July 7, 1999

OPINION NO. 99-037

The Honorable James J. Mayer, Jr.
Richland County Prosecuting Attorney
38 South Park, Second Floor
Mansfield, Ohio 44902

Dear Prosecutor Mayer:

You have submitted an opinion request in which you ask the following question: "Is a county permissive sales and use tax that was adopted as an emergency measure pursuant to ORC Section 5739.021 and subsequently approved by the electors of the county on a continuing basis subject to an election to repeal under ORC Section 5739.022?" According to your opinion request, on December 31, 1987, the board of county commissioners passed a resolution to levy a sales tax under R.C. 5739.021 and the corresponding use tax under R.C. 5741.021 for the months of February through December of 1988. This resolution was adopted as an emergency measure. On the same date, the county commissioners passed a second resolution asking the board of elections to submit to the electors of the county the question of continuing these taxes after December 1988. At the next general election, the voters approved the continuation of the sales and use taxes, which still remain in effect. You question whether the levying of these sales and use taxes may now be repealed through the process set forth in R.C. 5739.022.

In order to answer your question, we must first examine the authority pursuant to which the taxes you describe were levied. At the time the sales and use taxes you describe were adopted, former R.C. 5739.021(A) authorized counties to levy a sales tax or to increase the rate of such tax to provide additional general revenues for the county.[1] *See* 1987-1988 Ohio Laws,

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[1] The use tax you describe was adopted under former R.C. 5741.021, which, as then in effect, required any county that levied a sales tax under former R.C. 5739.021 also to levy a use tax at the same rate and provided for continuation of the use tax until the repeal of the sales tax. *See* 1981-1982 Ohio Laws, Part II, 2571, 2582 (Am. Sub. H.B. 373, eff. Jan. 29, 1982). Because the adoption of the use tax was automatic upon adoption of the sales tax under former R.C. 5739.021, we need not address your question separately with respect to each tax. *See* 1977 Op. Att'y Gen. No. 77-045 at 2-157 ("[t]here is no provision for the county sales tax under R.C.

Part II, 3158, 3171 (Am. Sub. H.B. 274, eff. July 20, 1987). Former R.C. 5739.021 provided for the levy of such tax or tax increase, in part, as follows:

> (A) …. *The tax shall be levied and the rate increased pursuant to a resolution of the county commissioners* and a certified copy of the resolution shall be delivered to the tax commissioner … not later than the sixtieth day prior to the date on which the tax is to become effective. Prior to the adoption of any resolution under this section, the board of county commissioners shall conduct two public hearings on the resolution…. If a petition for referendum is filed with the county auditor pursuant to [R.C. 305.31-.41], [2] the auditor shall, within five

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5739.021 to exist in the absence of the use tax under R.C. 5741.021, or conversely, for the use tax to exist in the absence of the sales tax").

[2] R.C. 305.31 states in pertinent part:

> The procedure for submitting to a referendum any resolution adopted by a board of county commissioners pursuant to [R.C. 307.697(D)(1), R.C. 322.02, R.C. 322.06, R.C. 324.02, R.C. 4301.421(B)(1), R.C. 4504.02, *R.C. 5739.021*, R.C. 5739.026, R.C. 5741.021, R.C. 5741.023, or R.C. 5743.024(C)(1)] or rule adopted pursuant to [R.C. 307.79] shall be as prescribed by this section.
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> Except as otherwise provided in this paragraph, when a petition, signed by ten per cent of the number of electors who voted for governor at the most recent general election for the office of governor in the county, is filed with the county auditor *within thirty days after the date such resolution is passed* or rule is adopted by the board of county commissioners, *or is filed within forty-five days after the resolution is passed, in the case of a resolution adopted pursuant to [R.C. 5739.021] that is passed within one year after a resolution adopted pursuant to that section has been rejected or repealed by the electors*, requesting that such resolution be submitted to the electors of such county for their approval or rejection, such county auditor shall, after ten days following the filing of the petition, and not later than four p.m. of the seventy-fifth day before the day of election, transmit a certified copy of the text of the resolution or rule to the board of elections…. The board shall submit the resolution or rule to the electors of the county, for their approval or rejection, at the succeeding general election held in the county in any year, or on the day of the succeeding primary election held in the county in even-numbered years, occurring subsequent to seventy-five days after the auditor certifies the sufficiency and validity of the petition to the board of elections.
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> No resolution shall go into effect until approved by the majority of those voting upon it. (Emphasis added.)

> days, notify the board of county commissioners and the tax commissioner of the filing of the petition by certified mail. If the auditor declares the petition invalid, he shall, within five days, notify the board and the tax commissioner of his findings by certified mail. Where the auditor has declared the petition to be invalid the effective date of the tax or increased rate of tax levied by this section shall be the first day of the month following the expiration of thirty days from the date the petition was declared invalid.
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> (B)(1) A resolution levying or increasing the rate of a sales tax pursuant to this section shall become effective on the first day of the month specified in the resolution but not earlier than the first day of the month following the expiration of sixty days from the date of its adoption, subject to a referendum as provided in [R.C. 305.31-.41], unless the resolution is adopted as an emergency measure …, in which case it shall go into effect on the first day of the month following the expiration of thirty days from the date of notice by the board of county commissioners to the tax commissioner of its adoption. The emergency shall receive an affirmative vote of all of the members of the board of commissioners, and shall state the reason for such necessity.
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> (2) A resolution may direct the board of elections to submit the question of levying the tax or increasing the rate of tax to the electors of the county at the next primary or general election in the county occurring not less than seventy-five days after such resolution is certified to the board, and *no resolution adopted under division (B)(2) of this section shall go into effect unless approved by a majority of those voting upon it* and not until the first day of the month following the expiration of thirty days from the date of notice to the tax commissioner by the board of elections of the affirmative vote. (Emphasis and footnote added.)

Id.

Thus, former R.C. 5739.021(B) established several methods by which a resolution concerning the levy or increase of the sales tax could become effective. A resolution adopted other than as an emergency measure became effective "on the first day of the month specified in the resolution but not earlier than the first day of the month following the expiration of sixty days from the date of its adoption, subject to a referendum as provided in [R.C. 305.31-.41]."[3] R.C. 5739.021(B)(1) (as amended in Am. Sub. H.B. 274). In the event that a resolution not

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Although you have not asked whether a referendum may now be held on either of the resolutions you mention, we note that the time for a referendum under R.C. 305.31-.41 on those resolutions has long since expired. *See also* 1987-1988 Ohio Laws, Part II, 3158, 3160 (Am. Sub. H.B. 274, eff. July 20, 1987) (former R.C. 305.31).

[3] Pursuant to former R.C. 305.31, as in effect at the time the resolutions were passed, *see* Am. Sub. H.B. 274, a resolution adopted under former R.C. 5739.021 that was submitted to a referendum could not go into effect until approved by a majority of those voting on it.

passed as an emergency measure provided for the submission of the question to the voters under former R.C. 5739.021(B)(2), the resolution did not go into effect unless approved by a majority of the voters. Finally, if the resolution were adopted as an emergency measure, it became effective "on the first day of the month following the expiration of thirty days from the date of notice by the board of county commissioners to the tax commissioner of its adoption," former R.C. 5739.021(B)(1), and was subject to repeal in accordance with former R.C. 5739.022.[4] *See* 1985 Op. Att'y Gen. No. 85-023 (syllabus) ("[a] resolution adopted pursuant to R.C. 5739.021 as an emergency measure may be submitted to a vote of the electors only pursuant to an initiative petition as provided for in R.C. 5739.022").

Although the taxes about which you ask were authorized by former R.C. 5739.021, they still remain in effect. You, therefore, ask whether such sales and use taxes are subject to repeal through an election under R.C. 5739.022. *See generally* 1985 Op. Att'y Gen. No. 85-023 at 2-90 ("without specific statutory authorization, neither referendum nor initiative petitions are available to the electors of a county to challenge the actions of the county commissioners").

The authority to conduct an election to repeal is established by R.C. 5739.022, which states in pertinent part:

> (A) The question of repeal of either a county permissive tax or an increase in the rate of a county permissive tax *that was adopted as an emergency measure pursuant to [R.C. 5739.021* or R.C. 5739.026] may be initiated by filing with the board of elections of the county not less than seventy-five days before the general

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[4] At the time the resolutions you describe were adopted, R.C. 5739.022, as amended in Am. Sub. H.B. 274, stated in pertinent part:

> (A) The question of repeal of either a county permissive tax or an increase in the rate of a county permissive tax *that was adopted as an emergency measure pursuant to [R.C. 5739.021* or R.C. 5739.026] may be initiated by filing with the board of elections of the county not less than seventy-five days before the general election in any year a petition requesting that an election be held on the question….
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> ….
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> (B) If a majority of the qualified electors voting on the question of repeal of either a county permissive tax or an increase in the rate of a county permissive tax approve the repeal, the result of the election shall be certified immediately after the canvass by the board of elections to the county commissioners, who shall upon certification, after the current year, in the case of a repeal of a county permissive tax, cease to levy the tax, or, in the case of a repeal of an increase in the rate of a county permissive tax, levy the tax at the rate at which it was imposed immediately prior to the increase in rate and cease to levy the increased rate.

> election in any year a petition requesting that an election be held on the question. The question of repealing an increase in the rate of the county permissive tax shall be submitted to the electors as a separate question from the repeal of the tax in effect prior to the increase in the rate. Any petition filed under this section shall be signed by qualified electors residing in the county equal in number to ten per cent of those voting for governor at the most recent gubernatorial election.
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> After determination by it that the petition is valid, the board of elections shall submit the question to the electors of the county at the next general election….
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> (B) If a majority of the qualified electors voting on the question of repeal of either a county permissive tax or an increase in the rate of a county permissive tax approve the repeal, the board of elections shall notify the board of county commissioners and the tax commissioner of the result of the election immediately after the result has been declared. The county commissioners shall, on the first day of the month following the expiration of thirty days after the date it receives the notice, in the case of a repeal of a county permissive tax, cease to levy the tax, or, in the case of a repeal of an increase in the rate of a county permissive tax, levy the tax at the rate at which it was imposed immediately prior to the increase in rate and cease to levy the increased rate. (Emphasis added.)

The procedure established by R.C. 5739.022 for the repeal of a permissive sales tax or sales tax increase applies, by its terms, only to a tax or tax increase that was "adopted as an emergency measure pursuant to [R.C. 5739.021 or R.C. 5739.026]." *See State ex rel. Burech v. Belmont County Bd. of Elections*, 19 Ohio St. 3d 154, 155, 484 N.E.2d 153, 154 (1985) ("R.C. 5739.022 authorizes an election, upon referendum petition, to repeal an emergency permissive sales tax levied by a county in accordance with R.C. 5739.021").

In the situation about which you ask, the sales tax and the corresponding use tax were originally adopted for a certain number of months pursuant to a resolution that was adopted as an emergency measure. At the same time it adopted the first resolution, the county commissioners passed a second resolution in accordance with former R.C. 5739.021(B)(2), not as an emergency measure, asking for a vote on the question whether to levy the sales and use taxes for a continuing period of time following the expiration of the tax levy period specified in the original resolution. A vote on the resolution was held, and, in accordance with former R.C. 5739.021(B)(2), the second resolution went into effect only after approval by a majority of those voting upon it. It was the voters' approval of the second resolution, therefore, that authorized the continued levy of the sales and use taxes that are still being collected. Because the second resolution, pursuant to which the sales and use taxes are currently being collected, was not adopted as an emergency measure, it is not now subject to referendum under R.C. 5739.022. *See* 1985 Op. Att'y Gen. No. 85-023.

Based on the foregoing, it is my opinion, and you are hereby advised, that a resolution adopted, other than as an emergency measure, under former R.C. 5739.021(B)(2) (1987-1988

Ohio Laws, Part II, 3158, 3171 (Am. Sub. H.B. 274, eff. July 20, 1987)) for the levy of a sales tax is not subject to a vote to repeal under R.C. 5739.022.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

July 7, 1999

The Honorable James J. Mayer, Jr.
Richland County Prosecuting Attorney
38 South Park, Second Floor
Mansfield, Ohio 44902

SYLLABUS: 99-037

A resolution adopted, other than as an emergency measure, under former R.C. 5739.021(B)(2) (1987-1988 Ohio Laws, Part II, 3158, 3171 (Am. Sub. H.B. 274, eff. July 20, 1987)) for the levy of a sales tax is not subject to a vote to repeal under R.C. 5739.022.