* R.C. 5705.01(C) (defining "taxing authority"). As noted above, a levy in excess of the ten-mill limitation for the Auglaize County Board of Health was approved by the voters in November 1995 pursuant to R.C. 3709.29. It is the revenue from this levy which the board wishes to use to purchase real property for office space.

In determining whether resources generated from the tax levy may be used for this purpose, we must examine the precise language of R.C. 3709.29 under which the tax was levied, as well as the resolution and ballot language placing the question of the levy before the voters. *See* 1990 Op. Att'y Gen. No. 90-069 at 2-292 ("no levy moneys may be expended for purposes that are not within the ballot language"); 1982 Op. Att'y Gen. No. 82-037 at 2-108 ("as a general rule, where the particular expenditures which a taxing authority wishes to make are not specifically enumerated in the statement of purpose for the levy, whether the proposed expenditures may be made depends upon whether such uses come within the purpose as stated in the resolution and on the ballot"); 1963 Op. Att'y Gen. No. 154, p. 240, 246 (a tax authority's declaration of purpose contained in the resolution and ballot is controlling); 1962 Op. Att'y Gen. No. 2997, p. 337; 1960 Op. Att'y Gen. No. 1697, p. 617. In doing so, we must bear in mind Ohio Const. art. XII, § 5 which states: "No 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." *See In re Petition for Transfer of Funds*, 52 Ohio App. 3d 1, 2, 556 N.E.2d 191, 192 (Montgomery County 1988) (Ohio Const. art. XII, § 5 "prevents taxes levied for a specific purpose which the voters approve being used for a purpose the voters did not approve"). We are also guided by the principle that taxing statutes are to be strictly construed and their application cannot be extended beyond the clear meaning of the statutory language used. *Clark Restaurant Co. v. Evatt*, 146 Ohio St. 86, 64 N.E.2d 113 (1945).

R.C. 3709.29 reads, in pertinent part, as follows:

> If the estimated amount of money necessary *to meet the expenses of a general health district program* will not be forthcoming to the board of health of such district out of the district health fund because the taxes within the ten-mill limitation will be insufficient, the board of health shall certify the fact of such insufficiency to the board of county commissioners of the county in which such district is located.... The board of county commissioners shall thereupon, in the year preceding that in which such health program will be

[3]Ohio Const. art. XII, § 2 prohibits the taxation of property "in excess of one per cent of its true value," unless approved by a majority of the electors of the taxing district voting on the question. This is known as the "ten-mill limitation." *See* R.C. 5705.02; R.C. 5705.03; R.C. 5705.07.

> effective, by vote of two-thirds of all the members of that body, declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide an adequate amount for the necessary requirements of such district within the county, and that *it is necessary to levy a tax in excess of such limitation in order to provide the board of health with sufficient funds to carry out such health program.* (Emphasis added.)

The resolution adopted by the board of county commissioners for Auglaize County included a declaration that "the amount of taxes which is raised within the ten-mill limitation will be insufficient to provide the necessary funding to meet *the expenses* of The Auglaize County Combined General Health District," and that it was necessary to levy a tax in excess of the ten mill limitation "to ensure that there [are] sufficient [funds] to carry out *the programs* of The Auglaize County Combined General Health District." (Emphasis added.) The ballot language read similarly: "An additional tax for the benefit of Auglaize County for the purpose of PROVIDING SUFFICIENT FUNDS FOR THE BOARD OF HEALTH TO CARRY OUT ITS HEALTH PROGRAMS."

We turn now to R.C. Chapter 5705 to aid us in determining whether R.C. 3709.29 and the 1995 resolution and ballot language authorize the board of health to use proceeds from the levy to purchase real property. R.C. Chapter 5705, in keeping with Ohio Const. art. XII, § 5, establishes the specific purposes for which taxes may be levied. *See* R.C. 5705.03; R.C. 5705.04; R.C. 5705.09; R.C. 5705.10.

Two purposes for which tax revenue may be raised are to pay current operating expenses and to acquire and construct permanent improvements.[4] R.C. 5705.03(A); R.C. 5705.05; R.C. 5705.06; R.C. 5705.19(A) and (F). R.C. 5705.01(F) defines "current operating expenses" and "current expenses" as "the lawful expenditures of a subdivision, *except those for permanent improvements*, and except payments for interest, sinking fund, and retirement of bonds, notes, and certificates of indebtedness of the subdivision" (emphasis added). R.C. 5705.01(E) defines "permanent improvement" or "improvement" as "any property, asset, or improvement with an estimated life or usefulness of five years or more, including land and interests therein, and reconstructions, enlargements, and extensions thereof having an estimated life or usefulness of five years or more." Real property and improvements thereon are thus considered to be "permanent improvements" for tax levy purposes. *See Roddy v. Andrix*, 95 Ohio L. Abs. 311, 313, 201 N.E.2d 816, 818 (C.P. Madison County 1964).

As required by Ohio Const. art. XII, § 5, the various provisions of R.C. Chapter 5705 which empower taxing authorities to levy taxes, and other taxing statutes such as R.C. 3709.29, specifically set forth the purpose or purposes for which each tax shall be levied. The revenue therefrom may be spent for only the purpose or purposes thus specified. *See* R.C. 5705.10; *In re Petition for Transfer of Funds*; 1997 Op. Att'y Gen. No. 97-030 at 2-176 (it is "fundamental under Ohio law that money that is derived from a particular tax levy may be expended only for the purpose for which that levy was adopted"); 1994 Op. Att'y Gen. No. 94-004.

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[4]A taxing authority is also authorized to "levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes, and certificates of indebtedness of such subdivision and taxing unit, including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness," R.C. 5705.03(A), and such other special levies as are provided by law.

Revenue from a tax levied for current expenses or current operating expenses may not be used to acquire or construct permanent improvements unless the authorizing statute explicitly permits such use. *See Roddy v. Andrix*, 95 Ohio L. Abs. at 313, 201 N.E.2d at 817-18 (finding that funds from a special maintenance and operation tax levied under R.C. 5705.19, which provided at the time that a tax levied in excess of the ten mill-limitation under that statute, "shall be confined to a single purpose," could not be used to acquire real estate and construct a school building, stating that, "'[c]onstruction or permanent improvement' is a particular purpose, and 'maintenance and operation' is a particular purpose.... [t]hey are entirely different purposes"); 1997 Op. Att'y Gen. No. 97-001 at 2-5 to 2-6 n.9; 1981 Op. Att'y Gen. No. 81-035; 1963 Op. Att'y Gen. No. 154, p. 240 (syllabus, paragraph 3) ("[t]he proceeds of a levy under Section 5705.191, Revised Code, for 'the purpose of supplementing the General Fund for current expenses ... for the purpose of making an appropriation for Child Welfare Services' may only be expended for services for children, viz. assistance, maintenance, etc., and may not be used for the construction of permanent improvements"); 1951 Op. Att'y Gen. No. 455, p. 200 (syllabus) ("[f]unds collected from a special levy [for the county child welfare board for care and service to children in the county children's home] in excess of the ten mill limitation pursuant to [R.C. 5705.19], may properly be expended for the repairing of electric wiring in fixtures of a county children's home, but may not be expended for any 'permanent improvement' or 'improvement,' as those terms are defined in [R.C. 5705.01(E)]").[5]

The General Assembly has, in certain instances, authorized a taxing authority to levy a special tax to provide revenue for both operating expenses and the construction or acquisition of permanent improvements. *See, e.g.*, R.C. 5705.221 (authorizing a board of county commissioners to submit to the voters a tax in excess of the ten-mill limitation "for the operation of alcohol and drug addiction programs and mental health programs and the acquisition, construction, renovation, financing, maintenance, and operation of alcohol and drug addiction facilities and mental health facilities"); R.C. 5705.222 (authorizing a board of county commissioners to submit to the voters a tax in excess of the ten-mill limitation "for the operation of programs and services by county boards of mental retardation and developmental disabilities and for the acquisition, construction, renovation, financing, maintenance, and operation of mental retardation and developmental disabilities facilities"); R.C. 5705.24 (authorizing a board of county commissioners to submit to the voters a tax in excess of the ten-mill limitation to supplement the general fund appropriations "for the support of children services and the care and placement of children," and such tax "may be expended for any operating or capital improvement expenditure necessary for the support of children services and the care and placement of children").

There are also examples of statutory authority for the levy of a special tax for either current expenses *or* the construction or acquisition of a permanent improvement. *See, e.g.*, R.C. 5705.23 (authorizing a board of library trustees to have the appropriate taxing authority submit to the voters a tax in excess of the ten-mill limitation "for current expenses of the public library *or* for the construction of any specific permanent improvement or class of improvements which the board of library trustees is authorized to make or acquire and which could be included in a single issue of bonds" (emphasis added)). Thus, it is apparent that where the General Assembly has intended to authorize the levy of a tax to fund both

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[5]Nor may revenue derived from a levy for permanent improvements be used for current expenses. *See* 1947 Op. Att'y Gen. No. 1672, p. 115 (the cost of repairs and alterations to a building rented by a subdivision may not be paid from a fund established for the construction or acquisition of permanent improvements).

current operating expenses and permanent improvements, or to fund, at the discretion of the appropriate authority, either current expenses or permanent improvements, it has explicitly and unambiguously so stated.

The General Assembly has provided no such indication in R.C. 3709.29, which authorizes a tax levy for the sole purpose of providing the board of health with sufficient funds to carry out its programs. *See generally Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81, 83 (1927) ("[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"); *Kiefer v. State of Ohio*, 106 Ohio St. 285, 139 N.E. 852 (1922). The costs of maintaining and operating programs or providing services are considered current operating expenses, and thus, a tax levied for the purpose of providing a board with funds to operate its programs may not be used for the acquisition of permanent improvements, in the absence of explicit authority for such use. *See* 1988 Op. Att'y Gen. No. 88-096; 1963 Op. Att'y Gen. No. 154, p. 240, at 248; 1962 Op. Att'y Gen. No. 2997, p. 337; 1960 Op. Att'y Gen. No. 1697, p. 617. R.C. 3709.29 contains no authority for a tax levied thereunder to be used for permanent improvements, which is consistent with the fact that R.C. 3709.29's statutory predecessor, G.C. 1261-40a, was enacted in 1951, *see* 1951 Ohio Laws 476 (Am. Sub. H.B. 504, eff. Sept. 10, 1951), and as discussed above, boards of health had no authority to acquire real property until 1999 when Sub. H.B. 581 became effective.[6]

Because, in this instance, the tax was levied pursuant to R.C. 3709.29 for the sole purpose of supporting the board of health's program or programs, the board may not use revenue from the levy to purchase the building in which it is now housed or other real property.[7] The revenue from any tax levied in the future under R.C. 3709.29 (as it reads now) would likewise be unavailable for the purchase of real property.

The General Assembly has not, of course, left boards of health without the means to fund the purchase of real property. A board of county commissioners is authorized by R.C. 3707.55(C) to issue securities in order to provide revenue for the acquisition of real property by the general health district.[8] Division (A) of R.C. 3707.55 also authorizes a board of health to "enter into loan agreements, including mortgages," for the acquisition of real property.

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[6]Sub. H.B. 581, 122nd Gen. A. (1998) (eff. March 30, 1999) did not amend R.C. 3709.29.

[7]The cost to a general health district of renting office space is considered an operating expense, which is payable from a tax levied under R.C. 3709.29 for health programs, as well as from money provided the health district pursuant to R.C. 3709.28. *See* 1991 Op. Att'y Gen. No. 91-016; 1983 Op. Att'y Gen. No. 83-081; 1954 Op. Att'y Gen. No. 3499, p. 47. Maintenance and repair costs are also considered to be operating expenses. *See* 1951 Op. Att'y Gen. No. 455, p. 200 (the cost of repairing electrical wiring in a building may be met out of funds designated for current expenses; however if the replacement of or an addition to lighting fixtures has an estimated life or usefulness of five years or more, then it is a permanent improvement and the cost thereof may not be paid from a tax levied for current expenses); 1947 Op. Att'y Gen. No. 1672, p. 115.

[8]R.C. 3707.55 reads in part:

> (C) The board of county commissioners may issue securities of the county pursuant to Chapter 133. of the Revised Code for the acquisition of real property by a general health district under division (A) of this section, but only if the county has a contract with the general health district whereby

In response to your second question, the board of health may not use revenue from a tax levied pursuant to R.C. 3709.29, including the special tax levied in 1995, to purchase real property.

Therefore, it is my opinion, and you are so advised, as follows:

1. The board of health of a combined general health district has authority pursuant to R.C. 3707.55, which became effective in 1999, to purchase real property in order to provide office space for the health district.

2. Because the board of health of a combined general health district had no statutory authority to purchase real property until 1999, it is not bound by an option to purchase agreed to in 1997 as part of a lease of office space, nor may it enforce such option to purchase agreement against the lessor.

3. The board of health of a combined general health district may not use revenue derived from a tax levied pursuant to R.C. 3709.29 to purchase real property, regardless of whether the tax was levied before or after the enactment of R.C. 3707.55.

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the health district agrees to pay the county an amount equal to the debt charges on the issued securities on or before the date those charges fall due.

For purposes of this section, "debt charges" and "securities" have the same meanings as in section 133.01 of the Revised Code, and "board of health of a general health district" includes a board of health of a combined health district formed pursuant to section 3709.07, 3709.071, or 3709.10 of the Revised Code.