June 19, 2001

OPINION NO. 2001-022

The Honorable C. Keith Plummer
Guernsey County Prosecuting Attorney
139 Court House Square
P.O. Box 640
Cambridge, Ohio 43725-0640

Dear Prosecutor Plummer:

You have asked several questions concerning the repeal of a county motor vehicle license tax levied by the board of county commissioners. Your questions are as follows:

1. Do the county commissioners have the authority to repeal a motor vehicle license tax they imposed pursuant to R.C. 4504.16?

2. If the county commissioners have such authority, by what method must the action be taken?

3. If the commissioners do not have the authority to repeal the tax, are there any other methods by which the tax may be repealed?

Let us turn first to an examination of R.C. 4504.16, pursuant to which the board of county commissioners levied the additional motor vehicle license tax. R.C. 4504.16 authorizes the board of commissioners in any county that levies the tax authorized by R.C. 4504.15[1] to "levy an

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[1] R.C. Chapter 4504 authorizes a county to adopt three motor vehicle license taxes, subject to specified reductions and exemptions, which are in addition to the motor vehicle taxes levied by the State under R.C. Chapter 4503. R.C. 4504.02 permits a board of county commissioners to levy a tax, for the purposes specified therein, at the rate of five dollars per motor vehicle on all motor vehicles, the district of registration of which is located in the county. The county commissioners may supplement revenue for the same purposes by passing an additional motor vehicle license tax under R.C. 4504.15, which is also at the rate of five dollars per motor vehicle on all motor vehicles, the district of registration of which is located in the county, excluding motor vehicles whose district of registration is located within a municipal corporation that is

annual license tax … upon the operation of motor vehicles upon the public roads and highways." The tax is levied at the rate of five dollars per motor vehicle on all motor vehicles, the district of registration of which is located in the county, except those motor vehicles whose district of registration is located within a municipal corporation that is levying an additional motor vehicle license tax under R.C. 4504.171. *Id.* *See* 1990 Op. Att'y Gen. No. 90-006. *See also* R.C. 4503.10 (governing the determination of a motor vehicle's "district of registration").

Prior to adopting a resolution to levy a tax under R.C. 4504.16, the board of county commissioners must conduct two public hearings at specified intervals and in accordance with the prescribed notification requirements. *Id.* R.C. 4504.16 further provides as follows:

> No resolution levying a county motor vehicle license tax under this section shall become effective sooner than thirty days following its adoption, and such resolution is subject to a referendum as provided in sections 305.31 to 305.41 of the Revised Code, unless the resolution is adopted as an emergency measure necessary for the immediate preservation of the public peace, health, or safety, in which case it shall go into immediate effect. The emergency measure must receive an affirmative vote of all of the members of the board of county commissioners, and shall state the reasons for the necessity. A resolution may direct the board of elections to submit the question of levying the tax to the electors of the county at the next primary or general election occurring not less than seventy-five days after the resolution is certified to the board; no such resolution shall go into effect unless approved by a majority of those voting upon it.

In this instance, the board of county commissioners did *not* adopt the resolution as an emergency measure, and thus, the voters could have exercised their right to submit the tax to a referendum. No referendum petition was filed, however, and the resolution became effective thirty days after its adoption.

As a creature of statute, a board of county commissioners has only those powers conferred by statute, either expressly or by necessary implication. *See State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). As you note in your request for an opinion, R.C. 4504.16 does not expressly grant a board of county commissioners authority to

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levying a motor vehicle license tax under R.C. 4504.17. A county need not levy a tax under R.C. 4504.02 in order to levy a tax under R.C. 4504.15. R.C. 4504.15. R.C. 4504.16 authorizes a county to levy a second additional motor vehicle license tax as described herein. *See generally* 1990 Op. Att'y Gen. No. 90-006; 1969 Op. Att'y Gen. No. 69-105.

repeal a tax it levied thereunder. Such authority may, however, be implied from the commissioners' authority to levy the tax in the first instance.[2]

1973 Op. Att'y Gen. No. 73-031 addressed a question similar to the one you have posed with regard to the repeal of a county sales tax that had been enacted pursuant to R.C. 5739.021. In that instance, the board of county commissioners had adopted the tax as an emergency measure, thus precluding the electorate from submitting the tax to a referendum. The opinion noted that, while the question of repeal of the tax could be submitted to the voters pursuant to an initiative petition under R.C. 5739.022,[3] there was no other statutory provision expressly authorizing the repeal of the tax. The opinion explained at 2-119 to 2-120, however, that:

> … [T]he authority to enact a law necessarily implies the power to amend or repeal it…. The specific repealer provision of R.C. 5739.022 was inserted by the General Assembly only to preserve the initiative and referendum rights of the electorate when a board of commissioners has adopted a "piggy-back" sales tax as an emergency measure, and I see nothing to indicate any intention to deprive the commissioners of their own implied power to repeal any legislation they were empowered to enact. It should be noted that, under R.C. 5739.021, this tax is entirely permissive….
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> ….
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> …Although there is no express provision authorizing the county commissioners to repeal the resolution enacting the tax, the permissive nature of the tax implies such authority, and R.C. 305.35 speaks of a repeal by the commissioners as pre-empting a vote on the tax pursuant to a referendum petition filed under R.C. 305.31 *et seq*.

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[2] Indeed, the authority of a legislative body to repeal a law enacted by the electorate through the initiative process has been upheld, in the absence of any constitutional, statutory, or charter restriction to the contrary. *State ex rel. Singer v. Cartledge*, 129 Ohio St. 279, 195 N.E. 237 (1935). *See also Peppers v. Beier*, 75 Ohio App. 3d 420, 599 N.E.2d 793 (Seneca County 1991) (an ordinance passed by city council may repeal by implication an ordinance previously enacted by the people through the initiative process).

[3] R.C. 4504.021, like R.C. 5739.022, provides that a tax passed as an emergency measure may be repealed pursuant to a vote of the electorate. The question of such repeal is initiated by the filing of a petition "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." *Id. See generally* 1990 Op. Att'y Gen. No. 90-006. If a county motor vehicle license tax is not adopted as an emergency measure, the county commissioners' resolution levying the tax is not subject to repeal under R.C. 4504.021. *See* 1999 Op. Att'y Gen. No. 99-037. Because, in this instance, the commissioners' resolution levying a tax under R.C. 4504.16 was not passed as an emergency measure, it is not subject to repeal by the voters under R.C. 4504.021. And, we are unaware of any other statute that would grant the electorate the right to repeal such tax.

See also State ex rel. City of Youngstown v. Jones, 136 Ohio St. 130, 136, 24 N.E.2d 442, 445 (1939) ("[i]t is a well recognized principle that there is no such thing as an irrepealable statute, for a legislature has no power to bind successive legislatures"); *State ex rel. Singer v. Cartledge*, 129 Ohio St. 279, 283, 195 N.E. 237, 239 (1935) (after their adoption, statutes "'exist at the will of the legislature'" (quoting *Kadderly v. City of Portland*, 74 P. 710 (Oregon 1903)); State *ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898) (city council has the power to repeal an ordinance creating a public office, in which case the incumbent ceases to be an officer); *Milan and Richland Plank Road Co. v. Husted*, 3 Ohio St. 578 (1854) (the legislature has no authority to contract away its power to repeal a tax exemption).

The reasoning of 1973 Op. Att'y Gen. No. 73-031 is applicable to your question whether a board of county commissioners may repeal a motor vehicle license tax it has levied under R.C. 4504.16. The additional motor vehicle license tax levied under R.C. 4504.16 is a permissive tax, like the sales tax levied under R.C. 5739.021. *See* 1990 Op. Att'y Gen. No. 90-006. If the board of county commissioners determines that circumstances have changed such that the interests of the county and its inhabitants are no longer served by imposition of the additional tax, there is nothing to compel the board to levy it indefinitely. *See, e.g., State ex rel. Singer v. Cartledge*, 129 Ohio St. at 285, 195 N.E. at 239 ("[t]he *vox populi* that secured the initiated legislation of 1926 might prove to be a very weak voice in 1932, when the financial depression affected the people's pockets and denuded the city's funds. Evidently the city council so thought, else it might not have repealed the initiated ordinance").

Like the county sales tax described in 1973 Op. Att'y Gen. No. 73-031, a motor vehicle license tax that is adopted by the board of county commissioners under R.C. 4504.16 as an emergency measure may, pursuant to R.C. 4504.021, be repealed by the electorate upon the filing of an initiative petition and holding an election thereon. *See* note 3, *supra*. As explained in 1973 Op. Att'y Gen. No. 73-031, however, such power has been statutorily granted to the electorate in light of the preemption of their right to subject an emergency measure to a referendum. We do not view R.C. 4504.021 as constricting authority upon the board's implied power to repeal a measure it has enacted.

Furthermore, as pointed out in 1973 Op. Att'y Gen. No. 73-071, the language of R.C. 305.35 clearly contemplates that the board of county commissioners possesses the ability to repeal a tax it has levied. R.C. 305.35, relating to referendum petitions filed against a resolution passed by the board of county commissioners to impose certain, specified taxes,[4] reads in part:

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[4] Although a tax levied under R.C. 4504.16 is not specifically listed in R.C. 305.31 as one that is subject to referendum, R.C. 4504.16 provides, by its own terms, that the tax is subject to a referendum, as set forth in R.C. 305.31-.41.

> *If*, after a verified referendum petition has been filed against any resolution or rule, *the board of county commissioners repeals or rescinds such*, or it is held to be invalid, the board of elections shall not submit such resolution or rule to a vote of the electors. (Emphasis added.)

While not expressly authorizing a board of county commissioners to repeal a resolution levying a tax, R.C. 305.35 clearly reflects the General Assembly's recognition that such authority implicitly lies with the board. This recognition is also reflected in R.C. 4504.15, *see* note 1, *supra*, which states: "A county is not required to enact the tax authorized by section 4504.02 of the Revised Code in order to levy the tax authorized by this section, but no county may have in effect the tax authorized by this section *if it repeals the tax* authorized by section 4504.02 of the Revised Code after April 1, 1987" (emphasis added).

In answer to your first question, therefore, a board of county commissioners has the implied authority to repeal a motor vehicle license tax it levied pursuant to R.C. 4504.16. Your second question asks by what method the board of county commissioners must act to repeal the tax. Again, we turn to 1973 Op. Att'y Gen. No. 73-031 for guidance.

As discussed above, 1973 Op. Att'y Gen. No. 73-031 concluded that a board of county commissioners has the implied authority to repeal a sales tax it had enacted pursuant to R.C. 5739.021. The issue arose whether the board was required to conduct two public hearings prior to repealing the tax, since R.C. 5739.021 (like R.C. 4504.16) requires the board of county commissioners to conduct two public hearings prior to adopting a resolution to levy the tax. Citing case law which addressed similar issues,[5] the opinion concluded that "the procedure for a repeal need not necessarily be the same as that required for the original enactment," absent specific statutory language requiring such procedure, and thus "[a] legislative body may take testimony, but, in the absence of statutory requirement, it is not obliged to do so." *Id.* at 2-119.

The opinion also addressed the issue whether the repeal of a tax levied under R.C. 5739.021 is subject to a referendum, since R.C. 5739.021 grants the electorate the right to subject the tax to a referendum. Stating that "the right to a referendum or initiative must be specifically provided for, and, in the absence of such provision, there is no right," the opinion further noted that public hearings and the right of referendum are intended to protect the taxpayer and such protections are unnecessary where the commissioners intend to repeal, rather than impose, a tax burden. *Id.* at 2-120. *Cf. State ex rel. Flinn v. Wright*, 7 Ohio St. 333, 336 (1857) ("it is not difficult to conceive of very good reasons why the constitution should require a vote of two-

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[5] Specifically, 1973 Op. Att'y Gen. No. 73-031 cited *State ex rel. Singer v. Cartledge*, which held that the legislative body of a non-charter city may repeal an ordinance originally enacted pursuant to an initiative of the voters, and *State ex rel. Flinn v. Wright*, 7 Ohio St. 333 (1857), which held that a law, requiring a two-thirds vote for enactment, may be repealed by a simple majority.

thirds for the passage of an act establishing a new court, increasing the number of public functionaries, and possibly adding thereby to the public burdens, while the repeal of such act might be safely confided to the discretion of a simple majority").

Because, as discussed above, there is no express authority for the board of county commissioners to repeal a tax levied under R.C. 4504.16 (although such authority may be implied), there are no statutory requirements which specifically govern the process or method for repealing the tax. A board of county commissioners is not bound by the same requirements in R.C. 4504.16 that apply to the adoption of the motor vehicle license tax in order to consider and adopt a resolution repealing such tax, although the board must, of course, observe all applicable statutory requirements and internal administrative rules that pertain to the conduct of its business and the enactment of resolutions generally,[6] and *may* hold hearings on the issue of repeal if it so wishes. Furthermore, a resolution repealing a tax levied under R.C. 4504.16 is not subject to a referendum since there is no constitutional or statutory provision granting the electorate such right.

It is, therefore, my opinion, and you are hereby advised that:

1. A board of county commissioners that has adopted an additional motor vehicle license tax pursuant to R.C. 4504.16 has the implied authority to repeal such tax.

2. In order to repeal a tax previously imposed pursuant to R.C. 4504.16, a board of county commissioners is not required to follow the same notice and hearing requirements to which it must adhere in adopting a resolution to levy such a tax, but is subject only to those statutory and administrative requirements that generally govern the conduct of its business. A resolution repealing a tax levied under R.C. 4504.16 is not subject to a referendum.

Respectfully,

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[6] *See, e.g.*, R.C. 121.22 (open meetings act); R.C. 305.06-.11 (governing proceedings of boards of county commissioners).

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Attorney General

June 19, 2001

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SYLLABUS: 2001-022

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