March 18, 1999

OPINION NO. 99-022

The Honorable Mark A. Ochsenbein
Jackson County Prosecuting Attorney
266 East Main Street
Jackson, Ohio 45640

Dear Prosecutor Ochsenbein:

You have requested an opinion concerning the permissible uses of the revenues from sales and use taxes imposed by the county under R.C. 5739.021 and R.C. 5741.021. You question whether such revenues may be expended for the employment of a jail administrator prior to the completion of the jail project that is being funded by these tax revenues.

By way of background, your opinion request states that Jackson County is constructing a county jail, and while the jail is under construction, the county sheriff would like to employ a jail administrator to prepare for the opening and operation of the jail. The Jackson County voters have approved a sales tax under R.C. 5739.021. According to the resolution of the county commissioners to levy the sales tax:

> The purpose for which this tax increase is levied is to provide additional revenues for the County and the additional tax revenues shall be directed to the General Fund to provide for construction, equipping, and furnishing a new jail, courts and sheriff's office for Jackson County and paying debt service on bonds or notes issued for such purposes and providing revenue for the operation or maintenance of such jail for a continuing period of years.

Information you have submitted indicates that the county has also levied the corresponding use tax under R.C. 5741.021 for the same purpose set forth in the resolution quoted above. You question whether the revenues generated by these sales and use taxes may be used to pay the compensation of a jail administrator who will be hired prior to the completion of the jail facility.

In order to determine whether the proposed expenditure of the sales and use tax revenues you describe is permitted, we must begin by noting that, pursuant to Ohio Const. art. XII, § 5, "[n]o tax shall be levied, except in pursuance of law; and every law imposing a tax shall state,

distinctly, the object of the same, to which only, it shall be applied." *See generally* 1982 Op. Att'y Gen. No. 82-037 at 2-108 ("as a general rule, where the particular expenditures which a taxing authority wishes to make are not specifically enumerated in the statement of purpose for the levy, whether the proposed expenditures may be made depends upon whether such uses come within the purpose as stated in the resolution and on the ballot"). Moreover, as stated in 1992 Op. Att'y Gen. No. 92-058 at 2-239, "[i]t is clear that the statement of the purpose of a proposed tax levy as set forth in the resolution and the ballot language must conform and be limited to the purposes authorized by statute." Let us, therefore, examine R.C. 5739.021 pursuant to which the sales tax you describe was levied.

R.C. 5739.021 states, in pertinent part:

> (A) *For the purpose of providing additional general revenues for the county or supporting criminal and administrative justice services in the county, or both*, and to pay the expenses of administering such levy, any county may levy a tax at the rate of not more than one per cent at any multiple of one-fourth of one per cent upon every retail sale made in the county, except sales of watercraft and outboard motors required to be titled pursuant to [R.C. Chapter 1548] and sales of motor vehicles, and may increase the rate of an existing tax to not more than one per cent at any multiple of one-fourth of one per cent.
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> The tax shall be levied and the rate increased pursuant to a resolution of the county commissioners. *The resolution shall state the purpose for which the tax is to be levied* and the number of years for which the tax is to be levied, or that it is for a continuing period of time. If the tax is to be levied for the purpose of providing additional general revenues *and* for the purpose of supporting criminal and administrative justice services, the *resolution shall state the rate or amount of the tax to be apportioned to each such purpose*. The rate or amount may be different for each year the tax is to be levied, but the rates or amounts actually apportioned each year shall not be different from that stated in the resolution for that year....
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> ....
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> A county that levies a tax pursuant to this section *shall* levy a tax at the same rate pursuant to [R.C. 5741.021]. (Emphasis added.)

R.C. 5739.021(A) thus permits a county to levy a sales tax for either or both of the purposes specified therein, *i.e.*, providing additional general revenues for the county or supporting criminal and administrative justice services in the county.[1] In the event that a sales tax is levied

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[1] As used in R.C. 5739.021, the purpose of "criminal and administrative justice services" includes, among other things:

> the exercise by the county sheriff of all powers and duties vested in that office by law; ...; the operation and maintenance of any detention facility, as defined in

for both purposes, R.C. 5739.021(A) requires the resolution to state "the rate or amount of the tax to be apportioned to each such purpose." Finally, R.C. 5739.021 requires a county that levies a sales tax under R.C. 5739.021 also to levy a use tax in accordance with R.C. 5741.021 at the same rate as the sales tax was levied under R.C. 5739.021.[2]

> [R.C. 2921.01]; and the construction, acquisition, equipping, or repair of such a detention facility, including the payment of any debt charges incurred in the issuance of securities pursuant to [R.C. Chapter 133] for the purpose of constructing, acquiring, equipping, or repairing such a facility.

R.C. 5739.021(H). *See generally* R.C. R.C. 2921.01(F) (defining "[d]etention facility" as meaning "any public or private place used for the confinement of a person charged with or convicted of any crime in this state or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in this state or another state or under the laws of the United States").

[2] R.C. 5741.021 states in pertinent part:

> (A) For the purpose of providing additional general revenues for the county *or* supporting criminal and administrative justice services in the county, *or both*, and to pay the expenses of administering such levy, any county which levies a tax pursuant to [R.C. 5739.021] shall levy a tax at the same rate levied pursuant to [R.C. 5739.021] on the storage, use, or other consumption in the county of [various items and services]....
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> ....
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> The tax shall be levied pursuant to a resolution of the board of county commissioners which shall be adopted after publication of notice and hearing in the same manner as provided in [R.C. 5739.021]. Such resolution shall be adopted and shall become effective on the same day as the resolution adopted by the board of county commissioners levying a sales tax pursuant to [R.C. 5739.021] and shall remain in effect until such sales tax is repealed.
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> (C) The additional tax levied by the county shall be collected pursuant to the schedules in [R.C. 5739.025]. If the additional tax or some portion thereof is levied for the purpose of criminal and administrative justice services, the revenue from the tax, or the amount or rate apportioned to that purpose, shall be credited to a *special fund* created in the county treasury for receipt of that revenue.
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> ....
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> (E) As used in this section, "criminal and administrative justice services" has the same meaning as in [R.C. 5739.021].

The disposition of the revenues from the sales tax levied under R.C. 5739.021 is provided for in R.C. 5739.211, which states in pertinent part:

> (A) The moneys received by a county levying an additional sales tax pursuant to [R.C. 5739.021] shall be deposited in the county *general fund* to be expended for any purpose for which general fund moneys of the county may be used, including the acquisition or construction of permanent improvements *or* in the *bond retirement fund* for the payment of debt service charges on notes or bonds of the county issued for the acquisition or construction or [*sic*] permanent improvements. The amounts to be deposited in each of such funds shall be determined by the board of county commissioners. (Emphasis added.)

Similar provision is made in R.C. 5741.031[3] for funds received by a county levying the corresponding use tax under R.C. 5741.021. Thus, in amounts determined by the board of county commissioners, the moneys received by the county from the sales and use taxes levied under R.C. 5739.021 and R.C. 5741.021 are to be placed in the general fund "to be expended for any purpose for which general fund moneys of the county may be used, including the acquisition or construction [of] permanent improvements" or in the bond retirement fund for the payment of debt service charges on the bonds or notes described therein.

An exception to the requirement that revenues from such levies be placed in the general fund or the bond retirement fund, as determined by the county commissioners, however, is established in R.C. 5739.021(E), which provides in pertinent part, that:

> If the additional tax or some portion thereof is levied for the purpose of criminal and administrative justice services, the revenue from the tax, or the amount or rate apportioned to that purpose, shall be credited to a *special fund* created in the county treasury for receipt of that revenue. (Emphasis added.)

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[3] R.C. 5741.031 states in pertinent part:

> (A) The funds received by a county levying an additional use tax pursuant to [R.C. 5741.021] shall be deposited in the county general fund to be expended for any purpose for which general fund moneys of the county may be used, including the acquisition or construction of permanent improvements, or in the bond retirement fund for the payment of debt service charges on notes or bonds of the county issued for the acquisition or construction of permanent improvements, or in the bond retirement fund for the payment of debt service charges on notes or bonds of the county issued for the acquisition or construction of permanent improvements. The amounts to be deposited in each of such funds shall be determined by the board of county commissioners.

See also R.C. 5741.021(C) (requiring that any portion of revenues from use tax for "criminal and administrative justice services" be placed in a special fund in the county treasury, apart from the general fund).

The language of the sales and use tax resolutions about which you ask are somewhat ambiguous. Although the resolutions describe their purposes as being "to provide additional revenues for the County," the resolutions further state that "the additional tax revenues shall be directed to the General Fund to provide for" purposes that fall within "criminal and administrative justice services," as defined in R.C. 5739.021(H). *See* note one, *supra*. Although R.C. 5739.021(E) and R.C. 5741.021(C) require that any portion of revenues derived from those sales and use taxes for "criminal and administrative justice services" be placed in a special fund, apart from the general fund, it is our understanding that Jackson County has placed such revenues in the general fund and has earmarked such revenues for "construction, equipping, and furnishing a new jail, courts and sheriff's office for Jackson County and paying debt service on bonds or notes issued for such purposes and providing revenue for the operation or maintenance of such jail," as stated in the resolutions levying the taxes. *See generally* 1981 Op. Att'y Gen. No. 81-035 (discussing the segregation of portions of general fund moneys whose permitted uses are restricted).[4]

With this background in mind, let us turn to your specific question, whether the sales and use tax revenues you describe, once placed in the general fund of the county, may be used to pay the compensation of a jail administrator hired prior to completion of the jail. The authority of the county sheriff to employ persons is set forth, in part, in R.C. 325.17, which authorizes the county sheriff, among others, to hire necessary deputies and employees and to fix their compensation, which "shall not exceed, in the aggregate, for [that] office, the amount fixed by the board of county commissioners for such office."

Specifically concerning the employment of jail personnel, R.C. 341.05 states in pertinent part:

> (A) The sheriff shall assign *sufficient staff to ensure the safe and secure operation of the county jail*, but staff shall be assigned only to the extent such

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[4] You have not asked whether R.C. 5739.021 and R.C. 5741.021 require that any portion of the particular revenues about which you ask be placed in a fund other than the county's general fund. Given the ambiguity in the language of the resolutions levying these particular taxes, however, you may wish to consider the establishment of a special fund for these revenues. Placement of these moneys in a special fund would not appear to preclude their use for payment of the jail administrator's salary. Although the salary of jail personnel, including that of the jail administrator, is, pursuant to R.C. 341.05, "payable" from the general fund, we do not find that such salaries may be paid only from the general fund if there are other moneys available for that purpose.

> staff can be provided with funds appropriated to the sheriff at the discretion of the board of county commissioners. The staff may include any of the following:
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> (1) *An administrator for the jail*;
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> (2) Jail officers, including civilian jail officers who are not sheriff's deputies, to conduct security duties;
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> (3) Other necessary employees to assist in the operation of the county jail.
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> ....
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> (E) The compensation of jail staff *shall* be payable from the *general fund* of the county, upon the warrant of the auditor, in accordance with standard county payroll procedures. (Emphasis added.)

Thus, R.C. 341.05(A)(1) requires the county sheriff to provide sufficient jail staff, which may include a jail administrator, to provide for the safe and secure operation of the county jail. The sheriff's ability to assign jail staff is limited, however, to such staff as may be provided from funds appropriated to the sheriff by the county commissioners. In addition, pursuant to R.C. 341.05(E), the compensation of such jail staff is payable from the county's general fund.

In the situation you describe, the revenues from the sales and use taxes have been placed in the general fund and earmarked, at least in part, for the operation of the jail. Pursuant to R.C. 341.05(E), the salary of a jail administrator is payable from the general fund. It appears, therefore, that your underlying concern is whether the salary of a jail administrator who is hired prior to completion of the jail facility is an expense of operating the jail.

Because Jackson County currently has no jail, it is clear that certain preparations must be made prior to the opening and operation of the jail. *See, e.g.*, R.C. 341.02 (requiring either the sheriff or jail administrator to "prepare written operational policies and procedures and prisoner rules of conduct, and maintain the records prescribed by these policies and procedures in accordance with the minimum standards for jails in Ohio promulgated by the department of rehabilitation and correction,"[5] and requiring approval by the court of common pleas prior to adoption of such operational policies and procedures and prisoner rules of conduct).

Moreover, because R.C. 341.05(A) directs the sheriff, to the extent such staff can be provided with funds appropriated to the sheriff at the discretion of the county commissioners, to "assign sufficient staff to ensure the safe and secure operation of the county jail," it is within the discretion of the sheriff to determine whether employment of a jail administrator prior to completion of the jail is necessary to the safe and secure operation of the county jail. *See also* R.C. 325.17 (authorizing various county officers, including the sheriff, to determine what employees are necessary and to compensate such employees within the funds appropriated to

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[5] S*ee, e.g.*, 15 Ohio Admin. Code Chapter 5120:1-8 (minimum standards for full service jails); 15 Ohio Admin. Code Chapter 5120:1-12 (minimum standards for eight-hour facilities).

each office by the county commissioners).[6] *See generally Madden v. Bower*, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969) (finding the compensation of employees of the county engineer to be a cost of operation of the engineer's office). Accordingly, should the county sheriff determine, in a reasonable exercise of his discretion, that the employment of a jail administrator prior to completion of the jail facility is necessary to the eventual safe and secure operation of the jail, the salary paid to the jail administrator prior to completion of the jail is a cost of operation of the jail.

Because the sales and use tax revenues about which you ask have been placed in the general fund to be used, in part, for operation of the jail, which includes the salary of the jail administrator, and because the salary of a jail administrator is, pursuant to R.C. 341.05(E), payable from the county general fund, we find no reason that the sales and use tax revenues you describe may not be used to pay the salary of a jail administrator who is hired prior to the completion of the county jail.

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[6] It is beyond the scope of an opinion of the Attorney General to determine at what point prior to completion of the county jail employment of a jail administrator will be necessary. Rather, this decision is a matter within the discretion of the sheriff, subject to the limitations imposed by R.C. 341.05 and R.C. 325.17. *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918) ("every officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty"); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph four) ("where an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"), *aff'd sub nom. State ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

In answer to your question, it is my opinion, and you are hereby advised, that revenues from the sales and use taxes levied under R.C. 5739.021 and R.C. 5741.021 that have been placed in the county general fund and earmarked, in part, for the operation of the county jail, may be expended to pay the salary of a jail administrator hired prior to the completion of construction of the jail.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 18, 1999

The Honorable Mark A. Ochsenbein
Jackson County Prosecuting Attorney
266 East Main Street
Jackson, Ohio 45640

SYLLABUS: 99-022

Revenues from the sales and use taxes levied under R.C. 5739.021 and R.C. 5741.021 that have been placed in the county general fund and earmarked, in part, for the operation of the county jail, may be expended to pay the salary of a jail administrator hired prior to the completion of construction of the jail.