March 9, 2001

OPINION NO. 2001-005

The Honorable Amanda Spies Bornhorst
Tuscarawas County Prosecuting Attorney
125 E. High Avenue
New Philadelphia, OH 44663

Dear Prosecutor Bornhorst:

You have asked whether an income tax imposed by a municipal council and upheld by the electorate in a referendum constitutes an additional tax voted by the electorate, as described in R.C. 5747.51(E)(4), for purposes of determining the municipality's share in the undivided local government fund.

Undivided Local Government Fund

Your question involves the distribution of moneys deposited in the county undivided local government fund. It will be helpful to first set forth a brief discussion of the nature of such fund and the manner in which moneys in the fund are distributed to political subdivisions.

Within each county treasury is established an undivided local government fund. *See* R.C. 5747.50. Its primary source of revenue is the state treasury's local government fund, *see* R.C. 5747.03(A)(1); R.C. 5747.51, which is credited with a portion of the money collected from the state income tax,[1] the state sales and use taxes, the excise taxes and penalties collected from

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[1] Ohio Const. art. XII, § 9 reads: "Not less than fifty per cent of the income, estate, and inheritance taxes that may be collected by the state shall be returned to the county, school district, city, village, or township in which said income, estate, or inheritance tax originates, or to any of the same, as may be provided by law." Money deposited in the local government fund pursuant to R.C. 5747.03(A)(1) is credited towards the fifty per cent requirement of this provision. R.C. 5747.03(B)(2)(c).

public utilities pursuant to R.C. Chapter 5727, the kilowatt hour tax levied on electric distribution companies under R.C. 5727.81, and the state corporation franchise tax.[2]

The state Tax Commissioner must determine each county's proportionate share of the local government fund, R.C. 5747.501; R.C. 5747.51, and distribute to each county its share of the amount available for distribution, R.C. 5747.50. The county must deposit these moneys to the credit of the undivided local government fund in the county treasury. R.C. 5747.50. The county budget commission then determines the amount needed by, and to be apportioned to, each subdivision within the county for current operating expenses, based on the subdivision's tax budget. R.C. 5747.51(B). *See* R.C. 5747.01(Q)(1) (defining "subdivision" as the county and any municipal corporation, park district, or township). *See also City of Canton v. Stark County Budget Commission*, 40 Ohio St. 3d 243, 243, 533 N.E.2d 308, 309 (1988) (the undivided local government fund "consists of money due the county from the state to assist the county and its subdivisions in their current operations").

A subdivision's share in the county's undivided local government fund is based on its "relative need" as compared to the "relative need" of the other subdivisions entitled to receive moneys from the fund. *See generally Lake County Budget Commission v. Village of Willoughby Hills*, 9 Ohio St. 2d 108, 224 N.E.2d 120 (1967) (syllabus, paragraph 2) ("[t]he need of a subdivision for revenue, in addition to what it has, is an essential requirement for any apportionment to that subdivision from the county undivided local government fund"). Briefly stated, the county budget commission determines a subdivision's "relative need" by first deducting from the subdivision's total expenditures its revenue and certain, statutorily specified expenditures, such as those for permanent improvements and debt charges. R.C. 5747.51(C)-(F). The budget commission then totals the "relative need" of all participating subdivisions and computes a "relative need factor" by dividing the total amount in the undivided local government fund by the total relative need of all participating subdivisions. R.C. 5747.51(G). The relative need of each subdivision is then multiplied by the relative need factor to determine the subdivision's proportionate share in the undivided local government fund. R.C.5747.51(H). *See generally City of Lima v. Allen County Budget Commission*, 66 Ohio St. 3d 167, 610 N.E.2d 982 (1993).

As is apparent from the above calculations, the greater a subdivision's revenue, the less will be its "relative need" and the smaller will be its share in the undivided local government fund. Division (E)(4) of R.C. 5747.51 allows a subdivision to deduct from its revenue total the revenue received "from an additional tax … voted by its electorate." A deduction in revenue for taxes voted by the electorate will increase a subdivision's "relative need" under this statutory calculation, and thus its proportionate share in the undivided local government fund. *See City of*

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[2] *See* R.C. 5727.45 (excise taxes and penalties levied on public utilities); R.C. 5727.84(B)(2) (kilowatt hour tax); R.C. 5733.12(A) (state corporation franchise tax); R.C. 5739.21(A) and R.C. 5741.03(A) (state sales and use taxes); R.C. 5747.03 (state income tax).

New Boston v. Scioto County Budget Commission, 20 Ohio St. 2d 151, 152, 254 N.E.2d 342, 343 (1969) ("it is important for each subdivision to reduce such 'revenues available' to as low a figure as possible," and "it is in the interest of a subdivision to reduce that figure by as much as can be brought within the exception for 'those revenues which a subdivision receives from an additional tax … voted by its electorate'").

As explained in *Board of County Commissioners v. Scioto County Budget Commission*, 17 Ohio St. 2d 39, 41, 244 N.E.2d 888, 890 (1969), the purpose of the deduction for taxes voted by the electorate is to avoid "penaliz[ing] the people who have voted additional taxes upon themselves." The court points out that, there would be no reason for an electorate to vote additional taxes upon itself "if this additional taxation is to result in a reduction of the [subdivision's] allocation from the local government fund." *Id.*, 17 Ohio St. 2d at 41, 244 N.E.2d at 890. *See also Board of Park Commissioners v. Budget Commission*, 22 Ohio St. 2d 155, 159, 258 N.E.2d 435, 438 (1970) ("the General Assembly, in granting the credit for an additional voted tax, intended a principle which would neither penalize voters who imposed higher taxes upon themselves nor discourage the imposition of necessary taxes"); *City of Painesville v. Board of County Commissioners*, 17 Ohio St. 2d 35, 244 N.E.2d 892 (1969) (holding that a similar exclusion in the statutory predecessor to R.C. 5747.51 for taxes voted by the electorate did not constitute a denial of equal protection under the United States or Ohio Constitution); *City of Lancaster v. Fairfield County Budget Commission*, 174 Ohio St. 163, 166, 187 N.E.2d 42, 44-45 (1962) ("[a] political subdivision which votes and collects a levy outside the ten-mill limitation to provide for governmental operations is entitled to credit therefor in the allocation of an undivided local government fund of a county and should not be penalized for assuming an added tax burden to provide for a governmental activity, which would normally be paid out of current operating funds"). The courts have thus liberally construed the phrase "additional tax voted by the electorate" to effectuate this legislative purpose. *Board of Park Commissioners v. Budget Commission.*

The Power of Referendum

In addressing your question, whether a municipal income tax upheld in a referendum constitutes a tax voted by the electorate for purposes of R.C. 5747.51(E)(4), we turn next to an examination of the nature of the referendum power. Ohio Const. art. II, § 1f reads as follows:

> The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Describing the power of referendum as granting the people the "right to a vote upon an act of" the legislature, the court explained the powers of referendum and initiative in *State ex rel. Nolan v. ClenDening*, 93 Ohio St. 264, 280, 112 N.E. 1029, 1033 (1915) as follows:

> Now, the people's right to the use of the initiative and referendum is one of the most essential safeguards to representative government. The enemies of the "I. & R." persistently misrepresent it as destroying representative government, but it is not so. It is rather a guaranty or safeguard to preserve representative government. It is only when government ceases to be representative of the public welfare that the "I. & R." can be successfully invoked. If the people get real representative government there is no occasion for the "I. & R."

93 Ohio St. at 277, 112 N.E. at 1032. *See also Markus v. Trumbull County Board of Elections*, 22 Ohio St. 2d 197, 200, 259 N.E.2d 501, 503 (1970) (the right of referendum secures "a voted expression of the will of the electorate"); *Ohio Valley Electric Ry. Co., v. Hagerty*, 14 Ohio App. 398, 400 (Lawrence County 1921) (a "legislative act is nullified, if, upon a referendum, it fails to be approved by a majority of the electors voting thereon," and the filers of a referendum petition "have the power to suspend the legislative power of the council" until the next regular election).

The General Assembly has, pursuant to Ohio Const. art. II, § 1f, enacted R.C. 731.29 which provides that, with certain exceptions not at issue here, any ordinance passed by a municipality's legislative authority is subject to referendum, and will not go into effect until thirty days after it is filed with the mayor of a city or passed by the legislative authority of a village.[3] A petition, signed by at least ten percent of the electors, that is filed within those thirty days may order that the ordinance "be submitted to the electors of such municipal corporation for their approval or rejection." *Id.* The board of elections must submit the ordinance to the electors of the municipal corporation "for their approval or rejection," at the next general election and no ordinance "shall go into effect until approved by the majority of those voting upon it." *Id.* An ordinance that receives an affirmative majority of votes cast at a referendum election "shall become effective" on the fifth day after the board of elections certifies the official vote. R.C. 731.31.

Application to R.C. 5747.51(E)(4)

It is significant that an ordinance does not become effective immediately upon approval by the municipality's legislative authority.[4] Instead, the Constitution and enabling legislation (or

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[3] A municipal corporation may adopt a charter governing its electorate's power of referendum, rather than follow statutory provisions. *See* R.C. 731.41; *State ex rel. Bramblette v. Yordy*, 24 Ohio St. 2d 147, 265 N.E.2d 273 (1970) (a municipality may include in its charter a provision exempting ordinances for raising revenue from the operation of the referendum, even though such exemption is not provided in statute).

[4] R.C. 731.30, enacted by the General Assembly pursuant to Ohio Const. art. II, §1f, exempts certain legislation from referendum, including appropriations for current expenses and emergency measures. *See Shryock v. City of Zanesville*, 92 Ohio St. 375, 110 N.E. 937 (1915)

charter) guarantee the electorate an opportunity to vote on the matter. If a referendum petition is filed within the specified timeframe, implementation of the ordinance is further suspended until the election when the voters express either their approval or rejection of the legislative authority's action. It is only after the voters approve the ordinance that it goes into effect. The approval of an ordinance upon referendum is clearly a direct expression of the will of the voters, and a municipal income tax approved upon referendum is as much a tax "voted by the electorate" as one that is, in the first instance, authorized by vote of the people.

This conclusion is supported by *City of Lima v. Allen County Budget Commission*, 66 Ohio St. 3d at 172, 610 N.E.2d at 986, in which the court noted that, in order for an additional tax to qualify for deduction from revenue under R.C. 5747.51(E)(4), "the vote by the electorate need not be directly on the additional tax," and indicated that, a five-year income tax passed by city council and approved by the voters pursuant to referendum was a "voted tax" for purposes of R.C. 5747.51(E)(4), although a renewal of the tax by city council without a vote of the electorate was not.[5]

The conclusion that a municipal income tax approved by the voters upon referendum is a "tax voted by the electorate" for purposes of R.C. 5747.51(E)(4) is also supported by the purpose served by the statutory allowance for the deduction, as discussed above, and is consistent with the courts' liberal interpretation of the allowance. Voters who approve a tax upon referendum in essence vote the tax upon themselves, and would be penalized and discouraged from doing so if the municipality's share in the local government fund was consequently reduced.

You have questioned the effect of language in R.C. 5747.51(E)(4) upon the interpretation of what constitutes a tax voted by the electorate. The language in question reads as follows:

> For the purposes of this division, any measure adopted by a board of county commissioners pursuant to section 322.02, 324.02, 4504.02, or 5739.021 of the Revised Code, including those measures upheld by the electorate in a referendum conducted pursuant to section 322.021, 324.021, 4504.021, or 5739.022 of the Revised Code, shall not be considered an additional tax voted by the electorate.

This language seems to exclude from the meaning of "additional tax voted by its electorate" at least certain levies that are adopted by the board of county commissioners and subsequently

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(upholding the constitutionality of the exemption for emergency measures, currently found in R.C. 731.30). These measures may go into immediate effect.

[5] The court's analysis was based on the decision in *City of New Boston v. Scioto County Budget Commission*, 20 Ohio St. 2d 151, 254 N.E.2d 342 (1969), wherein the court decided that an income tax passed by city council after the electorate amended the city charter, deleting the prohibition against passage of an income tax and authorizing the city council to levy a one-half percent tax, was one voted by the electorate for purposes of what is now R.C. 5747.51(E)(4).

approved upon referendum. However, the term "referendum," as it appears in the language quoted above, is misused.

An examination of the statutory provisions referred to in R.C. 5747.51(E)(4) (R.C. 322.021, R.C. 324.021, R.C. 4504.021, and R.C. 5739.022) reveals that the process they authorize is not a referendum, but one for determining whether a tax that is passed by the board of county commissioners as an emergency measure and becomes effective immediately should be *repealed.* In voting whether to repeal one of the specified taxes, the electorate is acting upon a tax that has already been levied by the board of county commissioners and become effective without a vote of the people. This is in contrast to the referendum process where the tax does not become effective until after approval by the voters. The distinction may thus provide the basis for the different treatment R.C. 5747.51(E)(4) accords to taxes submitted to the voters for repeal and those subject to voter approval by referendum.[6]

Even if the above-quoted language actually referred to the statutes governing the referendum process,[7] the fact that such language is in division (E)(4) supports the conclusion that a tax upheld by referendum is indeed a tax voted by the electorate. If a tax approved by

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[6] R.C. 305.42 provides that R.C. 305.32 to R.C. 305.41, which govern the form and content of petitions for submitting resolutions adopted by a board of county commissioners to a referendum, apply to petitions authorized by R.C. 322.021, R.C. 324.021, R.C. 4504.021, and R.C. 5739.022. While the petitions for referendum and repeal may be subject to the same standards as to form, this does not alter the fundamental difference between the electorate's power of referendum and the right of voters to repeal an emergency measure.

[7] If passed as a non-emergency measure, the taxes specified are, by the terms of the respective statutory provisions, subject to referendum and do not become effective for thirty days. *See also* R.C. 305.31-.41 (procedure for submitting taxes adopted by a board of county commissioners to a referendum).

referendum were not considered in the first instance to be a tax voted by the electorate,——there would be no need for the General Assembly to explicitly exclude certain taxes so approved.

Based upon the foregoing, it is my opinion, and you are so advised that, a municipal income tax approved by the voters upon referendum is a tax voted by the electorate for purposes of R.C. 5747.51(E)(4). Therefore, revenue from the income tax may be deducted from the municipality's revenue total in determining its share in the undivided local government fund.

Respectfully,

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Attorney General

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