

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

GEORGE FISHER,	:	APPEAL NO. C-140081
Plaintiff-Appellant,	:	TRIAL NO. A-1300706
vs.	:	<i>OPINION.</i>
AMBERLEY VILLAGE, OHIO,	:	
and	:	
AMBERLEY VILLAGE PUBLIC	:	
SAFETY DEPARTMENT,	:	
Defendants-Appellees,	:	
and	:	
ROBERT A. GOERING, HAMILTON	:	
COUNTY TREASURER,	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed from is: Affirmed

Date of Judgment Entry on Appeal: May 8, 2015

*Reminger Co., LPA, Patrick Kasson and Whitney D. Cole, for Plaintiff-Appellant,
Wood & Lamping LLP and Kevin K. Frank, for Defendants-Appellees.*

Please note: this case has been removed from the accelerated calendar.

CUNNINGHAM, Presiding Judge.

{¶1} Plaintiff-appellant George Fisher appeals from the judgment of the Hamilton County Court of Common Pleas in a suit challenging the validity of a tax for police services levied by defendant-appellee Amberley Village, Ohio (“the Village”),¹ the municipality where he resides. Fisher first sought to enjoin the collection of the tax on the grounds that it was illegal and in contravention of the Village’s charter and R.C. Chapter 5705, but he later allegedly paid the tax under protest and sought a recovery of his tax payment and prospective injunctive relief on behalf of all of the Village’s taxpayers.

{¶2} The Village contended that Fisher’s claims were barred by laches and, additionally, that his claims were meritless because the tax complied with the charter and R.C. Chapter 5705 et seq. Both parties moved for summary judgment. For the following reasons, we affirm the trial court’s judgment in favor of the Village.

I. Background Facts

{¶3} Following the 2008 recession, the Village, like many municipalities, began experiencing mounting financial challenges. It had been operating at an annual deficit and had been drawing on its reserves to meet expenses. By 2011, the Village was facing a budget crisis due to a decline in revenues from a variety of sources and an increase in debt from the controversial purchase of Amberley Green, a public park, on property formerly used as a country club. As a result, the Village began in earnest to explore options to meet its operating expenses and to restructure or retire the Amberley Green debt.

¹ Fisher also named as defendants the Village’s Public Safety Department, which we do not consider to be a party separate from the Village, and the Hamilton County Treasurer, joined pursuant to R.C. 2723.03.

{¶4} Village council studied the issue for months, and sought community input. They were aided by an ad hoc citizens' advisory committee, of which Fisher was a member. The ad hoc committee reviewed the Village's financial challenges and considered possible solutions, including a public-safety tax to fund some police services, which we refer to as the special police levy. There is no evidence that Fisher promoted the levy.

{¶5} Village council voted on November 14, 2011, to place a five-year, ten-mill special police levy on the March 2012 ballot. At the time of the resolution, the expenses of the police department were paid from the Village's general fund and consumed nearly 50 percent of the Village's budget. The ten-mill levy was intended to generate an additional estimated \$1.6 million annually to partially fund the expenses of the police department, with the balance of the expenses to continue to be paid from the general fund.

{¶6} Before the proposed special police levy was placed on the ballot, Fisher and others residents privately questioned its legality. Essentially, they contended that any levy for additional funds to cover the current expenses of providing police services had to be placed on the November ballot and could last no longer than two years under the express terms of Article VII, Section 2 of the Village's charter. Although Fisher never voiced his objection to the Village, Michael Lake, a member of the ad hoc committee with Fisher, did. Lake was informed by Scot Lahrmer, the Village's top administrator, that the special levy was legal, and Lake shared this information with Fisher.

{¶7} The March 2012 special police levy passed with 60 percent of the voters in favor. Village council then established a special police fund, separate and

distinct from the general fund, to deposit all funds generated from the special policy levy.

{¶8} The special police levy was placed against property effective July 2012, and payments on the tax duplicates began in January 2013. Fisher filed this lawsuit on January 29, 2013, to enjoin the collection of the tax, upon a declaration that it was illegal. In his amended complaint, he added the allegation that he had paid the tax under protest, and he sought a return of his payment and prospective injunctive relief. He also sought to certify a class action.

{¶9} Fisher claimed that the tax was illegal based on his belief that Article VII, Section 2 of the charter applied, and the Village had not followed the legal requirements of that section in passing the levy. The Village responded that the requirements of Article VII, Section 2 of the charter did not apply, that it had followed the statutory procedures for passing a special levy, and that the levy and collection of the tax was legal. The Village also argued that Fisher's complaint was essentially an election contest and that he had waited too long to seek judicial redress for his claim.

{¶10} Fisher contended that his delay in bringing the suit to enjoin the collection of the tax was justified because he had been assured by Lake before the March 2012 election that the Village had confirmed the legality of the levy. The Village asserted that those facts did not excuse the delay. And it claimed prejudice from the delay because the Village had planned the future in reliance upon the special police levy's passage and had chosen not to take other actions to provide the needed revenue such as placing a levy on the November 2012 ballot. The Village did, however, receive an unexpected \$5.3 million payout from the state, after the passage

of the special police levy, which independently alleviated some of its financial problems.

{¶11} The parties filed competing motions for summary judgment. The trial court, in a written decision, resolved the competing motions in favor of the Village and against Fischer, and entered judgment for the Village. In doing so, the court declared the tax valid based on the plain reading of the charter and the applicable tax statutes. The court also addressed the issue of laches and determined, in the alternative, that Fisher's claims challenging the validity of the tax were barred under that doctrine.

II. Analysis

{¶12} In his sole assignment of error, Fisher challenges both the grant of summary judgment for the Village and the denial of summary judgment for him. We review summary judgment de novo, applying the standards set forth in Civ.R. 56. *See Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. In his assignment of error, Fisher maintains that summary judgment should be entered in his favor, but in his argument he also takes the contrary and, thus, unavailable position that genuine issues of fact remain.

A. Laches

{¶13} We first address the issue of laches. Laches is typically an equitable defense, requiring proof by the person asserting the defense of (1) an unreasonable delay or lapse of time in asserting a right; (2) the absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice. *United States Playing Card Co. v. Bicycle Club*, 119 Ohio App.3d 597, 603, 695 N.E.2d 1197 (1st Dist.1997).

{¶14} The trial court found that laches applied to bar Fisher’s claims for relief, relying on case law discussing the application of laches in election-related matters. Fisher argues that this was error, in part because his claims were not based on the statutory provisions for election contests, and instead were based on R.C. 2723.01, which specifically authorized him to bring his suit after the payment of his taxes under protest.

{¶15} Generally, relators in election-related matters must act with “the utmost diligence.” *See State ex rel. City of Chillicothe v. Ross Cty. Bd. of Elections*, 123 Ohio St.3d 439, 2009-Ohio-5523, 917 N.E.2d 263, ¶ 9, 14. This is because election cases implicate the rights of the electors, and those rights provide the basis for the statutory time limits with respect to the creation and certification of the ballots, including absentee ballots. *Id.* As a result of these statutory time constraints, persons seeking relief in election cases have the affirmative burden to show that they acted with sufficient diligence; laches is not an affirmative defense. *Smith v. Scioto Cty. Bd. of Elections*, 123 Ohio St.3d 467, 2009-Ohio-5866, 918 N.E.2d 131, ¶ 14. And because of the time-sensitive nature of the contest, the losing party in an election contest brought under R.C. 3515.09 has an appeal of right from the common pleas court judgment directly to the Ohio Supreme Court.

{¶16} The trial court treated Fisher’s claim as an election-related matter that could not be brought without a showing of “utmost diligence.” But Fisher’s action was brought under R.C. 2723.01, and was not an election-related contest. Rather, it was a challenge to the legality of a tax. His assertions go to the issue of whether there was legal authority for holding the election on the special and additional tax in the first instance, not whether “fraud, mistake or error occurred in the process of ascertaining and declaring the public will as expressed at the voting booth,” or that

the results of the election were erroneous. *See Copeland v. Tracy*, 111 Ohio App.3d 648, 654-655, 676 N.E.2d 1214 (10th Dist.1996), citing *State ex rel. v. O'Brien*, 47 Ohio St. 464, 25 N.E. 21 (1890).

{¶17} The statute governing Fisher’s claim, R.C. 2327.01, provides that the common pleas court “may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.”

{¶18} The statute provides two remedies not recognized under the common law. “[A]n equitable remedy by injunction, where it is necessary only to prove that the tax is illegal,” and second, “a legal action to recover if the tax is void for any cause.” *McBride v. Univ. Club*, 112 Ohio St. 69, 72 (1925); *Pagels v. Beaman*, 29 Ohio C.A. 209 (1st Dist.1918) (interpreting Section 12075 of the General Code, now codified in R.C. 2327.01). Fisher’s claim to enjoin the collection of the tax evolved into a claim for prospective injunctive relief, as he paid the challenged tax under protest and sought the recovery of his payment and a permanent injunction.

{¶19} *Laches is not an appropriate defense.* A claim under R.C. 2327.01 to enjoin the assessment or collection of an illegal tax is governed by equitable principles, *Conn v. Jones*, 115 Ohio St. 186, 192-193, 152 N.E. 897 (1929), and is not governed by an express statute of limitations. R.C. 2723.01 does, however, limit the time period for which a taxpayer may recover under a claim for the return of a tax paid but illegally collected or assessed. This restriction has been referred to generally as a “statute of limitations.” *Paramount Film Distrib. Corp. v. Tracy*, 118 Ohio App. 29, 32, 193 N.E.2d 283 (10th Dist.1962), *aff’d*, 175 Ohio St. 55, 191 N.E.2d 839

(1963); *Shanahan v. City of Toledo*, 6th Dist. Lucas No. L-09-1077, 2009-Ohio-5991, ¶ 23.

{¶20} The legislature’s inclusion of this restriction demonstrates its anticipation that a taxpayer would, in some cases, file a lawsuit claiming the recovery of an illegal tax long after it had been assessed or collected, and its intent to allow the claim but limit the amount of recovery. This restriction serves to protect the government’s ability to provide “a reasonable basis for estimating revenues and making appropriations.” *Paramount* at ¶ 32; *Shanahan* at ¶ 23.

{¶21} In light of the language of the statute and the remedial purpose of the statute of “protecting the citizen from illegal extractions,” *Stephan v. Daniels*, 27 Ohio St. 527, 536 (1875) (discussing 5848 of the Revised Statutes, the precursor to 12075 of the General Code and ultimately R.C. 2327.01.), we determine that the Village could not assert the traditional defense of laches to Fisher’s claim for injunctive relief. Therefore, the trial court improperly considered the defense of laches.

{¶22} *No showing of laches.* Even if laches were an appropriate defense for the trial court’s consideration, the Village failed to present sufficient evidence to successfully invoke it. There was no great and unreasonable delay in the commencement of the action. Fisher brought his action about six months after the assessment of the tax in July 2012, and immediately after the attempted collection of it in January 2013. And the record reflects that despite this delay, the Village knew even before the levy was placed on the March 2012 ballot that a taxpayer had questioned the legality of it.

{¶23} Moreover, the Village failed to show that the delay caused any *material* prejudice. See *Connin v. Bailey*, 15 Ohio St.3d 34, 35, 472 N.E.2d 328

(1984). Although the Village claimed that Fisher’s filing of the lawsuit in January 2013 prevented it from seeking alternative sources of revenue, and that the Village’s finances would be “crippled” by the enjoinder of the levy, the record demonstrates that the Village received a one-time payment from the state after the passage of the levy that increased the Village’s revenues by \$5.3 million.

{¶24} Thus, even if laches should be considered, the Village failed to demonstrate that the delay was unreasonable and that it was materially prejudiced by the delay. Accordingly, the trial court’s judgment cannot be affirmed on the basis of laches.

{¶25} *Estoppel is inappropriate.* Although not raised as a defense by the Village, courts have applied the related doctrine of estoppel to bar a claim under the statute to enjoin the collection of a tax. But that doctrine does not apply where there is only “inaction” on the part of the plaintiff, unless there is a duty to speak. *See Ohio Fuel Supply v. Paxton*, 1 F.2d 662, 664-666 (S.D. Ohio 1924) (summarizing Ohio case law), *aff’d*, 11 F.2d 740 (6th Cir. 1926). Ultimately, Ohio’s statutes “give no assurance to taxing authorities that they will receive the full amount of tax assessed in favor of the subdivisions which they respectively represent.” *Id.* at 666.

{¶26} The Ohio Supreme Court reviewed the issue of estoppel in *Counterman v. Dublin Twp.*, 38 Ohio St. 515 (1882). That case involved a taxpayer action to enjoin a tax levied for the payment of bonds issued for the construction of a railroad. After the bonds had been issued and the construction had commenced, the taxpayers claimed that the General Assembly’s act under which the tax was levied was contrary to Ohio’s Constitution. *Id.* The defendant township argued that the plaintiffs were “estopped” from bringing their claim because they had full knowledge of the affirmative vote to provide the railway line and the procedures that had taken

place to complete the railroad, but they had taken no action to enjoin the building of the railroad, the issuance of the bonds, or the disbursement of the money received from their sale. *Id.* at 515-516.

{¶27} The Supreme Court rejected the estoppel defense, stating:

An act of the general assembly in conflict with the constitution [] is a mere nullity, and no one is estopped to assert its invalidity. Such is the general rule. * * *

But parties may, under certain circumstances, be precluded from availing themselves of such infirmity.

Where one actively intervenes to secure the passage of an act, or the expenditure of money in the pursuance of it, or where one, with knowledge that improvements are in progress on his lands, under the authority of a legislative enactment, permits the work to proceed without objection, there is much reason for saying he should not be permitted to plead that such statute is unconstitutional. But the same reason does not apply where there is only inaction, and the ‘duty to speak ought to be very imperative to make mere silence operate as an estoppel.’ If we should hold the plaintiffs to be estopped on the facts here set forth, we would, in effect, require every property owner to determine, at his peril, in advance of the expenditure of any money under the authority of the act, whether such act was unconstitutional, and incur the necessary expense of

obtaining a judicial determination of the question. And he would thus become not only the guardian of his own property rights in that regard, but charged with the duty of controlling the conduct of the officers provided by law for the township.

(Internal citations omitted.) *Id.* at 517-518.

{¶28} In this case, the Village did not present evidence demonstrating that Fisher, as contemplated by the *Counterman* court, should be estopped from challenging the validity of the tax. Therefore, we must now review whether the trial court properly interpreted and applied the Village’s charter and the tax statutes when disposing of the competing motions for summary judgment.

B. Validity of the Tax

{¶29} To determine the merits of Fisher’s challenge to the validity of the tax, we must examine two related issues. First, we must determine whether the Village’s levy of additional funds for the specific purpose of police services was unauthorized and invalid when it was procured by the procedures set forth by statute for special levies outside the ten-mill limit, where the Village charter set a seven-mill limit for the “current operating expenses” of the Village, but not “for all the purposes of the municipal corporation,” and the charter sets forth a procedure for the additional levy of taxes for the “purpose of meeting current expenses.”

{¶30} Second, we must resolve whether the charter prohibits the Village from having a special levy for the purpose of raising additional funds for a police department, where the expenses to be paid for by those special funds were “current expenses” of the Village when council voted on the resolution to place the levy for the special funds on the ballot.

1. Rules of Construction

{¶31} Amberley Village is a chartered municipality with home rule powers that are derived from the Ohio Constitution, including the power to tax. *See Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 602, 639 N.E.2d 212 (1998), citing *State ex rel. Zielonka v. Carrell*, 99 Ohio St. 220, 227, 124 N.E. 134 (1919). The Village may exercise those powers “freely and fully where not limited by relevant charter, statutory, or constitutional provisions.” *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections*, 62 Ohio St.3d 17, 20, 577 N.E.2d 645 (1991). Therefore, a municipality possesses authority to act “in ways not specified by, but not in violation of, its charter.” *Id.* at 21.

{¶32} In interpreting the Village’s charter and the limitations that it provides, we are guided by the usual rules of statutory construction, as the charter does not contain any provision regarding the interpretive issues involved. *See, e.g., McQueen v. Dohoney*, 1st Dist. Hamilton No. C-130196, 2013-Ohio-2424, ¶ 42, citing *State ex rel. Comm. for the Charter Amendment v. City of Westlake*, 97 Ohio St.3d 100, 2002-Ohio-5302, 776 N.E.2d 1041, ¶ 28.

{¶33} The “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” R.C. 1.42.

{¶34} We are also aided by a body of case law that has developed specifically for the construction of municipal charters. These rules of construction provide that in matters of local self government, if a portion of a municipal charter expressly conflicts with parallel state law, the charter provisions will prevail. *State ex rel. Minor v. Eschen*, 74 Ohio St.3d 134, 138, 656 N.E.2d 940 (1995). Where a

charter and statutes address the same subject, but they do not expressly conflict, the courts must “harmonize” the charter and statutory provisions on the matter. *State ex rel. N. Olmsted v. Cuyahoga Cty. Bd. of Elections*, 93 Ohio St.3d 529, 533, 757 N.E.2d 314 (2001); *State ex rel. Fattlar v. Boyle*, 83 Ohio St.3d 123, 127, 698 N.E.2d 987 (1998). *State ex rel. Lightfield v. Village of Indian Hill*, 69 Ohio St.3d 441, 443, 633 N.E.2d 524 (1994). But, generally, where a charter is silent on a matter, state statutes control. *See McQueen*, 1st Dist. Hamilton No. C-130196, 2013-Ohio-2424, at ¶ 69-72.

2. Tax Levies and Funds under the Revised Code

{¶35} A brief review of the statutory framework for tax levies and funds is warranted. For purposes of the tax-levy law, R.C. Chapter 5705, a municipal corporation that has adopted a charter is a “subdivision,” *see* R.C. 5705.01(A)-(B), and the municipal corporation’s legislative authority is its “taxing authority.” R.C. 5705.01(C). Taxes in Ohio for subdivisions are divided into five separate types of levies:

- (A) The general levy for debt charges within the ten-mill limitation;
- (B) The general levy for current expense within the ten-mill limitation;
- (C) Special levies authorized by sections 5705.01 to 5705.47, inclusive, of the Revised Code, within the ten-mill limitation;
- (D) The general levy for debt charges authorized by law or by a vote of the people in excess of the ten-mill limitation;

(E) Other special or general levies authorized by law or
by vote of the people in excess of the ten-mill limitation.

R.C. 5705.04.

{¶36} Relatedly, under R.C. 5705.09, each subdivision in Ohio must establish a variety of separate funds, including a “general fund,” a “special fund for each special levy,” and 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.” Of importance to this case is the distinction under the state statutes between a general levy, which may typically be used for any expense of the taxing authority, and a special levy, which may only be used for a specific purpose.

{¶37} *General v. special levy.* The purpose of a general levy for “*current expenses*” is to provide one general operating fund, the “general fund,” from which an expenditure for “*current expenses*” may be made. R.C. 5705.05. The general fund is funded by “[a]ll revenue derived from the general levy for *current expense* within the ten-mill limitation, from any general levy for *current expense* authorized by vote in excess of the ten-mill limitation, and from sources other than the general property tax, unless its use for a particular purpose is prescribed by law.” (Emphasis added.)

R.C. 5705.10(A).

{¶38} Conversely, taxes generated by a special levy, such as one for police services, must be deposited into a special fund for each such levy. These revenues must be used for that special purpose, as identified by the resolution of the levying jurisdiction. R.C. 5705.09 and 5705.10(C) and (I). *See Kinsey v. Bower*, 147 Ohio St. 66, 74-75, 68 N.E.2d 317 (1946) (interpreting G.C. 5625.15, now R.C. 5705.19).

{¶39} Money may be transferred from the general fund to any special fund, R.C. 5705.14(E), but transfers from special funds to other funds are subject to strict limitations. Ohio Constitution, Article XII, Section 5; R.C. 5705.14 through 5705.16.

{¶40} Importantly, as used throughout the tax-levy law, “*current expenses*” and “*current operating expenses*” are interchangeable terms that are defined 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.” R.C. 5705.01(F).

{¶41} Thus, current expenses by definition may include expenditures for police services. But police services are also identified as a purpose for which a subdivision may hold a special levy. R.C. 5705.19(J). Therefore, the tax-levy law authorizes the payment of these police department expenses from either the general fund or a special fund. The special fund, however, must be established and funded with dollars from a special levy passed by voters for the purpose of meeting the expenses of a police department.

3. Statutory Limits of Taxation

{¶42} A review of the limits of taxation is also warranted. Article VII, Section 2, Ohio Constitution provides that no property may be taxed in excess of one percent of its true value in money for all state and local purposes, except when approved by the voters or provided for by a municipal charter. In accordance with the Constitution, R.C. 5705.02 sets a ten-mill limitation for “subdivisions,” with some exceptions.

{¶43} The taxing authority of a political subdivision is authorized to levy property taxes within the ten-mill limitation for the purpose of paying current operating expenses. R.C. 5705.03(A). And, under R.C. 5705.19, a taxing authority,

with voter approval and in accordance with the procedures set forth by statute, may impose a tax exceeding the ten-mill limitation for certain enumerated “purposes.” This includes the purpose of police department expenses, such as “providing and maintaining motor vehicles, communications, other equipment, buildings, and sites for such buildings used directly in the operation of a police department, or the payment of salaries of permanent or part-time police, communications, or administrative personnel to operate the same * * *.” R.C. 5705.19(J).

{¶44} With respect to the procedures of the special-excess levy, the taxing authority must pass by a super majority the resolution declaring the need to levy a tax in excess of the ten-mill limitation. The resolution may be passed at any time of the year, but the resolution must be certified to the board of elections at least 75 days before the election on the tax levy. R.C. 5705.19. With a few exceptions not relevant here, the duration of the tax-rate increase may not exceed five years. *Id.*

{¶45} *Charter opt-out provision.* A municipality, by its charter, may opt out of the ten-mill limitation for “all the purposes of the municipal corporation” or only for the “*current operating expenses*” of the municipal corporation. R.C. 5705.18; *State ex rel. Thomas v. Heuck*, 49 Ohio App. 436, 197 N.E. 376 (1st Dist.1934). The charter may also require the vote for the levying of taxes that exceed the limit to be held at a “November election.” R.C. 5705.18.

4. The Relevant Charter Provisions

{¶46} Article VII of the Village’s charter specifically pertains to “Finances.” Section 1 provides:

Taxes. The Council, by resolution adopted by vote of five members, may if necessary levy a tax for *current expenses* on real and personal property in the Village.

The rate of such tax shall not exceed 7 mills on a dollar of assessed valuation.

{¶47} Section 2 provides:

Extra Levy. On or before the 15th day of August in any year the Council may, by resolution adopted by vote of not less than five of the members, declare that the amount of money that may be raised by taxation under the preceding section [*for current expenses*], together with all other funds available during the year, will be insufficient to provide an adequate amount for the necessary requirements of the Village and that it is necessary to levy taxes in excess of said limitations for the purpose of meeting the *current expenses* of the Village, and may require the submission of the question of levying such additional tax to the electors of the Village at the next November election. Such resolution shall specify the additional rate of levy required and the number of years during which such increased rate may be levied, which shall not exceed two years. Such resolution shall take effect upon its adoption and shall be certified by the Clerk forthwith to the election authorities who shall place said question upon the ballot in the following form:

For the approval of an additional levy of taxes by Amberley Village at the rate of ____ mills to be used for

the purpose of meeting *current expenses* and to be effective during the tax year _____. Against the approval of an additional levy of taxes by Amberley Village at the rate of ____ mills to be used for the purpose of meeting *current expenses* and to be effective during the tax year _____.

The question covered by such resolution shall be submitted as a separate proposition, but may be printed on the same ballot with any other proposition submitted at the same election. If a majority of those voting thereon vote for the approval of such additional levy, Council shall immediately make such levy, or such part thereof as it finds necessary, pursuant to such approval, and certify the same to the County Auditor to be placed on the tax list and collected as other taxes.

(Emphasis added.)

{¶48} The charter also provides:

The municipality shall have home rule and under this Charter shall exercise all powers of local self government granted by the Constitution of Ohio and all other powers granted to municipalities by the laws of Ohio in effect at any given time. No reference in this Charter to any particular power shall be deemed to be exclusive. If the manner of exercising any power be not prescribed in this Charter it shall be exercised in the manner prescribed by

ordinance, or in the manner prescribed by the general law in any case wherein the general law may not be modified by or pursuant to Charter or ordinance, or wherein the manner of exercise has not been prescribed by ordinance.

Amberley Village, Ohio Charter, Article II.

{¶49} After a review of the charter and the relevant statutes, we conclude that the provisions of Article VII, Sections 1 and 2 apply only to a general levy for *current expenses* in excess of the seven-mill limitation, and not to a special levy for the purpose of police expenses, as contemplated by R.C. 5705.19(J). Moreover, we conclude that the Village was not prohibited from having a special levy for the purposes of raising additional funds for the police department, even though the expenses to be paid for by those special-levy funds were “*current expenses*” of the Village when council voted on the resolution to place the levy for the special funds on the ballot after determining its need.

{¶50} *Charter exemption for “current expenses” only.* Fisher argues that the charter limits any extra levies that result from an inability to pay current expenses. We agree that the only way in which council can exceed the seven-mill limitation to provide for “*current expenses*” is found in Article VII, Section 2 of the charter. But this provision does not preclude council from exceeding the relevant-mill limitation when it is necessary for the *special purpose of police services*. See *Kinsey v. Bower*, 147 Ohio St. 66, 68 N.E.2d 317 (1946). The charter does not limit council on this issue, and the charter provides the municipality with all the powers of self government. See *State ex rel. Bedford v. Cuyahoga Cty. Bd. of Elections*, 62 Ohio St.3d 17, 21, 577 N.E.2d 645 (1991).

{¶51} Importantly, in Article VII, Section 1 of the charter, the Village only exempted itself from the ten-mill limit of the total tax rate without a vote of the people for the “*current expenses*”; the charter does not contain language addressing the “limitation of the total tax rate which may be levied without a vote of the people *for all the purposes* of the municipal corporation.”

{¶52} Further, the charter does not contain any definition of the term “current expenses.” Because the charter does not define this term, we apply the statutory definition. *See* R.C. 1.42. As previously noted, the term “*current expenses*” is defined in the tax statutes as “the lawful expenditures of a subdivision, except those for public improvements, and except payments for interest, sinking fund, and retirement of bonds, notes, and certificates of indebtedness of the subdivision.” R.C. 5705.01(F). And by statute, the “intent of the general levy for current expenses” is “to provide one general operating fund derived from taxation from which expenditures for current expenses of any kind may be made.” R.C. 5705.05. The levies authorized by Article VII, Sections 1 and 2 of the charter fall within this statutory description for general levies, as those sections do not include a special restriction on the use of the taxes generated.

{¶53} The absence of language addressing the enactment of a tax for a special purpose is also significant. Article VII, Section 2 of the charter actually sets forth the language to be contained in a ballot submitted to voters for the “extra levy,” and that language must specify that the additional levy of taxes is “to be used for the purpose of meeting *current expenses*.”

{¶54} Under the reading proposed by Fisher, the Village would be prohibited from enacting any levy other than a levy for “*current expenses*.” The citizens of the Village could not enact a special levy for police or fire services.

{¶55} Given the absence of any provisions in the charter prohibiting the enactment of special levies, together with the charter’s reservation of authority to exercise additional powers in the manner prescribed by the general law, the council properly placed the special levy for police services on the March 2012 ballot under R.C. 5705.19(J).

{¶56} *Current expenses of a police department may be funded by general or special funds.* Fisher implicitly argues that the current expenses of the police department could not be funded by special funds. But a special fund can be established and funded with dollars from a special levy passed by the voters for the purposes set forth in R.C. 5705.19, which includes meeting the expenses of a police department. R.C. 5705.09 and 5705.10(C) and (I). In the absence of any provisions in the charter to the contrary, the Village was authorized to pay the current expenses of the police department from either the general fund or a special fund, as provided in the state statutes. *See State ex rel. Bedford*, 62 Ohio St.3d at 21, 577 N.E.2d 645.

{¶57} *Subject matter of special levies is limited.* Fisher also argues that the trial court’s reading of the charter provisions renders the language of Article VII, Section 2 meaningless; council may simply label a levy as a special levy and then it will not have to follow the procedures set forth in that section. But Fisher’s argument fails to consider the provisions of R.C. 5705.19 that limit the subject matter of special levies. Any special levy must be for one of the purposes that is specified under that statute. A police levy is an authorized purpose. R.C. 5705.19(J).

III. Conclusion

{¶58} Ultimately, the Village charter set a seven-mill limit for the “current operating expenses” of the Village, but not “for all the purposes of the municipal

corporation.” The charter sets forth the procedure for the additional levy of taxes for the “purpose of meeting current expenses,” but does not expressly limit council’s powers with respect to taxes for special purposes, or expressly prohibit the special levy for the purpose of raising additional funds outside the relevant-mill limit for a police department. And the charter reserves the municipality’s authority to exercise additional powers in the manner prescribed by the general law. Thus, the Village’s levy of funds for the specific purpose of police services was authorized under state law and valid, where the Village followed the procedures set forth by statute for the special levy. Therefore, we conclude that the Village’s tax for police services is legal, and Fisher was not entitled to the relief he sought.

{¶59} Accordingly, we overrule the assignment of error and affirm the trial court’s judgment.

Judgment affirmed.

HENDON, J., concurs.
DEWINE, J., dissents.

DEWINE, J., dissenting.

{¶60} Because I believe that we ought to follow Amberley’s charter as it is written, I respectfully dissent from the majority’s decision.

{¶61} This is not a complicated case. Back in 1964, the citizens of Amberley Village enacted a charter provision that provided some protections against future tax increases. Nothing too arduous, only that, if council found that current funds were insufficient to meet the obligations of the village and found additional taxes necessary, anything beyond the seven mills provided for in the charter needed to be placed on the ballot by a super-majority of council for a vote “at the next November election” and could not exceed two years. In 2012, the Amberley council did, indeed, determine that

current funds weren't sufficient to meet its needs. But rather than place the additional tax measure for a vote in the November election—where voter turnout presumably would have been at its highest—council chose to disregard the charter provision and place the tax increase on the March ballot.

{¶62} One Amberley taxpayer, George Fisher, was none too happy about this scenario. He chose to avail himself of the remedy provided by Ohio law to an aggrieved taxpayer in this instance and filed a lawsuit. The trial court granted summary judgment, finding that the suit was barred by laches and that the charter provision did not apply because council labeled the levy a “special” levy. (Never mind that the charter provision made no distinction between special and other levies.) The majority concludes that the trial court got it wrong about laches, but accepts its conclusion that special levies are somehow exempt from the charter provision. I concur with the majority in its rejection of the application of laches in this situation, but not with its decision as to the scope of the charter provision.

I. The Plain Language of the Charter

{¶63} A charter, of course, is no small thing. For a municipal government, it serves much the same role as a written constitution. It is a means by which citizens place limits on their elected representatives. The city council of a charter municipality is duty bound to follow its dictates. In the words of our Supreme Court, “[i]f the members of a legislative body can ignore, with impunity, the mandates of a constitution or a city charter, then it is certain that the faith of the people in constitutional government will be undermined and eventually eroded completely.” *Cleveland v. Locher*, 25 Ohio St.2d 49, 52, 266 N.E.2d 831 (1971).

{¶64} With that said, the starting place for any analysis ought to be with the language of the charter. Article VII, Section 1 provides that council may, if necessary,

levy a tax for current expenses at a rate not to exceed seven mills. Section 2 provides that before August 15 of any year, a super-majority of five council members may, by resolution:

declare that the amount of money that may be raised by taxation under the preceding section, together with all other funds available during the year, will be insufficient to provide an adequate amount for the necessary requirements of the Village and that it is necessary to levy taxes in excess of said limitations for the purposes of meeting the current expenses of the village, and may require the submission of the question levying such additional tax to the electors of the Village at *the next November election*.

(Emphasis added.) That provision is directly applicable to the situation in which Amberley found itself back in 2012. It is undisputed that council determined that the amount of money available was “insufficient” to meet “the necessary requirements of the Village.” It is likewise beyond dispute that council determined that it was necessary “to levy taxes in excess of [the seven-mill limitation]” to meet “the current expenses” of the village. Indeed, Amberley Village’s manager, who was designated by the Village under Civ.R. 30(B)(5) to answer questions on its behalf in this lawsuit, admitted to the exact circumstances set forth in the charter provision:

Q. So generally what occurred is the taxes in the general fund were insufficient to provide an adequate amount for the necessary requirements of the village, and it became necessary to levy taxes in excess for the purpose of meeting the current expenses of the village, that’s what the police fund -- or the police levy did, correct?

A. Yes

Given the foregoing, council was authorized to place an “additional tax” on the ballot—but only at the next November election.

{¶65} By all rights, the analysis ought to stop there. The charter is written in plain English. Its simple terms tell us that the “additional tax” needed to be voted on in November. It wasn’t. So Mr. Fisher has a valid claim. But rather than rely on the plain language of the charter, the majority takes us on an extensive meander through state taxation statutes and comes to the conclusion that the charter doesn’t apply in this instance because council chose to call the additional tax it imposed to fund current expenses a police levy. I’m not persuaded, and in the next section I explain why.

II. Nothing in State Law Requires Us to Disregard the Plain Language of the Charter

{¶66} The majority hinges its decision on a determination that “the provisions of Article VII, Sections 1 and 2 apply only to a general levy for current expenses in excess of the seven-mill limitation, and not to a special levy for the purpose of police expenses.” The most glaring problem with this conclusion is that it is almost impossible to square with the charter. The charter says “additional tax”; it makes no mention of “general” or “special” levies. Thus the natural reading is that voters meant to limit any additional tax levied to fund current expenses, regardless of whether a “general” or “special” label was affixed to the levy.

{¶67} Central to the majority’s analysis is its attempt to “harmonize” the charter with state law by limiting Article VII, Sections 1 and 2 to taxes that are paid into the general fund. In its view, general levies are subject to the limitations in the charter (levies beyond seven mills must be initiated by a super-majority of council, placed on a November ballot, and may not exceed two years). Special levies, on the other hand, are subject only to the ten-mill limitation provided for in state law. The problem with this

argument is that while we harmonize nonconflicting provisions of state law with a municipal charter, we are not to do so when there is an express conflict. *See State ex rel. Murray v. Scioto Cty. Bd. of Elections*, 127 Ohio St.3d 280, 2010-Ohio-5846, 939 N.E.2d 157, ¶ 40. Here, there is an express conflict. The charter says that levies for “additional taxes” to fund current expenses must be voted on at a November election. This is in direct conflict with state law that would allow such levies to be voted on at any election.

{¶68} The majority finds it “significant” that the charter doesn’t include any language providing for “the enactment of a tax for a special purpose.” I agree that the absence of such language is significant, but not for the reasons suggested by the majority. The significance of the noninclusion of such a provision is exactly that: the charter doesn’t authorize special levies to fund current expenses beyond the seven-mill limitation. That may not be a result that is particularly palatable to everyone. No doubt those who would like to raise taxes would prefer more flexibility in doing so. But that’s what the charter says.

{¶69} It is also worth pointing out that the majority’s reading would lead to curious results. Under the majority’s view, the seven-mill limitation in the charter applies only to levies for the general fund, and state law applies to special levies. State law allows for total unvoted levies of up to ten mills. *See R.C. 5705.02*. So under this view, council without a vote of the people could levy seven mills for current expenses into the general fund, *plus* another three mills for current expenses into any special fund authorized by state law. It is hard to imagine that this is what the voters of Amberley had in mind when they authorized a charter amendment limiting unvoted tax increases for current expenses to seven mills.

III. Conclusion

{¶70} To decide this appeal, we need to do no more than follow the unambiguous language of Amberley's charter. Where council determines that an additional tax is necessary beyond the seven-mill limitation to fund current expenses, such a tax must be voted on at a November election. Because Amberley's council did not follow this simple language, Mr. Fisher was entitled to prevail in the trial court. And because the majority does not follow this simple language, I respectfully dissent.

Please note:

The court has recorded its own entry on the date of the release of this opinion.