October 17, 2011

The Honorable Andrew J. Hinders
Mercer County Prosecuting Attorney
119 North Walnut Street
Celina, Ohio 45822

SYLLABUS: 2011-037

Revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 to provide additional revenue for the constructing, equipping, furnishing, operation, and maintenance of an adult detention facility may be expended by a county to purchase video equipment for conducting arraignments.

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OPINION NO. 2011-037

The Honorable Andrew J. Hinders
Mercer County Prosecuting Attorney
119 North Walnut Street
Celina, Ohio 45822

Dear Prosecutor Hinders:

You have requested an opinion about the authority of a county to expend revenue derived from a sales and use tax levy. Specifically, you ask whether revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 to provide additional revenue for the constructing, equipping, furnishing, operation, and maintenance of an adult detention facility may be expended by a county to purchase video equipment for conducting arraignments.[1]

Under Ohio law, revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 must be deposited in a special fund and expended only for the purpose for which the tax is levied. *See* R.C. 5739.211(B); R.C. 5741.031(B); 2006 Op. Att'y Gen. No. 2006-028 at 2-253 n.7; 1993 Op. Att'y Gen. No. 93-075 at 2-371; *see also* Ohio Const. art. XII, § 5 ("every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied"); R.C. 5705.09(F) (a county must establish 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"); R.C. 5705.10(H) ("[m]oney paid into any fund shall be used only for the purposes for which such fund is established"). In determining whether revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 may be used for a particular purpose, we must examine the precise language of R.C. 5739.026 and R.C. 5741.023 under which the tax was levied, as well as the resolution and ballot language placing the question of the levy before the voters. *See* R.C. 5739.026(D)(1); R.C. 5739.211(B); R.C. 5741.031(B); 2000 Op. Att'y Gen. No. 2000-048 at 2-296; 1993 Op. Att'y Gen. No. 93-042 at 2-215. *See generally Clark Rest. Co. v. Evatt*, 146 Ohio St. 86, 64 N.E.2d 113 (1945) (syllabus, paragraph 3) (taxing statutes are to be strictly construed and their application cannot be extended beyond the clear meaning of the statutory language used).

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[1] Pursuant to Ohio R. Crim. P. 10(B) and Ohio R. Crim. P. 43(A), a court may permit the presence and participation of a defendant at an arraignment by remote contemporaneous video.

R.C. 5739.026 authorizes a county to levy an additional sales tax for any one or more of several listed purposes and requires that a corresponding use tax be levied pursuant to R.C. 5741.023.[2] *See* R.C. 5739.026(A), (F); *see also* R.C. 5741.023(A). *See generally* 2007 Op. Att'y Gen. No. 2007-002 at 2-13 n.1 ("[u]nder Ohio law, a sales tax is always accompanied by a use tax for the same purposes…. In the case of a sales tax under R.C. 5739.026, the applicable use tax provisions appear in R.C. 5741.023"). R.C. 5739.026(A)(5) and (7) state, in pertinent part, that a county may levy a sales tax for one or more of the following purposes:

> (5) *To provide additional revenue for the acquisition, construction, equipping, or repair of any specific permanent improvement* or any class or group of permanent improvements, which improvement or class or group of improvements shall be enumerated in the resolution required by division (D) of this section, and to pay principal, interest, premium, and other costs associated with the issuance of bonds or notes in anticipation of bonds issued pursuant to [R.C. Chapter 133] for the acquisition, construction, equipping, or repair of the specific permanent improvement or class or group of permanent improvements;
>
> ….
>
> (7) *To provide additional revenue for the operation or maintenance of a detention facility*, as that term is defined under [R.C. 2921.01(F).][3] (Emphasis and footnote added.)

R.C. 5739.026 and R.C. 5741.023 thus authorize a county to levy a sales and use tax for the purpose of providing "additional revenue for the acquisition, construction, equipping, or repair of any specific permanent improvement," "additional revenue for the operation or maintenance of a detention facility," or both. *See* R.C. 5739.026(A), (F); R.C. 5741.023(A).

Although the term "permanent improvement" is not explicitly defined for purposes of R.C. 5739.026, in uniform public securities law and general tax levy law, this term includes buildings used to accommodate governmental offices and functions. *See* R.C. 133.01(CC) (as used in statutes that make reference to R.C. Chapter 133 (uniform public securities law), a "permanent improvement" means "any property, asset, or improvement certified by the fiscal officer, which certification is conclusive, as having an estimated life or period of usefulness of five years or more, and includes, but is not limited to, real estate, buildings, and personal property and interests in real estate, buildings, and

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[2] A sales tax levied pursuant to R.C. 5739.026 is "in addition to" the tax levied by R.C. 5739.02 and any tax levied pursuant to R.C. 5739.021 or R.C. 5739.023. R.C. 5739.026(F). A use tax levied pursuant to R.C. 5741.023 is "in addition to" the tax levied by R.C. 5741.02 and, with limited exceptions, any tax levied pursuant to R.C. 5741.021 or R.C. 5741.022. R.C. 5741.023(B).

[3] R.C. 2921.01(F) defines a "detention facility" as "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."

personal property, equipment, furnishings, and site improvements, and reconstruction, rehabilitation, renovation, installation, improvement, enlargement, and extension of property, assets, or improvements so certified as having an estimated life or period of usefulness of five years or more"); R.C. 5705.01(E) (for purposes of R.C. Chapter 5705 (tax levy law), a "permanent improvement" is "any property, asset, or improvement with an estimated life or usefulness of five years or more, including land and interests therein, and reconstructions, enlargements, and extensions thereof having an estimated life or usefulness of five years or more"). A building that serves as an adult detention facility therefore is a "permanent improvement," as that term is used in R.C. 5739.026. *See generally* 2000 Op. Att'y Gen. No. 2000-048 at 2-297 ("[r]eal property and improvements thereon are … considered to be 'permanent improvements' for tax levy purposes"); *Webster's Third New International Dictionary* 812-13 (unabr. ed. 1993) (a "facility" is "something … that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end"). This means that R.C. 5739.026 and R.C. 5741.023 authorize a county to levy a sales and use tax to provide additional revenue for the acquisition, construction, equipping, repair, operation, and maintenance of an adult detention facility.[4]

In the present context, in June 2007, the Board of Commissioners of Mercer County approved Resolution #07-789, which determined that "there is a need for additional revenues for a period of fifteen (15) years for the purpose of constructing, equipping and furnishing a new adult detention facility and operating or maintenance of said detention facility."[5] The resolution declared:

> NOW, THEREFORE, BE IT RESOLVED, by the Board of Commissioners of Mercer County:
>
> SECTION 1. That, subject to the approval of a majority of the electors voting on the question, the rate of the existing sales tax levied upon retail sales in the County pursuant to Chapter 5739 of the Revised Code is hereby increased by one-half of one per cent for a period of fifteen (15) years, commencing April 1, 2008. The proceeds derived from such additional one-half of one per cent shall be used for the following purposes and in the following amounts:

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[4] In addition to R.C. 5739.026 and R.C. 5741.023, other provisions of the Revised Code authorize a county to levy a tax to provide funding for the acquisition, construction, equipping, repair, operation, and maintenance of an adult detention facility. *See, e.g.*, R.C. 5705.19(F); R.C. 5705.19(K); R.C. 5739.021; R.C. 5741.021. These additional grants of authority do not, however, prohibit a county from levying a sales and use tax pursuant to R.C. 5739.026 and R.C. 5741.023 to provide funding for the acquisition, construction, equipping, repair, operation, and maintenance of an adult detention facility. *See* 2007 Op. Att'y Gen. No. 2007-002 at 2-20 n.11; *see also* 2011 Op. Att'y Gen. No. 2011-031, slip op. at 5 n.8.

[5] In your letter, you have explained that the adult detention facility is a building that serves as the county jail, sheriff's office, and a 9-1-1 dispatch center.

1) Pursuant to Section 5739.026(A)(5) of the Revised Code, for the purpose of constructing, equipping and furnishing a new adult detention facility and paying principal, interest, premium, and other costs associated with the issuance of bonds or notes in anticipation of bonds issued pursuant to Chapter 133 of the Revised Code for such construction, equipping, and furnishing, in such amounts each year for the duration of the increase as are required to pay debt service on bonds or notes issued by the County for such purpose; such amounts may be apportioned on a pro rata basis from each distribution of sales tax proceeds to the County (i.e., if the County receives twelve distributions of sales tax proceeds annually, 1/12 of the annual debt service shall be allocated to this purpose from each distribution;

2) Pursuant to Section 5739.026(A)(7) of the Revised Code, for the purpose of providing additional revenue for the operation or maintenance of the detention facility, the remainder of such proceeds after providing for the distribution set forth in Paragraph 1) above.

Pursuant to the provisions of Section 5741.023 of the Revised Code, the rate of the existing use tax levied pursuant to Chapter 5741 is also hereby increased by one-half of one per cent per annum, to be effective only if the sales tax increase provided for in this Section becomes effective and to be used for the same purposes and in the same amounts as the sales tax increase set forth above.

Similarly, the language appearing on the ballot for the vote on November 6, 2007, stated that revenue derived from the sales and use tax is to be used as follows:[6]

The Board of County Commissioners of Mercer County proposes to increase the levy of a sales and use tax in the amount of one half of one percent (1/2%) for the purposes of CONSTRUCTING, EQUIPPING, AND FURNISHING A NEW ADULT

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[6] Neither R.C. 5739.026 nor R.C. 5741.023 prescribes the language that must appear on the ballot when a county proposes to levy a sales and use tax under these statutes. In such a situation, the ballot language for voter approval of a sales and use tax under R.C. 5739.026 and R.C. 5741.023 is determined pursuant to "the general provisions of R.C. 3505.06, governing the questions and issues ballot." 2006 Op. Att'y Gen. No. 2006-028 at 2-254. *See generally* R.C. 3505.06(E) ("[t]he questions and issues ballot need not contain the full text of the proposal to be voted upon. A condensed text that will properly describe the question, issue, or an amendment proposed by other than the general assembly shall be used as prepared and certified by the secretary of state for state-wide questions or issues or by the board [of elections] for local questions or issues. If other than a full text is used, the full text of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law shall be posted in each polling place in some spot that is easily accessible to the voters").

> DETENTION FACILITY, AND PAYING DEBT SERVICE ON BONDS OR NOTES ISSUED FOR SUCH PURPOSE, AND PROVIDING ADDITIONAL REVENUE FOR THE OPERATION OR MAINTENANCE OF SUCH DETENTION FACILITY for the period of fifteen years.
>
> SHALL THE RESOLUTION OF THE MERCER COUNTY COMMISSIONERS PROPOSING A ONE-HALF PERCENT SALES AND USE TAX, BE APPROVED?

The resolution and ballot language placing before the voters the question of the sales and use tax levy to provide additional revenue for the "constructing, equipping, and furnishing" and the "operation or maintenance" of an adult detention facility is consistent with the purposes set forth in R.C. 5739.026(A)(5), R.C. 5739.026(A)(7), and R.C. 5741.023(A). *See* note 6, *supra*. In particular, R.C. 5739.026(A)(5), R.C. 5739.026(A)(7), R.C. 5741.023(A), and the resolution and ballot language specifically authorize revenue derived from such a levy to be used in "equipping" and the "operation" of an adult detention facility.[7]

The terms "equipping" and "operation" are not defined for purposes of R.C. 5739.026(A)(5), R.C. 5739.026(A)(7), R.C. 5741.023(A), and the resolution and ballot language. In the absence of any definition of the intended meaning of the terms "equipping" and "operation," the terms are accorded their common, ordinary, and accepted meanings. *See* R.C. 1.42 (when words or phrases have not acquired a technical or particular meaning, the words and phrases are "construed according to the rules of grammar and common usage"); *Eastman v. State*, 131 Ohio St. 1, 1 N.E.2d 140 (1936) (syllabus, paragraph 5) ("[w]ords in common use will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them").

In common usage, the terms "equipping" and "operation" are attributed the following meanings:

> **equip** … *vt* **equipped**; **equipping** … **1** : to furnish for service or action by appropriate provisioning … **2** : DRESS, ARRAY **3** : to make ready : PREPARE
> ….

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[7] The resolution and ballot language placing a sales and use tax levy before the voters may be narrower than the statutory language authorizing the levy. *See* 1993 Op. Att'y Gen. No. 93-042 at 2-215; 1990 Op. Att'y Gen. No. 90-069 at 2-292. In such circumstances, the narrower language appearing in the resolution and on the ballot "restricts the permissible expenditures of levy moneys." 1990 Op. Att'y Gen. No. 90-069 at 2-292; *accord* 1993 Op. Att'y Gen. No. 93-042 at 2-215. The resolution and ballot language in question explicitly authorize revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 to be expended to equip and operate an adult detention facility and do not prohibit a county from expending revenue derived from such a levy to provide additional revenue for "equipping" and the "operation" of an adult detention facility, as provided in R.C. 5739.026(A)(5), R.C. 5739.026(A)(7), and R.C. 5741.023(A).

> **operation** … **1** : performance of a practical work or of something involving the practical application of principles or processes **2 a** : an exertion of power or influence … **b** : the quality or state of being functional or operative … **c** : a method or manner of functioning … **3** : EFFICACY, POTENCY

Merriam-Webster's Collegiate Dictionary 422, 869 (11th ed. 2005).

The use and incorporation of the terms "equipping" and "operation" in R.C. 5739.026(A)(5), R.C. 5739.026(A)(7), R.C. 5741.023(A) and in the resolution and ballot language means that a county may expend the revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 to provide supplies and equipment to make or keep an adult detention facility functional. *See generally* 2011 Op. Att'y Gen. No. 2011-031, slip op. at 3 ("the use of the terms 'establishment' and 'operation' in R.C. 5705.19(BB) indicates that the proceeds of a tax levied pursuant to R.C. 5705.19(BB) are to be used to set up and run a countywide 9-1-1 system"); 1935 Op. Att'y Gen. No. 4368, vol. I, p. 734, at 735 (G.C. 2419 (now R.C. 307.01) provides "that county offices shall be equipped and as the feeding of prisoners is a necessary function of the sheriff's office, there is ample authority therein to furnish equipment which the county commissioners deem necessary").

The primary function of an adult detention facility is to confine persons charged with, or convicted of, criminal offenses. *See* R.C. 2921.01(F). One important purpose of an adult detention facility is ensuring that criminal defendants and offenders remain confined apart from the general population of the county. *See, e.g.*, R.C. 341.01; R.C. 341.05(A). Thus, in order for an adult detention facility to function properly, the adult detention facility must have supplies and equipment to prevent escapes. For this reason, revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 to provide additional revenue for the constructing, equipping, furnishing, operation, and maintenance of an adult detention facility may be expended by a county to provide supplies and equipment that prevent persons confined in an adult detention facility from escaping.

One way to prevent persons confined in an adult detention facility from escaping is through the use of video equipment for conducting arraignments. The use of video equipment to conduct arraignments will reduce the number of times such persons are transported to and from the courts.[8] A person who is required to be confined in an adult detention facility may be enticed to risk an escape attempt or encounter more and easier opportunities to escape when the person is in an environment that is less secure than the adult detention facility. *See generally* Art Heinz, *Pa Courts Expand Use of Video Conferencing*, 13 Lawyers J. 8, 8 (2011) ("[t]he use of video conferencing enhances security by reducing the risk of defendant escape or assault on transport officers, judges, and anyone in the courtroom"); Richard Magnus, *The Confluence of Law and Policy in Leveraging Technology: Singapore Judiciary's Experience*, 12 Wm. & Mary Bill of Rts. J. 661, 664 (2004) (the advantages of

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[8] When the arraignment of a person who is confined in an adult detention facility is conducted by a court through the use of video equipment, the person is not required to be transported from the adult detention facility to the court for the arraignment. *See* Ohio R. Crim. P. 10(B); Ohio R. Crim. P. 43(A).

using video technology to conduct arraignments include "elimination of transportation and security risks, and [reducing] escape and assault risks"). Further, when law enforcement officers are transporting persons to and from the courts there may be less law enforcement officers available to guard the other persons confined in an adult detention facility. This may increase escape attempts at an adult detention facility during those times. *See generally* Jeffrey M. Silbert et al., Special Topic, *Telecommunications in the Courtroom: The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida*, 38 U. Miami L. Rev. 657, 659 (1984) (when video equipment is used to conduct arraignments, "[s]ecurity is maximized because the defendants do not leave the jail. Video eliminates the prisoners' potential for causing disruption and inflicting harm"); Ronnie Thaxton, Note, *Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 Iowa L. Rev. 175, 183 (1993) (supporters of closed-circuit video arraignments claim that such arraignments "reduce the number of court correctional personnel needed during the arraignment process, reduce court and transportation costs, [and] increase security and reduce the risk of defendants escaping" (footnotes omitted)); Hawaii Bar Journal Board of Editors, Article, *An HBJ Interview with Chief Justice Ronald T.Y. Moon: Tackling Court Backlogs in Lean Times*, Hawaii Bar J. (1995) (use of a video system to conduct arraignments showed that "security was enhanced for the community and the courts since in-custody defendants remained at the detention facility"). Accordingly, insofar as video equipment for conducting arraignments prevents persons confined in an adult detention facility from escaping, revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 to provide additional revenue for the constructing, equipping, furnishing, operation, and maintenance of an adult detention facility may be expended by a county to purchase video equipment for conducting arraignments.[9]

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[9] When arraignments are conducted by video, it is necessary to install some of the video equipment at the courthouse. *See* Ohio R. Crim. P. 10(B); Ohio R. Crim. P. 43(A). It thus might be argued that insofar as some of the video equipment is not located in, or used at, the adult detention facility, revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 to provide additional revenue for the constructing, equipping, furnishing, operation, and maintenance of the adult detention facility may not be used to purchase video equipment for conducting arraignments.

We cannot, however, accept this proposition. No provision in the Revised Code mandates that all equipment purchased with revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 to provide additional revenue for the constructing, equipping, furnishing, operation, and maintenance of the adult detention facility must be located and used in the adult detention facility. As explained previously, a county may expend such revenue to purchase equipment when the equipment is used to make or keep an adult detention facility functional. Because video equipment for conducting arraignments prevents persons confined in an adult detention facility from escaping and no statute requires the equipment to be located and used only in the adult detention facility, a county is authorized by R.C. 5739.026 and R.C. 5741.023 to purchase the video equipment for installation in the courthouse.

In conclusion, it is my opinion, and you are hereby advised that revenue derived from a sales and use tax levied pursuant to R.C. 5739.026 and R.C. 5741.023 to provide additional revenue for the constructing, equipping, furnishing, operation, and maintenance of an adult detention facility may be expended by a county to purchase video equipment for conducting arraignments.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General