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**SUPPLEMENTAL OPINION**

**To:** John R. Hamercheck, President, Lake County Board of Commissioners  
**CC:** John Plecnik, Richard Regovich, Christopher Galloway, Michael Zuren,  
Stephen L. Byron, Joseph Szeman  
**From:** Charles E. Coulson, Prosecuting Attorney  
**Re:** Local Government Fund for Lake County  
**Date:** August 23, 2023

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This opinion supplements my prior opinion, dated July 24, 2023, regarding the continued use of the alternative method for the distribution of the local government fund. At the August 7, 2023 meeting of the Budget Commission, I agreed to reconsider my July 24, 2023 opinion taking into consideration any information or opinions submitted to me by the various subdivisions that receive a share of the local government fund. To date, I have received the August 7, 2023 memorandum of Stephen L. Byron, Law Director for the Villages of Kirtland Hills and Waite Hill and its attached exhibits, and a letter, dated August 11, 2023, from Joseph Szeman, Law Director for the City of Mentor (the memoranda).

In my July 24, 2023 opinion, I noted what I believed to be a typographical error in the Sunset Clause. Both Mr. Byron's and Mr. Szeman's memoranda misconstrue my July 24, 2023 opinion that the alternative method is no longer in place to be based on this typographical error. Their memoranda suggest that there is no typographical error and the effect of the Sunset Clause was to limit the ability to seek review and modification of the alternative method, restricting the Budget Commission's authority to seek amendment of the alternative method to every fifth year. Given this interpretation, the memoranda opine that the effect of the 2012 resolution was to request reconsideration of the alternative method. The memorandum from Mr. Byron further provides records which indicate that a committee was formed and met on April 24, 2012. The records indicate that the committee members believed that the alternative method would remain in place unless the board of commissioners, the largest city, and a majority of the remaining subdivisions

agreed to amend or repeal the alternative method. The minutes from the April 24, 2012 committee meeting indicate that a majority of the members of the committee voted to continue to use the alternative method. The memoranda opine that the alternative method remains in effect because it was not revised, amended, or repealed in 2012. The memoranda additionally argue that the Budget Commission must continue to apply the alternative method because the issue of the effect of the 2012 resolution is barred by res judicata as there was no appeal of the continued use of the alternative method after the 2012 resolution.

I disagree with the memoranda's interpretation of the Sunset Clause. The Sunset Clause states that "[t]he alternate formula *shall continue for successive periods of five years unless* either the County, or the largest city or 50% of the remaining participants by motion of their legislative bodies prior to January 31<sup>st</sup> of each fifth year of distribution, request that the alternative formula be amended or abolished." (Emphasis added). The necessary implication is that if a request to amend or abolish is made, the alternative method would cease to continue for another five year period. Further, the memoranda's interpretation of the Sunset Clause is contradicted by the 1995 amendment to the alternative method to permit the Painesville Township Park District to receive a portion of the local government fund. Based on the memoranda's interpretation of the Sunset Clause, this amendment could not have taken place until 1998, and then only if the county, the largest city, or 50% of the remaining participants requested that the alternative method be amended prior to January 31, 1997.

Most importantly, the memoranda disregard binding precedent from the Supreme Court of Ohio which holds that an alternative method of allocation adopted pursuant to R.C. 5747.53 is not a contract. *Township of Andover v. Ashtabula County Budget Commission*, 49 Ohio St.2d 171, 174, 360 N.E.2d 690 (1977); *City of Girard v. Trumbull County Budget Commission*, 70 Ohio St.3d 187, 191, 638 N.E.2d 67, 1994-Ohio-169. The Supreme Court of Ohio has explicitly precluded the application of contract law principles to an alternative method. *Id.*

Mr. Szeman argues that the Board of Commissioners' 1982 resolution is not like *Andover*. In *Andover*, the city of Ashtabula limited its approval to one year at a time. Mr. Szeman further points out that the Supreme Court of Ohio has clarified that the statutory provision relating to determining the allocation of the local government fund does not require annual approval. Indeed, the Supreme Court of Ohio has disavowed dicta in *Andover* that suggested that annual approval is necessary and clarified that "after initial and *unlimited* approval, additional action by the necessary governmental units is required only in order to revise, amend, repeal, or adopt a new formula." *City of Lancaster v. Fairfield County Budget Commission*, 86 Ohio St.3d 137, 142, 712 N.E.2d 719, 1999-Ohio-142. (Emphasis added). However, "*subdivisions can either restrict their approval of an alternative method to a given time, or they can grant unrestricted approval.*" *City of Reynoldsburg v. Licking County Budget Commission*, 104 Ohio St.3d 453, 820 N.E.2d 323, 2004-Ohio-6773, ¶25. (Emphasis

added). The restricted approval need not be limited to one year, but can be any time period.

Mr. Szeman further states that the 1982 resolution “created an open-ended effective period subject to review via specially convened committee no less than every 5 years. This was and remains lawful.” There is no precedent permitting the participants to alter the statutory process for adopting, revising or repealing the alternate method or to impose periodic review requirements. In fact, as discussed above, there is binding precedent that holds that the alternative method is not a contract. The necessary governmental units cannot, therefore, contractually create a limitation on the ability to seek an amendment or revision to the alternative method.

The memoranda’s focus on the intent of the participants in adopting the alternative method which included the Sunset Clause is exactly the kind of contractual analysis that the Supreme Court of Ohio has rejected. *Girard* at 192. What the participants intended or understood the Sunset Clause to mean is not relevant because the alternative method is not a contractual agreement. The intent or understanding of the necessary governmental units in 1982 or the committee participants in 2012 is not relevant because the alternative method is not a contractual agreement.

Consequently, my July 24, 2023 opinion was not based on what I perceive to be a typographical error in the Sunset Clause. Rather, my opinion was based on the applicable law. The local government fund appropriation is strictly a statutory procedure. The necessary governmental units cannot agree to alter the statutory procedure. *Girard* at 192. When considering an alternative method of allocating the local government fund, the necessary governmental units can only reject, unconditionally approve, or approve for a limited period of time. *Reynoldsburg*, ¶25. As such, the only relevant question to the determination of whether the Budget Commission should continue to distribute the local government funds pursuant to the alternative method is whether the Budget Commission had approval to use the alternative method from all of the necessary governmental units. Specifically, at issue here is whether the Board of Commissioners’ 1982 resolution unconditionally approved the alternative method, or approved the alternative method for a limited period of time.

By incorporating the Sunset Clause into the 1982 resolution, the Board of Commissioners restricted its approval of the alternative method of allocation to five years with continued approval automatically renewing for successive five year periods **unless** the Board of Commissioners notified the Budget Commission that it would not renew its approval through a motion to amend or abolish the alternative method. Given the Supreme Court of Ohio precedent precluding the application of contract principles to the alternative method, it is not clear that a court would find the automatic renewal provision to be effective. Assuming *arguendo* that this provision is applicable, the Board of Commissioners renewed its approval of the alternative method of allocation for subsequent five year periods in 1987, 1992, 1997, 2002, and 2007 by failing to pass a resolution for the alternative

method to be amended or abolished.

In 2012, however, the Board of Commissioners, through its January 26<sup>th</sup> resolution, notified the Budget Commission that it was revoking its approval of the alternative method. Consequently, beginning in 2013, the Budget Commission no longer had all of the necessary approvals to use the alternative method and the undivided local government fund should have been distributed according to the statutory method.

Moreover, the 2012 committee's vote to continue to use the alternative method does not provide the necessary approval to use the alternative method. While I agree with the memoranda's statements that the alternative method can only be revised, amended, or repealed with the approval of all the necessary governmental units, it is also true that the Budget Commission can only determine the amount of the undivided local government fund to be apportioned to each subdivision pursuant to an alternative method if that alternative method has been approved by: (1) the board of county commissioners; (2) the legislative authority of the most populous city in the county; and (3) a majority of the boards of township trustees and legislative authorities of municipal corporations located in the county, excluding the most populous city. R.C. 5747.53(B). The granting or denying of approval of an alternative method of apportionment must be by motion passed upon a majority vote of the members of a board of county commissioners, board of township trustees, or legislative authority of a municipal corporation. *Id.* Therefore, the vote of the 2012 committee does not meet the statutory requirements for approving the alternative method. As discussed above, the Board of Commissioners did not renew its limited approval of the alternate method, thereby effectively returning the local government fund distributions to the statutory method.

Since the 2012 resolution, the Board of Commissioners has not approved the alternative method and the Budget Commission does not have the necessary approval to continue to use the alternative method to determine the amount of the undivided local government fund to be apportioned to each subdivision.

Although allocation of each subdivision's share of the local government fund has continued to be determined using the alternative method since the 2012 resolution, this issue is not barred by res judicata. In *Girard*, the Supreme Court of Ohio rejected the argument that the failure to raise the question of the validity of the adoption of the alternative method in a prior appeal waived the argument in subsequent appeals. The court found that it had previously held that, pursuant to R.C. 5705.37, the taxing authority of a subdivision must file a notice of appeal in each year that an action taken by a county budget commission is questioned, and "[i]t would be inconsistent with [the prior] holding to apply claim preclusion to defeat appeals filed in successive years pursuant to R.C. 5705.37." *City of Girard v. Trumbull County Budget Commission*, 70 Ohio St.3d 187, 193, 638

N.E.2d 67, 1994-Ohio-169. Thus, the failure to raise the validity of the adoption and application of the alternative method in prior years precludes disputing the allocation of the local government fund in those years, but does not preclude an appeal in subsequent years.

Further, although R.C. 5747.53(G) states that “[t]he actions of the county budget commission taken pursuant to this section are final and may not be appealed to the board of tax appeals, except on the issues of abuse of discretion and failure to comply with the formula,” R.C. 5747.53 does not preclude an appeal on the issue of whether an alternative method was properly or effectively adopted. In *Warren County Park District v. Warren County Budget Commission*, BTA 84-E-955, 1985 WL 23202 (Sep. 23, 1985), the Board of Tax Appeals held that “[t]he limits imposed by R.C. 5747.53 become effective when an alternative formula is duly adopted. Since the appellant is challenging the action of adopting the alternative method, the Board must consider that threshold issue before R.C. 5747.53 becomes applicable.”

Therefore, it is still my opinion that the Budget Commission should seek the necessary approval to adopt an alternative method, and until an alternate method is approved, revert to the statutory method.