

OPINION NO. 94-015**Syllabus:**

Unused moneys in a county delinquent tax and assessment collection fund established pursuant to R.C. 321.261 may be transferred to the county general fund only in the manner provided in R.C. 5705.15 and 5705.16; no authority to transfer moneys from the delinquent tax and assessment fund exists under R.C. 5705.14.

To: David Sams, Madison County Prosecuting Attorney, London, Ohio
By: Lee Fisher, Attorney General, March 28, 1994

You have requested an opinion regarding whether unused moneys in the delinquent tax and assessment collection fund may be transferred to the county's general fund.

The Delinquent Tax and Assessment Collection Fund

The delinquent tax and assessment collection fund is established by R.C. 321.261, which states:

Five percent of all delinquent real property, personal property, and manufactured home taxes and assessments collected by the county treasurer shall be deposited in the delinquent tax and assessment collection fund,¹ which shall be created in the county treasury. The moneys in the fund, one-half of which shall be appropriated by the board of county commissioners to the treasurer and one-half of which shall be appropriated to the county prosecuting attorney, shall be used solely in connection with the collection of delinquent real property, personal property, and manufactured home taxes and assessments.

Annually by the first day of December, the treasurer and the prosecuting attorney each shall submit a report to the board regarding the use of the moneys appropriated to their respective offices from the delinquent tax and assessment collection fund. Each report shall specify the amount appropriated to the office during the current calendar year, an estimate of the amount so appropriated that will be expended by the end of the year, a summary of how the amount appropriated has been expended in connection with delinquent tax collection activities, and an estimate of the amount that will be credited to the fund during the ensuing calendar year. (Footnote added.)

There is no provision in R.C. 321.261 or any other section of the Revised Code that expressly authorizes the transfer of unexpended moneys in the delinquent tax and assessment collection fund to any other fund of the county. Accordingly, it is necessary to examine the provisions of R.C. 5705.14-.16, which govern the authority of subdivisions generally to transfer moneys from one fund to another.

¹ As originally established, this fund was the delinquent real estate tax and assessment collection fund (commonly referred to as the DRETAC fund); however, in 1990, the General Assembly expanded the sources and uses of the fund, changed its name accordingly, and recodified the provisions governing the fund from R.C. 319.54(G) to R.C. 321.261. See 1989-1990 Ohio Laws, Part IV, 5887, 5890-91 (Am. Sub. H.B. 576, eff. March 27, 1991).

Transfer of Money from One County Fund to Another

R.C. 5705.14 authorizes transfers among certain funds² of a subdivision if made by a resolution passed by a two-thirds majority of the subdivision's taxing authority.³ If a transfer is not authorized pursuant to R.C. 5705.14, it may be authorized pursuant to R.C. 5705.15. Transfers authorized by R.C. 5705.15, however, are subject to the more rigorous procedural requirements of R.C. 5705.16, including approval by the Tax Commissioner and by the court of common pleas of the county where the funds are held.

A. Transfers Under R.C. 5705.14

Divisions (A) through (H) of R.C. 5705.14 authorize transfers of moneys among the various funds of a subdivision and describe the circumstances in which those transfers may occur. R.C. 5705.14(A)-(C) authorize transfers of moneys from a bond fund, any specific permanent improvement fund, the sinking fund, or bond retirement fund of a subdivision. R.C. 5705.14(D) authorizes transfers from any special fund of a subdivision, other than particular categories of improvement funds. R.C. 5705.14(E) authorizes a transfer of money from the general fund of a subdivision. R.C. 5705.14(F) authorizes transfers of state motor vehicle license tax and motor vehicle fuel excise tax revenues retained or received by a county, and R.C. 5705.14(G) provides a similar transfer authorization in the case of such revenues received or retained by a municipal corporation. R.C. 5705.14(H) authorizes transfers of money from a county's mental retardation and developmental disabilities general fund and capital fund. The final paragraph of R.C. 5705.14 states that, except in the case of money to be transferred pursuant to R.C. 5705.14(E) from the general fund to any other fund of the subdivision, the foregoing transfers "shall only be made by resolution of the taxing authority passed with the affirmative vote of two-thirds of the members."

A delinquent tax and assessment collection fund is not a bond fund, a specific permanent improvement fund, a sinking fund, or a bond retirement fund. Further, a delinquent tax and assessment fund does not constitute a category of fund expressly mentioned in R.C. 5705.14(E)-(H). It is apparent, therefore, that R.C. 5705.14(A)-(C) and R.C. 5705.14(E)-(H) have no application to transfers of moneys from a county's delinquent tax and assessment collection fund.

It also is apparent that division (D) of R.C. 5705.14 has no application to the delinquent tax and assessment collection fund. R.C. 5705.14(D) authorizes transfers of moneys as follows:

² Pursuant to R.C. 5705.09, each subdivision is required to establish the following funds for the deposit of its moneys: general fund, R.C. 5705.09(A); sinking fund whenever the subdivision has outstanding bonds other than serial bonds, R.C. 5705.09(B); bond retirement fund, for the retirement of serial bonds, notes, or certificates of indebtedness, R.C. 5705.09(C); a special fund for each special levy, R.C. 5705.09(D); a special bond fund for each bond issue, R.C. 5705.09(E); a special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose, R.C. 5705.09(F); a special fund for each public utility operated by a subdivision, R.C. 5705.09(G); and a trust fund for any amount received by a subdivision in trust, R.C. 5705.09(H).

³ As used in R.C. Chapter 5705 (tax levy law), the term "[s]ubdivision" includes "any county," R.C. 5705.01(A), and "[t]axing authority" means, "in the case of any county, the board of county commissioners," R.C. 5705.01(C).

The unexpended balance in any *special fund*, other than an improvement fund, existing in accordance with division (D), (F), or (G) of section 5705.09 or section 5705.12 of the Revised Code, may be transferred to the general fund or to the sinking fund or bond retirement fund *after the termination of the activity, service, or other undertaking for which such special fund existed*, but only after the payment of all obligations incurred and payable from such special fund. (Emphasis added.)

By its express terms, R.C. 5705.14(D) permits transfers of the unexpended balance in any special fund only after the termination of the activity, service, or other undertaking for which the special fund existed. Clearly, the activity for which the county's delinquent tax and assessment collection fund exists has not terminated. The collection of delinquent real property, personal property, and manufactured home taxes and assessments is a continuing activity. Even if, in a particular year, all expenses incurred by the treasurer and prosecuting attorney in connection with the collection of delinquent real property, personal property, and manufactured home taxes and assessments are satisfied, the need to collect delinquent taxes and thus the need for the fund continues. *See In re Petition for Transfer of Funds*, 52 Ohio App. 3d 1, 556 N.E.2d 191 (Montgomery County 1988) (holding that, for purposes of transfers under R.C. 5705.14(D), where the special fund was created to pay for fire protection, the need for that service was not terminated by paying the expenses for the current year). It follows that R.C. 5705.14(D) does not authorize transfers of the unexpended balance in the delinquent tax and assessment collection fund to the general fund of the county.⁴

B. Transfers Under R.C. 5705.15 and R.C. 5705.16

Certain transfers not authorized pursuant to R.C. 5705.14 may nonetheless be accomplished by the more rigorous transfer procedures set out in R.C. 5705.15-.16. R.C. 5705.15 states:

In addition to the transfers authorized in section 5705.14 of the Revised Code, the taxing authority of any political subdivision may, in the manner provided in this section and section 5705.16 of the Revised Code, transfer from

⁴ The above analysis assumes that the delinquent tax and assessment collection fund is a special fund subject to R.C. 5705.14(D). R.C. 5705.14(D) applies to any special fund "existing in accordance with division (D), (F), or (G) of section 5705.09 or 5705.12 of the Revised Code." Of these provisions, the pertinent one is R.C. 5705.09(F), which requires each subdivision to establish a special fund "for each class of revenues derived from a source *other than the general property tax*, which the law requires to be used for a particular purpose." (Emphasis added.) The delinquent tax and assessment collection fund includes moneys from delinquent real and personal property taxes and manufactured home taxes and assessments. R.C. 321.261. The manufactured home tax is levied "in lieu of any general property tax," R.C. 4503.06(J), and therefore constitutes a class of revenues derived from a source other than the general property tax, as required by R.C. 5705.09(F). Delinquent real and personal property taxes, however, arguably may be revenues derived from the general property tax. Accordingly, the delinquent tax and assessment collection fund may not be in its entirety a special fund for purposes of R.C. 5705.09(F) and, in turn, R.C. 5705.14(D). As discussed above, however, it is not necessary to resolve this issue here, since even if applicable, R.C. 5705.14(D) does not permit a transfer of moneys from the delinquent tax and assessment collection fund because the activity for which the fund exists does not terminate.

one fund to another any public funds under its supervision, except the proceeds or balances of loans, bond issues, special levies for the payment of loans or bond issues, the proceeds or balances of funds derived from any excise tax levied by law for a specified purpose, and the proceeds or balances of any license fees imposed by law for a specified purpose.

Pursuant to R.C. 321.261, the board of county commissioners is responsible for appropriating moneys in the delinquent tax and assessment collection fund to the county prosecuting attorney and treasurer, who must report back to the board regarding the use of the moneys. Thus, the board of county commissioners is responsible for supervising the public funds in the delinquent tax and assessment collection fund. Further, the delinquent tax and assessment collection fund is not one of the types of public funds excepted from the transfer provisions of R.C. 5705.15.⁵ Accordingly, R.C. 5705.15 permits the board of county commissioners, as the county's taxing authority, to transfer funds from the delinquent tax and assessment collection fund in accordance with R.C. 5705.16.⁶

R.C. 5705.16 provides first that a resolution declaring the necessity for a transfer of funds be passed by a majority of the board of county commissioners. The board then prepares a petition addressed to the court of common pleas of the county where the funds are held. The petition must contain specific information regarding the proposed transfer. If a duplicate copy of this petition is approved by the Tax Commissioner, the original petition then may be filed with the court. The court may grant the petition and order the transfer, if, after notice and a hearing, the court finds "that there are good reasons, or that a necessity exists, for the transfer, and that no injury will result therefrom." *Id.*

Conclusion

It is, therefore, my opinion, and you are hereby advised that unused moneys in a county delinquent tax and assessment collection fund established pursuant to R.C. 321.261 may be transferred to the county general fund only in the manner provided in R.C. 5705.15 and 5705.16; no authority to transfer moneys from the delinquent tax and assessment fund exists under R.C. 5705.14.

⁵ In addition to the funds that R.C. 5705.15 expressly excepts from its transfer provisions, at least one court has recognized a constitutional exception for funds from special levies enacted for a particular purpose. *See In re Petition for Transfer of Funds*, 52 Ohio App. 3d 1, 556 N.E.2d 191 (Montgomery County 1988) (applying Ohio Const. art XII, §5).

⁶ An earlier opinion of the Attorney General stated that the provisions of R.C. 5705.15 and 5705.16 were not applicable to the question of whether a board of county commissioners could act on their own to authorize transfers from the real estate assessment fund established in R.C. 325.31, a fund which is similar in many respects to the delinquent tax and assessment collection fund. *See* 1963 Op. Att'y Gen. No. 195, p. 286, 288. The question presented in 1963 Op. No. 195, however, concerned only the authority of the board of county commissioners to effect such transfers unilaterally. Your question is not so limited but asks instead whether any procedures exist by which such transfers can be made.