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Recovery Zone Bond Reallocation

We reported in our [February 2009 Public Finance Alert](#) and [June 2009 Public Finance Alert](#) concerning the new temporary authority under the American Recovery and Reinvestment Act of 2009 (ARRA), generally referred to as the Stimulus Act, to issue Recovery Zone Economic Development bonds for public infrastructure and facilities and Recovery Zone Facility bonds for certain private projects. Recovery Zone bond allocations were received by most Ohio counties and the cities of Akron, Cincinnati, Cleveland, Columbus, Dayton and Toledo. Under ARRA, Recovery Zone bonds must be issued by December 31, 2010.

To maximize the utilization of Recovery Zone bond allocations before their federal issuance authority expires on December 31, the Ohio Department of Development has notified allocation recipients that if they do not submit a report to the State by January 31, 2010 setting forth their plans to use allocations and do not otherwise comply with certain issuing deadlines, their allocations or portions thereof will be deemed by the State to have been waived and to have reverted to the State. The State has announced it will entertain applications for the reallocation of waived Recovery Zone allocations in March.

Recent Decisions of Interest

The limit on noneconomic compensatory damages in R.C. Section 2744.05(C)(1) does not violate the right to a jury trial or the right to equal protection under the law. *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St. 3d 278

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Ohio's commercial activity tax (codified in R.C. Chapter 5751, effective June 30, 2005) does not violate Sections 3 and 13 of Article XII of the Ohio Constitution since it is a tax on the privilege of doing business in the State and not a tax on the sale or purchase of food. *Ohio Grocers Assn. v. Levin*, 123 Ohio St. 3d 303

Vacation of a township road by a board of township trustees pursuant to R.C. Section 5553.045 was not a quasi-judicial administrative action subject to appeal under R.C. Chapter 2506. *Ohio Multi-Use Trails Assn. v. Vinton Cty. Commrs.*, 182 Ohio App. 3d 32, 2009-Ohio-2061 (Ohio App. 4th Dist.)

Court held that a municipality lacked power to appropriate a street lighting system because (1) the system is not a public utility under Section 4, Article XVIII of the Ohio Constitution, (2) the municipality does not have the power under Sections 3 and 7, Article XVIII of the Ohio Constitution to declare the system a public utility and (3) the system is personal property and not a fixture to the real property that it sits on and therefore not subject to appropriation under R.C. Section 719.01 (K). *Englewood v. Miami Valley Lighting, L.L.C.*, 182 Ohio App. 3d 58, 2009-Ohio-1631 (Ohio App. 2nd Dist.)

An unsuccessful bidder alleged that a state university wrongfully failed to award it a contract pursuant to statutory competitive bidding requirements and sought recovery of its bid preparation costs in the Ohio Court of Claims, which dismissed that action for lack of subject matter jurisdiction based on *Cementech, Inc. v. Fairlawn*, 109 Ohio St. 3d 475, where the Ohio Supreme Court denied recovery of lost profits by an unsuccessful bidder on a municipal project. Appellate Court distinguished *Cementech* and concluded that the Ohio Court of Claims has subject matter jurisdiction over the bidder's claims for "bid-preparation costs and attorney fees." *Meccon, Inc. v. Univ. of Akron*, 182 Ohio App. 3d 85, 2009-Ohio-1700 (Ohio App. 10th Dist.)

R.C. Section 9.68, by seeking to preempt all areas of firearms regulation by municipalities, even those in which the State of Ohio has not legislated, "unconstitutionally attempts to limit municipalities' home-rule police powers" and, by mandating the award of attorneys' fees and costs, also "violates the separation-of-powers doctrine espoused by the Ohio Constitution." *City of Cleveland v. State of Ohio*, 2009-Ohio-5968 (Ohio App. 8th Dist.)

Before an "agency or authority" requests a taxing authority to submit a tax levy to the electors, that "agency or authority" is required by R.C. Section 5705.03 (B)(3) to request and receive a certification of tax valuation and millage from the county auditor; in that

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case there is no need or authority for the taxing authority to request an additional or alternate certification from the county auditor. For this purpose, an "agency or authority" includes, but is not limited to, the board of library trustees of a county, municipal, school district or township public library, and the board of health of a general health district. However that term does not include a county MR/DD board, county children services board, community mental health board, alcohol and drug addiction services board, or alcohol, drug addiction and mental health board. *2009 Op. Att'y General No. 2009-030*

While a county auditor in issuing warrants is governed by R.C. Section 319.16 and therefore not subject to the doctrine of strict liability, a county auditor can be held personally liable for (1) issuing a warrant in violation of R.C. Chapter 5705 including but not limited to situations where either the funds have not been appropriated or there is no proper warrant drawn against an appropriate fund, (2) acting in bad faith or with a corrupt motive, and (3) the loss of public funds in issuing a warrant for payment of an expenditure that violates an existing constitutional, statutory or administrative provision, especially where the county auditor fails to act reasonably and prudently under the circumstances in issuing that warrant. *2009 Op. Att'y General No. 2009-033*

On September 23, 2009 the Ohio Attorney General issued his opinion to the State Auditor in response to her request for an opinion concerning whether subdivisions in Ohio whose deposits are protected by pooled collateral pursuant to R.C. 135.181 have a perfected security interest in the collateral under Ohio law so as to be recognized as secured creditors (rather than general creditors) by the FDIC if an Ohio bank were to fail. While that opinion analyzed complex issues of state law at length, the Attorney General warned that "[i]t is thus quite difficult to predict with any certainty what conclusion the FDIC or a court of law might reach if they are required to determine, as a matter of federal law, whether a subdivision's security interest in a pool of uncertificated securities pledged under R.C. 135.181(B) by an institution is legally enforceable and protected for purposes of 12 U.S.C.A. §1821(e)(12)." The Attorney General then encouraged the State Auditor to pursue further clarification and guidance by seeking a formal opinion from the FDIC and, in addition, set forth specific legislative changes that could be pursued in the General Assembly if desired. In the second paragraph of footnote 13 to that opinion the Attorney General recommends "that a subdivision that has public moneys in an institution that secures the deposit of such money by pledging a pool of securities under R.C. 135.181(B) enter

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into a written agreement with the institution that comports with the requirements of 12 U.S.C.A. §1823(e) (1)." *2009 Op. Att'y General No. 2009-036*

A board of county commissioners does not have express or implied statutory authority to construct an employee fitness center for county employees. *2009 Op. Att'y General No. 2009-040*

2009 Op. Att'y General No. 2009-046 and *2009 Op. Att'y General No. 2009-047* address numerous technical formatting, charging of fees and related issues and requirements under R.C. Section 317.114 regarding documents presented to a county recorder.

The Attorney General overruled *2008 Op. Att'y Gen No. 2008-009* on the basis of legislative changes and determined that R.C. 5705.05, as amended by H.B. 458, effective December 30, 2008, permits a township to fund permanent improvements, including roads and bridges, with proceeds of a voted general levy for current expenses. *2009 Op. Att'y General No. 2009-054*

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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