See related guidance in Bulletins 2014-02 and 2014-03,, regarding alcohol sales at agricultural society fairs and at other public events.

Bulletin 2003-005

Auditor of State Bulletin

Date Issued: October 20, 2003

TO: All County Auditors, Commissioners & Prosecutors
All City Auditors, Finance Directors, Council Members & Treasurers
All Independent Public Accountants
All School District Treasurers
All Township Clerks & Trustees
All Village Fiscal Officers, Council Members & Clerks

SUBJECT: Expenditure of Public Funds/Proper "Public Purpose"

As you may know, government entities may not make expenditures of public monies unless they are for a valid public purpose. This Bulletin addresses the requirements necessary to ensure that an entity's expenditure of public funds is for a proper public purpose.

Ohio Attorney General Opinion 82-006, which is attached for reference, addresses the expenditure of funds for public purposes. This opinion, citing the Ohio Supreme Court case of State ex rel. McClure v. Hagerman, 155 Ohio St. 320 (1951), provides guidance as to what may be construed as a public purpose. There are two criteria that demonstrate whether an expenditure is for a public purpose. First, the expenditure is required for the general good of all inhabitants. As stated in McClure, "[g]enerally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants …." Id. at 325. Second, the primary objective of the expenditure is to further a public purpose, even if an incidental private end is advanced.

The determination of what constitutes a public purpose is primarily a legislative function. As such, the decision to expend public funds "… must be made in accordance with the procedural formalities governing the exercise of legislative power. **Specifically, the decision must be memorialized by a duly enacted ordinance or resolution and may have prospective effect only**." 1982 Op. Atty. Gen. No. 82-006 (emphasis added). With due deference to local control generally, the Auditor of State's Office will only question expenditures where the legislative determination of a public purpose is manifestly arbitrary and incorrect. The Auditor of State's Office does not view the expenditure of public funds for alcoholic beverages as a proper public purpose and will issue findings for recovery for such expenditures as manifestly arbitrary and incorrect.

Thus, to avoid an audit finding, the Auditor of State's Office will require that expenditures of public funds for coffee, meals, refreshments, or other amenities have prior authorization by the appropriate legislative authority. If such prior authorization has been given, the Auditor of State's Office will not question the expenditure in the course of an audit unless there is a clear indication that the legislative determination is arbitrary and incorrect. **Please note, however, the use of public funds to purchase alcohol <u>will</u> be considered arbitrary and incorrect and <u>will</u> be cited by the Auditor of State's Office.**

Also note, for offices that do not have a legislative approval process for these types of expenditures, these principles still apply.

Questions concerning this bulletin should be address to the Legal Division of the State Auditor's Office at (800) 282-0370.

Sincerely,

Betty Montgomery
Ohio Auditor of State

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO

OPINION No. 82-006

1982 Ohio AG LEXIS 99

March 1, 1982

Syllabus:

1. Coffee, meals, refreshments and other amenities are fringe benefits which may properly be provided by units of local government to their employees as a form of compensation, if authorized by the officer or body having the power to fix the compensation of such employees.

2. Municipal funds may be expended to purchase coffee, means, refreshments or other amenities for municipal officers, employees or other persons, if the legislative body of the municipality has determined that such expenditures are necessary to further a public purpose and if its determination is not manifestly arbitrary or unreasonable.

3. The governing body of a political subdivision other than a municipality may expend public funds to purchase coffee, meals, refreshments and other amenities for its officers or employees or other persons if it determines that such expenditures are necessary to perform a function or to exercise a power expressly conferred upon it by statute or necessarily implied therefrom and if its determination is not manifestly arbitrary or unreasonable.

4. Since the decision to expend public funds to purchase coffee, meals, refreshments or other amenities is a legislative decision, [*2] it must be memorialized by a duly enacted ordinance or resolution and may have prospective effect only.

Request by: William J. Brown, Attorney General

Opinion:
The Honorable Thomas E. Ferguson
Auditor of State
88 East Broad Street, 5th Floor
Columbus, Ohio 43215

I have before me your request to clarify two opinions of this office which address the expenditure of public funds by local political subdivisions for the purchase of meals, refreshments, and other amenities for public officers and employees. Your specific questions are as follows:

1. Is the analysis set forth in 1981 Op. Att'y Gen. No. 81-052 applicable to units of local government other than boards of education, thus enabling them to provide coffee, meals, refreshments, and other amenities to their employees as fringe benefits?

2. Does the analysis set forth in 1975 Op. Att'y Gen. No. 75-008 correctly require that under no circumstances may public moneys be expended by a political subdivision for meals, refreshments or other amenities for officers and employees of the political subdivision or third parties, in the local area?

3. If the answer to the preceding question is in the negative, what criteria should be applied by the Bureau [*3] of Inspection and Supervision of Public Offices in determining, as required by R.C. 117.10, whether "public money has been illegally expended" as a result of such expenditures?

You have indicated that your first question arises as a result of paragraph three of the syllabus of 1981 Op. Att'y Gen. No. 81-052, which states: "A board of education, pursuant to its general power to compensate its teaching employees, may expend public funds to provide its teaching employees with free lunches at the school cafeteria or with cash payments for early retirement or for longevity of tenure with the employing school district." Your specific question is, therefore, whether employees of the various public employers throughout the state may be given fringe benefits, such as coffee, meals, and refreshments, as part of their compensation.

My conclusion in Op. No. 81-052 that a board of education could expend public funds to provide its teaching employees with certain amenities or benefits rested in large part on the Ohio Supreme Court's decision in Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). As I noted in Op. No. 81-052, the Ebert court [*4] spoke in general, unlimited terms and the rationale in Ebert, accordingly, "necessarily extends to any creature of statute and establishes the proposition that the power to employ includes the power to fix any fringe benefit — absent constricting statutory authority." n1 Op. No. 81-0552 at 2-202.

n1 I recently noted, however, one exception to this general rule. In 1981 Op. Att'y Gen. No. 81-056 I opined that Ebert does not extend to state agencies since the General Assembly has not given individual state agencies the power to determine the compensation payable to their employees.

Of course, because a municipality is not a creature of statute, the analysis in Ebert does not apply to the fixing of compensation by a municipal corporation for its employees. Because compensation is a matter of substantive local self-government, a municipal ordinance concerning compensation of municipal employees would supersede any statutory provision in conflict with the ordinance. See Northern Ohio Patrolmen's Benevolent Association v. City of Parma, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980). The rationale set forth in Op.

No. 81-052 does not, therefore, apply to municipalities [*5] as a restriction on their authority to compensate municipal employees.

In order to answer your first question, it is necessary to determine whether meals, refreshments and other amenities n2 (including coffee) are fringe benefits which may properly be provided to employees of local government units as "compensation," provided, of course, that there are no constricting statutory provisions. As I noted in 1977 Op. Att'y Gen. No. 77-090, there is no precise statutory or common law definition of the term "fringe benefit" as it relates to public employees. I indicated therein, however, that a fringe benefit is commonly understood to mean something that is provided at the expense of the employer and is intended to directly benefit the employee so as to induce him to continue his current employment. Madden v. Bower, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969). I am unable to be any more precise at this time. I do not, however, believe this imprecision is problematic with respect to your inquiry, since I am confident that there is little room for doubt in concluding that the illustrative amenities set forth in your request are properly viewed as fringe benefits when provided by an [*6] employer as an inducement to his employees to continue their current employment. See, e.g., 1981 Op. Att'y Gen. No. 81-082 (dental and eye care insurance as a fringe benefit); 1981 Op. Att'y Gen. No. 81-052 (free lunches and cash payments for early retirement or for longevity of tenure as fringe benefits).

n2 After receiving your request, I contacted your office to seek clarification of what might be encompassed by the term "other amenities." It is my understanding that this term was intended as a reference to such non-food items as flowers for sick employees or relatives of employees, token retirement gifts, or meritorious service awards.

In response to your first inquiry, it is, therefore, my opinion that coffee, meals, refreshments and other amenities are fringe benefits which may properly be provided by units of local government to their employees as a form of compensation, provided that there is no overriding statutory restriction to the contrary. Of course, in order for such benefits to be properly provided, they must be properly authorized by the local officer or body having the power to fix the compensation for such employees, and should be uniformly granted [*7] to all similarly situated employees. See Berenguer v. Dunlavey, 352 F. Supp. 444 (D. Delaware 1972), vacated as moot, 414 U.S. 895 (1973); Op. No. 81-082.

Your second question seeks clarification of the circumstances under which a political subdivision may expend public moneys for meals, refreshments and other amenities for its officers, employees or third parties. Since I have already discussed in response to your first question the legal basis for providing such amenities to employees as a form of compensation, I shall assume for the purposes of this inquiry that these amenities are not intended to be provided to the employees of the political subdivision as a form of compensation.

You specifically seek clarification of Op. No. 75-008, where I concluded that a board of education may not expend public funds for lunches or dinners for persons attending a local meeting of such board. Only two factual assumptions were evident in that opinion. First, the meals were being provided to members of the board of education, who are public officers. Second, the meetings in question took place in the home destrict and did not involve travel away from headquarters. Assuming [*8] no additional facts, I still am of the opinion that the provision of meals in such situation would not constitute a valid public purpose. This is not the same as saying, however, that under no circumstances may public moneys be expended by a political subdivision for meals, refreshments or other amenities, in the local area.

You have asked what criteria should, then, be applied in determining, as required by R.C. 117.10, whether "public money has been illegally expended" as a result of such expenditures. The relevant inquiry is whether the expenditure in question constitutes a "public purpose." Unfortunately, the problem of deciding what constitutes a public purpose has always been difficult. The courts have attempted no absolute judicial definition of a public purpose but have left each case to be determined by its own peculiar circumstances. The Ohio Supreme Court has, however, offered the following general guidelines to be applied in determining whether a particular expenditure constitutes a public purpose. State ex rel. McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951). First, the test is whether the expenditure is requird for the general good of all the [*9] inhabitants. "Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants...." Id. at 325, 98 N.E.2d at 838. Second, if the primary objective is to further a public purpose, it is immaterial that, incidentally, private ends may be advanced. Third, the determination of what constitutes a public purpose is primarily a legislative function, and a legislative determination of a public purpose will not be disturbed except where such determination is palpable and manifestly arbitrary and incorrect. Asked to consider whether a municipal corporation could expend its funds to pay the cost of membership in an association of municipal finance officers, the McClure court summarized the proper inquiry as follows:

"There is no universal test for distinguishing between a purpose which is public or municipal and, therefore, a proper object of municipal expenditure and one which is private and, therefore, an improper object to which to devote public money. Each case must be decided in the light of existing conditions, with respect to the objects sought to be accomplished, [*10] the degree and manner in which that object affects the public welfare, and the nature and character of the thing to be done; but the court will give weight to a legislative determination of what is a municipal purpose, as well as widespread opinion and general practice which regard as city purposes some things which may not be such by absolute necessity, or on a narrow interpretation of constitutional provisions. * * * It has been laid down as a general rule that the question whether the performance of an act or the accomplishment of a

specific purpose constitutes a 'public purpose' for which municipal funds may be lawfully disbursed rests in the judgment of the municipal authorities, and the courts will not assume to substitute their judgment for that of the authorities unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused."

McClure, 155 Ohio St. at 325-26, 98 N.E.2d at 838 (quoting 64 C.J.S. 334, 335, § 1835b). Thus, the provision of meals, refreshments or other amenities, although invariably conferring a private benefit, may be a permissible expenditure of public funds, if the legislative authority has determined that the expenditure [*11] is necessary to further a public purpose. Confronted with a situation in which such a legislative determination has been made, you may not find that public money has been illegally expended, within the meaning of R.C. 117.10, unless you have reason to believe that such determination is "'palpable and manifestly arbitrary and incorrect.'" McClure, 155 Ohio St. at 325, 98 N.E.2d at 838 (quoting 37 Am. Jur. 734-35, § 120). On the other hand, if you have reason to believe that the legislative body has abused its discretion in determining that a public purpose has been served by the expenditures in question, then it is your duty to make a finding in accordance with R.C. 117.10 so that a court may review the matter.

Reference is made throughout the foregoing analysis to the question conferred upon "legislative bodies" to determine what constitutes a public purpose. This terminology is understandable because the public purpose cases have traditionally been concerned with the power of municipalities to undertake certain functions. I understand your present inquiry to be broader, however, and to include counties, townships, school districts and other political subdivisions. It is, [*12] therefore, necessary to determine whether the term "legislative bodies" can encompass the governing bodies in political subdivisions other than municipalities.

In its strictest sense the term "legislative bodies" refers to the traditional bodies empowered to make laws, such as Congress, state legislatures and municipal councils. Courts have recognized, however, that the governing bodies of other political subdivisions are at times called upon to exercise legislative powers or functions. For example, in Stein v. Erie County Commissioners, 16 Ohio Misc. 155, 241 N.E.2d 300 (C.P. Erie County 1968), the court held that, when creating a regional airport authority under the provisions of R.C. Chapter 308, the county commissioners were acting in a legislative capacity. Similarly, in Morgan County Commission v. Powell, 292 Ala. 300, 305, 293 So.2d 830, 834 (1974), the court held that, "[i]n the aspect of appropriating money from the county treasury, a county governing body must be deemed as exercising a legislative power." Similarly, the adoption of zoning ordinances and maps is traditionally regarded as a "legislative act." See, e.g., County of Pasco v. J. Dico, Inc., [*13] 343 So.2d 83 (Fla. App. 1977); Board of Supervisors v. Lerner, 221 Va. 30, 267 S.E.2d 100 (1980). One court has found a board of education to be a "legislative body." Andeel v. Woods, 174 Kan. 556,

258 P.2d 285 (1953). In Allstate Insurance Co. v. Matropolitan Sewerage Commission, 80 Wis.2d 10, 258 N.E.2d 148 (1977), the court held that the decisions of a matropolitan sewerage commission with respect to planning and designing sewer systems were "legislative acts" for which the commission was immune from tort liability. As these cases suggest, legislative power can mean something broader than the usual power to enact laws. A governmental body may be deemed to exercise a legislative function when it promulgates policies, standards, regulations or rules of general application and prospective operation and when the body's decision is appropriately based on considerations similar to those a legislature could have invoked. Board of Supervisors v. Department of Revenue, 263 N.W.2d 227, 239 (Iowa 1978).

Relying on this broader definition of what constitutes a legislative function, I find no reason to restrict the public purpose analysis, illustrated by McClure, [*14] to municipalities only. It is my opinion that a decision properly made by the appropriate governing body of a county, township, school district or other political subdivision to expend public funds to provide coffee, meals, refreshments or other amenities is to be subjected to the same analysis. This does not mean, however, that other political subdivisions are on exactly the same footing a municipalities. Political subdivisions other than municipalities are creatures of statute and have only such powers as are expressly granted or necessarily implied. See, e.g., State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (board of county commissioners, as creature of statute, has only powers expressly conferred by statute). Consequently, such political subdivisions may make "legislative" decisions only with respect to matters in which they have been authorized to act by the General Assembly. The provision of meals, refreshments and other amenities by such political subdivisions is permissible, therefore, only if the governing body has reasonably determined that the provision of such amenities is necessary to the performance of a function [*15] or duty or to the exercise of a power expressly conferred by statute or necessarily implied therefrom. See 1930 Op. Att'y Gen. No. 2170, vol. II, p. 1241.

Additionally, since the decision to expend public funds for meals, refreshments or other amenities for persons other than employees is in a sense a legislative decision, it must be made in accordance with the procedural formalities governing the exercise of legislative power. Specifically, the decision must be memorialized by a duty enacted ordinance or resolution and may have prospective effect only. See Department of Revenue, 263 N.W.2d at 239. See, e.g., McClure, supra.

In specific response to your questions, it is, therefore, my opinion, and you are advised, that:

1. Coffee, meals, refreshments and other amenities are fringe benefits which may properly be provided by units of local government to their employees as a form of compensation, if authorized by the officer or body having the power to fix the compensation of such employees.

2. Municipal funds may be expended to purchase coffee, meals, refreshments or other amenities for municipal officers, employees or other persons, if the legislative [*16] body of the municipality has determined that such expenditures are necessary to further a public purpose and if its determination is not manifestly arbitrary or unreasonable.

3. The governing body of a political subdivision other than a municipality may expend public funds to purchase coffee, meals, refreshments and other amenities for its officers or employees or other persons if it determines that such expenditures are necessary to perform a function or to exercise a power expressly conferred upon it by statute or necessarily implied therefrom and if its determination is not manifestly arbitrary or unreasonable.

4. Since the decision to expend public funds to purchase coffee, meals, refreshments or other amenities is a legislative decision, it must be memorialized by a duly enacted ordinance or resolution and may have prospective effect only.

Bulletin 2003-009

Auditor of State Bulletin

Date Issued: December 23, 2003

TO: All State Agencies, Boards, and Commissions
All State Universities and Colleges
All Statewide Elected Officials
Ohio Supreme Court
All County Auditors, Commissioners, and Prosecutors
All City Auditors, Finance Directors, Council Members, and Treasurers
All Independent Public Accountants
All School District Treasurers
All Township Clerks and Trustees
All Village Fiscal Officers, Council Members, and Clerks
All Public Libraries

FROM: **Betty Montgomery**
Ohio Auditor of State

SUBJECT: Unresolved Findings for Recovery Database (ORC Section 9.24)

House Bill 95, the State of Ohio Operating Budget for fiscal years 2004-05, enacted a new provision of law (ORC section 9.24), effective January 1, 2004, that prohibits a state agency or political subdivision from awarding a contract for goods, services or construction, which is paid for in whole or in part with state funds, to a person against whom a finding for recovery has been issued by the Auditor of State, if the finding for recovery is unresolved. The purpose of this bulletin is to describe the provisions of this new law and to explain the database established by the Auditor of State pursuant to this law.

Explanation of Findings for Recovery

ORC 9.24 defines a finding for recovery as "a determination issued by the Auditor of State, contained in a report the Auditor of State gives to the Attorney General pursuant to section 117.28 of the Revised Code, that public money has been illegally expended, public money has been collected but not been accounted for, public money is due but has not been collected, or public property has been converted or misappropriated."

Pursuant to ORC 117.28, when a finding for recovery is issued in an audit report, the legal counsel for the public office is authorized to collect the public money due within 120 days after receiving the audit report. In addition, the Auditor of State is required to notify the Attorney General of every finding for recovery. If, after 120 days, the legal counsel for the public office has not initiated legal action to recover the public money due, the Attorney General is authorized to bring such an action.

ORC 9.24 (B) provides that a finding for recovery is unresolved unless any of the following criteria applies:

1. The money identified in the finding for recovery is paid in full to the state agency or political subdivision to whom the money was owed;

2. The debtor has entered into a repayment plan that is approved by the Attorney General and the state agency or political subdivision to whom the money identified in the finding for recovery is owed. A repayment plan may include a provision permitting a state agency or political subdivision to withhold payment to a debtor for goods, services, or construction provided to or for the state agency or political subdivision pursuant to a contract that is entered into with the debtor after the date the finding for recovery was issued.

3. The Attorney General waives a repayment plan described in division (2) of this section for good cause;

4. The debtor and state agency or political subdivision to whom the money identified in the finding for recovery is owed have agreed to a payment plan established through an enforceable settlement agreement.

5. The state agency or political subdivision desiring to enter into a contract with a debtor certifies, and the Attorney General concurs, that all of the following are true:

   (a) Essential services the state agency or political subdivision is seeking to obtain from the debtor cannot be provided by any other person besides the debtor;

   (b) Awarding a contract to the debtor for the essential services described in division (5)(a) is in the best interest of the state;

   (c) Good faith efforts have been made to collect the money identified in the finding of recovery.

6. The debtor has commenced an action to contest the finding for recovery and a final determination on the action has not yet been reached.

Auditor of State Database

ORC 9.24 (D) requires the Auditor of State to establish and maintain a database which is accessible to the public and which lists all persons[1] against whom an unresolved finding for recovery has been issued, dating back to January 1, 2001. The database is also to list the amount of money identified in the finding for recovery. The statute requires the Auditor of State to update the database on a quarterly basis to reflect findings for recovery that have been resolved. Both the initial database and all updates reflecting findings that have been resolved will be based upon written reports that the Attorney General is to provide to the Auditor of State. All new findings for recovery will be added to the database immediately upon being issued by the Auditor of State.

Although the statute only requires that the database be updated to reflect resolved findings on a quarterly basis, the Auditor of State and the Attorney General have agreed to a process to allow for more frequent updates. The Attorney General will notify the Auditor of State in writing upon the resolution of a finding, and the Auditor's database will be updated upon receipt of the certification from the Attorney General.

The database required by ORC 9.24 will be accessible via the Auditor of State's web site, at www.auditor.state.oh.us. The web site will contain a search function, allowing anybody to search for a specific person by name to determine if that person has unresolved findings for recovery issued since January 1, 2001. If the person does have a finding for recovery, the web site will provide additional information about the person and the finding, as well as a link to the audit report in which the finding was issued.

If a public office is searching the database in order to comply with the provisions of ORC 9.24, the web site will allow the public office to perform a certification search. A certification search allows users to be more specific about the persons for whom they are searching and at the end of the process, if none of the search results match the person to whom the public office plans to award a contract, it can print off a certification page documenting this fact for audit purposes.

In addition to searches by name, the database will allow users to obtain a complete listing of all unresolved findings issued since 2001. The database will also contain, for informational purposes only, all persons against whom findings for recovery have been issued since January 1, 2001, even if those findings have been resolved. The database will allow users to easily distinguish between resolved and unresolved findings for recovery. **Please note that only those persons who have unresolved findings for recovery are prohibited from entering into public contracts.**

[1] NOTE: For purposes of this draft, the use of "person" is defined an individual, corporation, business trust, estate, trust, partnership, and association. See ORC 1.59.

Responsibilities of a Public Office

ORC 9.24 (D) provides that before awarding a contract for goods, services or construction, which is paid for in whole or in part with state funds, a state agency or political subdivision is required to verify that the person does not appear in the database established by the Auditor of State.

As mentioned above, the Auditor of State and the Attorney General have agreed to a process that will keep the database as accurate and timely as possible. Nonetheless, it is still possible that a person may have resolved the finding, but the finding continues to be listed in the Auditor of State's database as unresolved. If this occurs, the public office should consult with its legal counsel about how to proceed.

Upon performing a certification search of the Auditor of State's database, if the person is not listed as having an unresolved finding for recovery, the public office may proceed with the contract. Again, when the database shows no unresolved findings for recovery for the person, the web site will offer users the option of printing out a certification page that can be maintained to demonstrate compliance with ORC 9.24 (E).

Responsibilities of a Person With an Unresolved Finding for Recovery

Any person who has an unresolved finding for recovery is prohibited from receiving a contract for goods, services, or construction, paid for in whole or in part with state funds. As described earlier in this bulletin, ORC 9.24 (B) provides the ways in which a finding for recovery may be resolved. **A finding for recovery will not be removed from the Auditor of State's database until written notification of the resolution is received from the Attorney General. Consequently, any person who wishes to resolve a finding for recovery should contact the Attorney General's Office at (614) 644-1234.**

We are well aware that many questions have arisen with this new legislation and that new questions will likely continue to arise. Because many of these questions involve legal interpretations of statute, the Auditor of State's Office is not able to answer all of these questions at this time. We will continue to work closely with the Attorney General's Office to seek clarification on these legal issues. In the meantime, state agencies and political subdivisions should work closely with their own legal counsel to determine how to comply with the requirements of ORC 9.24.

Again, the database of unresolved findings for recovery will be available on the Auditor of State's web site on January 1, 2004, at www.auditor.state.oh.us. Questions concerning this bulletin or the Auditor of State's database should be directed to the Auditor's Office at 1-800-282-0370. Questions regarding the resolution of findings for recovery should be directed to the Attorney General's Office at (614) 644-1234.

Betty Montgomery
Ohio Auditor of State