February 15, 2000

OPINION NO. 2000-011

The Honorable Russell B. Wiseman
Crawford County Prosecuting Attorney
130 N. Walnut Street
P.O. Box 509
Bucyrus, Ohio 44820

Dear Prosecutor Wiseman:

We are in receipt of your letter requesting an opinion concerning revenue sharing pursuant to R.C. 5709.82 when property tax abatements are granted in enterprise zones. On behalf of the Wynford Local School District Board of Education, you have asked these three questions:

1. Whether the percentage of municipal income tax approved by the electors and earmarked for a specific purpose is subject to revenue sharing as required under R.C. 5709.82(C) and (D).

2. Whether revenue sharing pursuant to R.C. 5709.82(C) is required for a project which was granted a tax abatement by a township prior to its annexation into a municipality, where (a) [the] municipality did not participate in the abatement proceedings but was aware that a tax abatement would be granted; (b) annexation proceedings were underway at the time the abatement was granted; and (c) the municipality assumed the costs of improvements related to the abated property following the annexation.

3. Whether a municipality may claim an infrastructure cost adjustment under R.C. 5708.82(A)(2) and (D) for debt service charges paid on debt incurred to reimburse another subdivision for infrastructure costs where the infrastructure was installed prior to the granting of any abatements in the area and benefits all parcels in the development, not just a particular abated project.

Although the benefits granted pursuant to the enterprise zone statutes are commonly referred to as tax abatements, the statutes use the words "exemption." *See* R.C. 5709.62; R.C. 5709.63; *see also* R.C. 5709.632. For purposes of clarity we will refer to "exemptions" as abatements throughout this opinion.

Your questions concern the payment of compensation by the City of Bucyrus to the Wynford Local School District in a situation involving the granting of enterprise zone tax abatements pursuant to R.C. 5709.61-.69 for three projects located in Crossroads Industrial Park, which was annexed into the City of Bucyrus in 1996 and is now part of the city. In each case, the new payroll of the project exceeds one million dollars, which is the threshold amount making a project subject to the provisions of R.C. 5709.82(C) mandating revenue sharing between a city and a school district.

The City of Bucyrus levies an income tax of one and one-half percent. Of that amount one-half percent was approved by the voters for the purpose of roadway improvements.[1] The issue is whether the entire one and one-half percent is subject to revenue sharing under R.C. 5709.82.

One of the projects in question, Bucyrus Precision Tech (BPT), was part of Holmes Township and had not yet been annexed into the City of Bucyrus. Annexation proceedings began with the filing of an application for annexation in 1995. On September 11, 1995, the City of Bucyrus adopted a resolution stating that it would provide services to the area proposed to be annexed. On December 4, 1995, the City of Bucyrus announced the decision of BPT to locate a facility at Crossroads Industrial Park, in Holmes Township. The annexation request was approved by the Board of County Commissioners on December 7, 1995. However, the Bucyrus City Council did not take action to accept the property until March 5, 1996. Prior to that date – on January 22, 1996 – the township granted BPT the tax abatement in question. The City of Bucyrus was aware of BPT's desire to relocate to Crossroads Industrial Park and was aware that a tax abatement would be granted, but the city did not participate in the tax abatement negotiations nor approve the tax abatement. The matter of concern is whether tax revenue sharing pursuant to R.C. 5709.82(C) is required in such a situation.

It is our understanding that, when Crossroads Industrial Park was initially developed, the Crawford County Commissioners installed water and sewer lines to benefit Crossroads Industrial Park. When the City of Bucyrus annexed the Park, the city assumed the costs of those improvements and issued $365,000 of bond anticipation notes to fund the costs. The city describes this transaction as the "acquisition" of the water and sewer lines. The water and sewer lines benefit the three projects that

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[1] The authority of a municipal corporation to levy an income tax is derived from Ohio Const. art. XVIII, §§ 3 and 7, and subject to statutory limits imposed by the General Assembly. *See* Ohio Const. art. XIII, § 6; Ohio Const. art. XVIII, § 13; R.C. Chapter 718; 1996 Op. Att'y Gen. No. 96-012, at 2-47 n.1. A municipal income tax levy in excess of one percent must be approved by the electorate, and the proceeds of such a levy may be used only for the specified purpose. R.C. 718.01(C).

have received tax abatements and also benefit undeveloped parcels in Crossroads Industrial Park. The matter at issue is whether the City of Bucyrus may receive an infrastructure cost offset, as defined in R.C. 5709.82(A)(2), for the annual debt service charges incurred on the bond anticipation notes.

In order to address your concerns, let us first look to the statutes authorizing enterprise zone tax abatements. The statutes permit the creation of several types of enterprise zones. *See* R.C. 5709.62; R.C. 5709.63; R.C. 5709.632. The legislative authority of a municipal corporation that is the central city of a metropolitan statistical area is authorized to designate proposed enterprise zones. R.C. 5709.62; R.C. 5709.632. Alternatively, a board of county commissioners may designate proposed enterprise zones for municipal corporations or townships, with the consent of the legislative authority of the municipal corporation or the board of township trustees. R.C. 5709.63; R.C. 5709.632. Since July 1, 1994, the Director of Development has been required to certify each enterprise zone. R.C. 5709.62(A); R.C. 5709.63(A); R.C. 5709.632. After an enterprise zone is created, agreements for tax abatements may be granted to enterprises submitting proposals that satisfy statutory requirements. R.C. 5709.62; R.C. 5709.63; R.C. 5709.632.

Let us now examine the statute that requires revenue sharing between a municipal corporation and a school district when tax abatements are granted. R.C. 5709.82 provides, with certain exceptions, that when the legislative authority of a political subdivision grants one of various kinds of tax abatements for real or tangible personal property, including an enterprise zone tax abatement under R.C. 5709.62, R.C. 5709.63, or R.C. 5709.632, the legislative authority may negotiate with each school district in the area and agree to compensate the school district for tax revenue that the school district would have received if the abatement had not been granted. R.C. 5709.82(B). Negotiation is required if the abatement is granted after July 1, 1994, if the municipal corporation imposes an income tax, and if the payroll of new employees[2] equals or exceeds one million dollars in any tax year for which the abatement is granted. R.C. 5709.82(C).

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[2] "New employee" is defined as follows:

> (1) "New employee" means both of the following:
>
> (a) Persons employed in the construction of real property exempted from taxation under the chapters or sections of the Revised Code enumerated in division (B) of this section;
>
> (b) Persons not described by division (A)(1)(a) of this section who are first employed at the site of such property and who within the two previous years have not been subject, prior to being employed at that site, to income taxation by the municipal corporation within whose territory the site is located on income derived from employment for the person's current employer. "New employee" does not include any

If a negotiated agreement is not reached within six months, the legislative authority is required to compensate the school district with an amount equal to fifty percent of the difference between the amount of taxes levied and collected by the municipal corporation on the incomes of new employees in a calendar year and the amount of any infrastructure costs[3] incurred in that calendar year. R.C. 5709.82(C) and (D). Thus, the portion of the income tax to which the mandatory allocation requirement applies is based on the amount of taxes collected on the incomes of new employees, and any taxes collected on the incomes of other persons residing or working in the municipal corporation are not affected by this calculation. The infrastructure costs used in the computation are limited to thirty-five percent of the amount of the taxes unless the board of education approves a greater amount. Payment must be made from the municipal corporation's general fund or a special fund established for the purpose. R.C. 5709.82(D).

Let us turn now to your first question, which asks whether the percentage of municipal income tax approved by the electors and earmarked for a specific purpose – that is, roadway improvements – is subject to revenue sharing as required under R.C. 5709.82(C) and (D). The revenue sharing statute applies when a municipal corporation "imposes a tax on incomes." R.C. 5709.82(C). The allocation mandated, if an agreement cannot be reached, is "an amount equal to fifty per cent of the difference between the amount of taxes levied and collected by the municipal corporation on the incomes of new employees in the calendar year" and the amount of infrastructure costs. R.C. 5709.82(D).

> person who replaces a person who is not a new employee under division (A)(1) of this section.

R.C. 5709.82(A)(1).

[3] "Infrastructure costs" is defined as follows:

> (2) "Infrastructure costs" means costs incurred by a municipal corporation in a calendar year to acquire, construct, reconstruct, improve, plan, or equip real or tangible personal property that directly benefits or will directly benefit the exempted property. If the municipal corporation finances the acquisition, construction, reconstruction, improvement, planning, or equipping of real or tangible personal property that directly benefits the exempted property by issuing debt, "infrastructure costs" means the annual debt charges incurred by the municipal corporation from the issuance of such debt. Real or tangible personal property directly benefits exempted property only if the exempted property places or will place direct, additional demand on the real or tangible personal property for which such costs were or will be incurred.

R.C. 5709.82(A)(2).

The statute does not distinguish among types or purposes of taxes on income. Instead, it applies in general terms to income taxes levied and collected by the municipal corporation. There is no statutory basis for excluding from such figure income taxes that are earmarked for particular purposes.

The question whether the revenue sharing provisions of R.C. 5709.82(D) apply to all income taxes levied and collected by the municipal corporation was considered in 1996 Op. Att'y Gen. No. 96-012. That opinion concluded that the revenue sharing provisions applied "to the total amount of income taxes levied and collected by the municipal corporation for its use and benefit," and included taxes approved by the voters for specified purposes. 1996 Op. Att'y Gen. No. 96-012 (syllabus, paragraph 1). The 1996 opinion excluded from the provisions of R.C. 5709.82(D) "the portion of a shared income tax that is required by agreement, ordinance, and ballot language to be paid to the school district." *Id*. That portion was excluded not because it was earmarked for a particular purpose, but because it was levied and collected by the municipal corporation for the use and benefit of the school district and not for the use and benefit of the municipal corporation.

In the instant case, all income taxes in question are collected for the use and benefit of the municipal corporation, though for different purposes of the municipal corporation. Hence, the exclusion recognized in 1996 Op. Att'y Gen. No. 96-012 is not applicable to the situation you have described.

We are in agreement with the analysis set forth in 1996 Op. Att'y Gen. No. 96-012. Applying that analysis in the instant case, we conclude that the fifty percent figure prescribed by R.C. 5709.82(D) for calculating compensation to a school district for tax revenue lost due to property tax abatement programs should be applied to the total amount of income taxes levied and collected by the municipal corporation for its use and benefit, including income taxes approved by the electors and earmarked for a specific purpose of the municipal corporation.

As was noted in 1996 Op. Att'y Gen. No. 96-012, the fact that tax proceeds are restricted by constitution and statute to the purpose for which the tax was levied provides no impediment to the allocation here proposed. 1996 Op. Att'y Gen. No. 96-012, at 2-49 n.3; *see also* Ohio Const. art. XII, § 5; R.C. 718.01(C); 1996 Op. Att'y Gen. No. 96-030. The statute plainly provides for the payment to be in "an amount equal to" the calculated amount and to be made from the municipal corporation's general fund or a special fund established for the purpose. R.C. 5709.82(D). Thus, the income tax proceeds whose use is restricted may be expended for the purpose required by law and moneys from other sources may be used to make the payment required by R.C. 5709.82(D).

This reading of the statute serves the purpose, as expressed in R.C. 5709.82, of compensating the school district for tax revenue that the school district would have received had the tax abatement not been granted. As was stated in 1996 Op. Att'y Gen. No. 96-012, at 2-52: "The General Assembly has prescribed the fifty percent split as the appropriate balance between the municipal corporation's interest in attracting new business and the school district's interest in fiscal stability, absent an agreement between the parties."

Let us turn now to your second question. That question asks whether revenue sharing pursuant to R.C. 5709.82(C) is required for a project that was granted a tax abatement by a township prior to its annexation into a municipality, where (a) the municipality did not participate in the abatement proceedings but was aware that a tax abatement would be granted; (b) annexation proceedings were underway at the time the abatement was granted; and (c) the municipality assumed the costs of improvement related to the abated property following the annexation.

By its terms, the mandatory revenue sharing provision of the statute applies to the legislative authority of a municipal corporation that has acted under certain named statutes "to grant or consent to the granting of an exemption from taxation for real or tangible personal property." R.C. 5709.82(C). Under the facts presented, the legislative authority of the municipal corporation has not acted to grant or consent to the granting of an abatement from taxation. Rather, the abatement was granted by action of the board of county commissioners with the consent of the board of township trustees. *See* R.C. 5709.63(A); R.C. 5709.632(A)(2). When the abatement was granted, the territory was not part of the City of Bucyrus and the city had no authority to grant or consent to the granting of an enterprise zone tax abatement. *See* 1996 Op. Att'y Gen. No. 96-030, at 2-116 ("the enterprise zone program [does not provide] any authority for a municipality to grant or consent to the grant of an exemption outside the municipal limits").

Further, there is no basis in law for concluding that the annexation of property is an action that triggers the negotiation or mandatory compensation requirements of R.C. 5709.82(C) and (D). As was stated in 1996 Op. Att'y Gen. No. 96-030, at 2-117: "The General Assembly cannot have intended that a municipality be forced to share its income tax revenue in situations where the municipality had no authority to control the terms and conditions of the tax exemption in the first place."

Because the legislative authority of the municipal corporation did not act to grant or consent to the granting of the abatement, the mandatory revenue sharing provisions do not apply. This result is compelled by the plain language of the statute. It is not affected by the fact that the municipality was aware that a tax abatement would be granted, by the fact that annexation proceedings were underway when the abatement was granted, or by the fact that the municipality assumed the costs of improvements related to the abated property following the annexation. We conclude, therefore, that a municipal corporation is not required to comply with the school district compensation provisions of R.C. 5709.82(C) and (D) when the municipal corporation annexes territory containing a project that, prior to the annexation, was granted a tax abatement by the board of county commissioners with the approval of the board of township trustees pursuant to R.C. 5709.63 or R.C. 5709.632.

This conclusion is consistent with 1996 Op. Att'y Gen. No. 96-030 (syllabus, paragraph 2), which concluded that "[a] municipality is not required to comply with the school district compensation provisions of R.C. 5709.82(C)-(D) when the municipality annexes territory in which a company with over one million dollars in new annual payroll has already been granted a tax exemption by a county or township, through a preexisting … enterprise zone program as provided in … R.C. 5709.61-.69." As

was stated in 1996 Op. Att'y Gen. No. 96-030, at 2-116: "R.C. 5709.82(C) requires more than the mere existence of an exemption. It expressly requires that the municipality itself act, under one of the specified statutes, to grant or consent to the exemption." On the facts before us, the municipal corporation had no authority to grant or consent to a tax abatement under R.C. 5709.61-.69 for a project located outside its boundaries and did not act to grant or consent to any such abatement. Hence, the municipal corporation cannot be required to share its revenue with the school district pursuant to R.C. 5709.82.

Let us now consider your final question. That question asks whether a municipality may claim an infrastructure cost adjustment under R.C. 5708.82(A)(2) and (D) for debt service charges paid on debt incurred to reimburse another subdivision for infrastructure costs where the infrastructure was installed prior to the granting of any abatements in the area and benefits all parcels in the development, not just a particular abated project.

Again our analysis begins with the language of the statute. Mandatory revenue sharing, absent an agreement, is in an amount equal to fifty percent of the difference between the taxes levied and collected on the incomes of new employees "and the amount of any infrastructure costs incurred in that calendar year," with the infrastructure costs limited to a maximum of thirty-five percent of the amount of those income taxes. R.C. 5709.82(C) and (D).

Infrastructure costs are defined to mean "costs incurred by a municipal corporation in a calendar year to acquire, construct, reconstruct, improve, plan, or equip real or tangible personal property that directly benefits or will directly benefit the exempted property." R.C. 5709.82(A)(2); *see* note 3, *supra*. If the municipal corporation finances any of these activities by issuing debt, the infrastructure costs are "the annual debt charges incurred by the municipal corporation from the issuance of such debt." *Id*. Real or tangible personal property is found to directly benefit abated property "only if the exempted property places or will place direct, additional demand on the real or tangible personal property for which such costs were or will be incurred." *Id*.

Whether particular costs come within the statutory definition requires findings of fact. It must be found that the costs are used for an authorized purpose relating to real or tangible personal property that directly benefits the abated property. An opinion of the Attorney General cannot be used to find those facts. We can, however, analyze the manner in which provisions of law apply to particular facts.

In the instant case, the costs in question relate to the construction of water and sewer lines that benefit Crossroads Industrial Park and the projects for which tax abatements were granted are located in Crossroads Industrial Park. Thus, it is assumed that each of the projects that has been granted a tax abatement will place direct, additional demand on the water and sewer improvements. If this is the case, then the water and sewer improvements directly benefit the projects that have been granted tax abatements. *See* R.C. 5709.82(A)(2). It is not necessary under the statute for the improvements to benefit only the projects that have been granted abatements. It is sufficient that the exempted property

places additional demand on the water and sewer lines that have been improved, even if the water and sewer lines will also benefit other property. Hence, the fact that undeveloped parcels in Crossroads Industrial Park may also benefit from the improvements does not render the costs of the improvements ineligible to be considered as infrastructure costs.

For a particular transaction to come within the definition of "infrastructure costs" it must be for the "acquisition, construction, reconstruction, improvement, planning, or equipping" of the improvements in question. R.C. 5709.82(A)(2). The statute does not specify the manner or source of "acquisition." *See generally Black's Law Dictionary* 24 (6th ed. 1990) (defining "acquire" to mean: "To gain by any means …. To gain ownership of …. The act of getting or obtaining something which may be already in existence, or may be brought into existence though means employed to acquire it"). Thus, there is no statutory basis for excluding from the coverage of the statute a situation in which a municipal corporation acquires real or tangible personal property from another public entity, provided that costs or debt charges are incurred as provided in the statutory definition of "infrastructure costs." *See* R.C. 5709.82(A)(2); *see also* 1996 Op. Att'y Gen. No. 96-030.

Similarly, a municipal corporation may cooperate with other public entities in constructing or improving property that constitutes infrastructure, or may take advantage of improvements that were previously made. However, the municipal corporation may claim an offset under R.C. 5709.82 only for costs or debt charges that come within the statutory definition.

Thus, a municipal corporation may claim an infrastructure cost adjustment under R.C. 5709.82(A)(2) and (D) for debt service charges paid on debt incurred to reimburse another subdivision for infrastructure costs where the infrastructure was installed prior to the granting of any abatements in the area and benefits all parcels in the development, provided that the reimbursement arrangement constitutes the acquisition, construction, reconstruction, improvement, planning, or equipping of real or tangible personal property that directly benefits exempted property. In each case, it will be necessary to examine the reimbursement arrangement in question.

For the reasons set forth above, it is my opinion, and you are advised:

1. The fifty percent figure prescribed by R.C. 5709.82(D) for calculating compensation to a school district for tax revenue lost due to property tax abatement programs should be applied to the total amount of income taxes levied and collected by the municipal corporation for its use and benefit, including income taxes approved by the electors and earmarked for a specific purpose of the municipal corporation. (1996 Op. Att'y Gen. No. 96-012, approved and followed.)

2. A municipal corporation is not required to comply with the school district compensation provisions of R.C. 5709.82(C) and (D) when the municipal

corporation annexes territory containing a project that, prior to the annexation, was granted a tax abatement by the board of county commissioners with the approval of the board of township trustees pursuant to R.C. 5709.63 or R.C. 5709.632. (1996 Op. Att'y Gen. No. 96-030, approved and followed.)

3. A municipal corporation may claim an infrastructure cost adjustment under R.C. 5709.82(A)(2) and (D) for debt service charges paid on debt incurred to reimburse another subdivision for infrastructure costs where the infrastructure was installed prior to the granting of any abatements in the area and benefits all parcels in the development, provided that the reimbursement arrangement constitutes the acquisition, construction, reconstruction, improvement, planning, or equipping of real or tangible personal property that directly benefits abated property.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

February 15, 2000

The Honorable Russell B. Wiseman
Crawford County Prosecuting Attorney
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SYLLABUS: 2000-011

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2. A municipal corporation is not required to comply with the school district compensation provisions of R.C. 5709.82(C) and (D) when the municipal corporation annexes territory containing a project that, prior to the annexation, was granted a tax abatement by the board of county commissioners with the approval of the board of township trustees pursuant to R.C. 5709.63 or R.C. 5709.632. (1996 Op. Att'y Gen. No. 96-030, approved and followed.)

3. A municipal corporation may claim an infrastructure cost adjustment under R.C. 5709.82(A)(2) and (D) for debt service charges paid on debt incurred to reimburse another subdivision for infrastructure costs where the infrastructure was installed prior to the granting of any abatements in the area and benefits all parcels in the development, provided that the reimbursement arrangement constitutes the acquisition, construction, reconstruction, improvement, planning, or equipping of real or tangible personal property that directly benefits abated property.