April 12, 2011

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
6th Floor Administration Building
21 West Boardman Street
Youngstown, Ohio 44503

SYLLABUS: 2011-010

1. A board of county commissioners that has created, participated in the creation of, or joined a port authority military-use facility has the authority under R.C. 5739.09(A)(5)(b)(ii) to increase by up to an additional two percent the rate of a county excise tax on lodging levied pursuant to R.C. 5739.09(A)(1). This two percent rate increase is in addition to the three percent tax rate authorized by R.C. 5739.09(A)(1).

2. A board of county commissioners may act pursuant to R.C. 5739.09(A)(5)(b)(ii) to increase the rate of a county excise tax on lodging even if a board of township trustees of a township located within the county has levied a separate excise tax on lodging pursuant to R.C. 505.56.

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OPINION NO. 2011-010

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
6th Floor Administration Building
21 West Boardman Street
Youngstown, Ohio 44503

Dear Prosecutor Gains:

I am in receipt of your request for an opinion on the following questions:

1. May a board of county commissioners that currently levies a three percent lodging tax under R.C. 5739.09(A)(1) impose an additional two percent lodging tax under R.C. 5739.09(A)(5)(b) for the benefit of a port authority military-use facility, resulting in a countywide lodging tax rate of five percent?

2. If so, does the answer to question one change if townships located within the county have also levied lodging taxes under R.C. 505.56?

R.C. 5739.09, formerly R.C. 5739.024, authorizes a board of county commissioners to levy an excise tax on certain hotel lodging transactions and specifies the manner in which the resulting tax revenues are to be allocated and distributed:

> A board of county commissioners may, by resolution adopted by a majority of the members of the board, levy an excise tax not to exceed *three per cent* on transactions by which lodging by a hotel is or is to be furnished to transient guests. The board shall establish all regulations necessary to provide for the administration and allocation of the tax.… Except as provided in [R.C. 5739.09(A)(2)-(7)], the regulations shall provide, after deducting the real and actual costs of administering the tax, for the return to each municipal corporation or township that does not levy an excise tax on the transactions, a uniform percentage of the tax collected in the municipal corporation or in the unincorporated portion of the township from each transaction, not to exceed thirty-three and one-third per cent. The remainder of the revenue arising from the tax shall be deposited in a separate fund and shall be spent *solely to make contributions to the convention and visitors' bureau* operating within the county. (Emphasis added.)

R.C. 5739.09(A)(1); *see also* 1988 Op. Att'y Gen. No. 88-082, at 2-400 to 2-401.

The relevant portions of R.C. 5739.09(A)(5) further provide:

> (b) For the purpose of contributing revenue to pay operating expenses of a port authority that operates a port authority military-use facility, the board of county commissioners of a county that created, participated in the creation of, or has joined such a port authority *may do one or both of the following*:
>
> (i) Amend a resolution previously adopted under [R.C. 5739.09(A)(1)] to designate some or all of the revenue from the tax levied under the resolution to be used for that purpose, notwithstanding that division;
>
> (ii) Amend a resolution previously adopted under [R.C. 5739.09(A)(1)] to *increase the rate of the tax by not more than an additional two per cent* and use the revenue from the increase exclusively for that purpose. (Emphasis added.)

As a preliminary matter, R.C. 5739.09(A)(5)(b) states the authority granted in division (A)(5) is available only to a board of county commissioners that "created, participated in the creation of, or has joined" a port authority military-use facility.[1] It is beyond the scope of the opinion process to make findings of fact. Based on conversations between the members of our respective staffs, however, it is my understanding that the Board of County Commissioners of Mahoning County has created, participated in the creation of, or joined a port authority military-use facility, as that term is defined in R.C. 5739.09(A)(5)(a)(ii).

In analyzing whether a board of county commissioners that currently levies a three percent lodging tax under R.C. 5739.09(A)(1) may impose an additional two percent lodging tax under R.C. 5739.09(A)(5)(b)(ii), we start with the plain language of the statute. "The paramount consideration in determining the meaning of a statute is legislative intent." *State v. Jackson*, 102 Ohio St. 3d 380, 2004-Ohio-3206, 811 N.E.2d 68, at ¶34. "To determine the legislative intent, we first review the statutory language. In reviewing the statutory language, we accord the words used their usual, normal, or customary meaning." *Gutmann v. Feldman*, 97 Ohio St. 3d 473, 2002-Ohio-6721, 780 N.E.2d 562, at ¶14 (citations omitted). "Where the wording of a statute is clear and unambiguous, [the] only task is to give effect to the words used." *State v. Elam*, 68 Ohio St. 3d 585, 587, 629 N.E.2d 442 (1994).

A board of county commissioners that has created, participated in the creation of, or joined a port authority military-use facility is authorized "to increase the rate of the tax [under R.C. 5739.09(A)(1)] by not more than an additional two per cent and use the revenue from the increase exclusively for" the purpose of contributing revenue to pay operating expenses of a port authority that operates a port authority military-use facility. R.C. 5739.09(A)(5)(b)(ii). This language is clear and unambiguous. It authorizes a board of county commissioners to increase the countywide lodging tax

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[1] The statute defines a port authority military-use facility as "port authority facilities on which or adjacent to which is located an installation of the armed forces of the United States, a reserve component thereof, or the national guard and at least part of which is made available for use, for consideration, by the armed forces of the United States, a reserve component thereof, or the national guard." R.C. 5739.09(A)(5)(a)(ii).

not more than an *additional* two percent. Thus, if the countywide lodging tax is three percent, the plain language of R.C. 5739(A)(5)(b)(ii) authorizes increasing the tax rate to five percent.

Your opinion request expresses some concern as to whether the two percent tax rate authorized by R.C. 5739(A)(5)(b)(ii) is inclusive or exclusive of the three percent tax rate authorized by division (A)(1). While I believe the language of R.C. 5739(A)(5)(b)(ii) is clear and unambiguous, even if we were to assume otherwise, the foregoing conclusion is bolstered by several basic canons of statutory construction.

"[W]ords and phrases in a statute must be read in context of the whole statute." *Commerce & Indus. Ins. Co. v. City of Toledo*, 45 Ohio St. 3d 96, 102, 543 N.E.2d 1188 (1989). "In enacting a statute, it is presumed that … [t]he entire statute is intended to be effective." R.C. 1.47. "All statutes relating to the same general subject matter must be read *in pari materia*, and in construing these statutes *in pari materia*, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes." *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995 (1995); *see also State ex rel. Myers v. Indus. Comm'n*, 105 Ohio St. 103, 136 N.E. 896 (1922) (syllabus, paragraph 1) (the "different sections and parts of sections of the same legislative enactment should if possible be so interpreted as to harmonize and give effect to each and all"). Finally, "words in statutes should not be construed to be redundant, nor should any words be ignored." *East Ohio Gas Co. v. Pub. Util. Comm'n*, 39 Ohio St. 3d 295, 299, 530 N.E.2d 875 (1988).

R.C. 5739.09(A)(5) was enacted in 2003-2004 Ohio Laws, Part I, 396, Part II, 2080 (Am. Sub. H.B. 5, eff. June 26, 2003). The clear purpose of R.C. 5739.09(A)(5) is to provide counties a means of generating revenue specifically for port authority military-use facilities. Construing the statute as a whole and reading R.C. 5739.09(A)(5)(b)(i) and R.C. 5739.09(A)(5)(b)(ii) *in pari materia*, it appears the General Assembly intended for these divisions to address two different situations, and for counties to have two distinct options for generating revenue. First, a county may reallocate "some or all" of the lodging tax imposed under R.C. 5739.09(A)(1) for the benefit of a port authority military-use facility. R.C. 5739.09(A)(5)(b)(i). R.C. 5739.09(A)(1) establishes the default rule that the tax revenue generated under division (A)(1)—after deducting expenses and remitting, when applicable, a portion of the tax collected to municipal corporations or townships located within the county—"shall be spent solely to make contributions to the convention and visitors' bureau operating within the county." Thus, R.C. 5739.09(A)(5)(b)(i) creates a situation in which a county's decision to fund a port authority military-use facility under this division will result, at least in part, in less moneys being received by the county convention and visitors' bureau.

By contrast, R.C. 5739.09(A)(5)(b)(ii) creates a second, and entirely different, funding paradigm. Under division (A)(5)(b)(ii), a county may impose an *additional* lodging tax of two percent. This allows a county to generate revenue for a port authority military-use facility while at the same time maintaining current levels of funding for a convention and visitors' bureau.

In addition, by allowing a county to reallocate "some or all" of the countywide lodging tax under R.C. 5739.09(A)(1), R.C. 5739.09(A)(5)(b)(i) effectively authorizes a tax of up to three percent for the benefit of a port authority military-use facility. If the tax authorized in R.C.

5739.09(A)(5)(b)(ii) were also subject to the three percent limit found in R.C. 5739.09(A)(1), then division (A)(5)(b)(ii) would be duplicative of division (A)(5)(b)(i). Thus, the only interpretation that gives separate effect to both R.C. 5739.09(A)(5)(b)(i) and R.C. 5739.09(A)(5)(b)(ii) is that division (A)(5)(b)(ii) authorizes the levying of a two percent lodging tax over and above the three percent lodging tax authorized in R.C. 5739.09(A)(1).

Your second question asks whether the answer to question one changes if townships located within the county have also levied lodging taxes under R.C. 505.56. That section provides, in relevant part, as follows:

> Subject to the limitation in [R.C. 5739.08(A)], a board of township trustees may by resolution adopted by a majority of the members of the board, levy an excise tax on transactions by which lodging by a hotel is or is to be furnished to transient guests. The board may establish all regulations necessary to provide for the administration and allocation of the tax. All funds arising from such an excise tax shall be deposited in the township treasury and may be expended for any lawful purpose. A board of township trustees shall not levy the tax authorized by this section in any city or village.

R.C. 505.56. Nothing in R.C. 505.56 expressly limits exercise of the taxing authority granted to a board of county commissioners under R.C. 5739.09(A)(5)(b)(ii).

Further, the General Assembly has enacted a comprehensive statutory scheme relating to lodging excise taxes. In several instances, the Revised Code specifically identifies when the existence of a county excise tax on lodging affects a township excise tax on lodging or *vice versa*. *See* R.C. 5739.08(A) ("[i]f a municipal corporation or township repeals a tax imposed under [R.C. 5739.08(A)], and a county in which the municipal corporation or township has territory has a tax imposed under [R.C. 5739.09(C)] in effect, the municipal corporation or township may not reimpose its tax as long as that county tax remains in effect"); R.C. 5739.09(A)(1) (requiring a county, subject to certain exceptions, to return "to each municipal corporation or township that does not levy an excise tax on the transactions, a uniform percentage of the tax collected in the municipal corporation or in the unincorporated portion of the township from each transaction, not to exceed thirty-three and one-third per cent"); R.C. 5739.09(B)(1) ("[t]he legislative authority of a municipal corporation or the board of trustees of a township that is not wholly or partly located in a county that has in effect a resolution levying an excise tax pursuant to [R.C. 5739.09(A)(1)] may, by ordinance or resolution, levy an excise tax not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests"). By contrast, the Revised Code nowhere indicates that the enactment of a township excise tax on lodging pursuant to R.C. 505.56 affects the authority of a board of county commissioners under R.C. 5739.09(A)(5)(b)(ii) to increase the rate of a county excise tax on lodging. This omission further supports the conclusion that the authority of a board of county commissioners' under division (A)(5)(b)(ii) is not dependent upon whether a township has levied an excise tax on lodging pursuant to R.C. 505.56. *See Lake Shore Elec. Ry. Co. v. Pub. Util. Comm'n*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (one should not recognize an unexpressed purpose in a statute when "it would not have been difficult to find language which would express that purpose").

In sum, it is my opinion, and you are hereby advised as follows:

1. A board of county commissioners that has created, participated in the creation of, or joined a port authority military-use facility has the authority under R.C. 5739.09(A)(5)(b)(ii) to increase by up to an additional two percent the rate of a county excise tax on lodging levied pursuant to R.C. 5739.09(A)(1). This two percent rate increase is in addition to the three percent tax rate authorized by R.C. 5739.09(A)(1).

2. A board of county commissioners may act pursuant to R.C. 5739.09(A)(5)(b)(ii) to increase the rate of a county excise tax on lodging even if a board of township trustees of a township located within the county has levied a separate excise tax on lodging pursuant to R.C. 505.56.

Respectfully,

MICHAEL DEWINE
Ohio Attorney General