

OPINION NO. 2003-039**Syllabus:**

Except as provided in R.C. 307.695 and R.C. 5739.09(A)(2), a nonprofit corporation that is recognized by a board of county commissioners as a convention and visitors' bureau and receives public funds from a county hotel lodging excise tax levied pursuant to R.C. 5739.09(A)(1) may contribute a portion of such funds to a county agency established by a board of county commissioners under R.C. 301.26 to operate and maintain county parks.

To: Robert D. Rinfret, Holmes County Prosecuting Attorney, Millersburg, Ohio
By: Jim Petro, Attorney General, December 23, 2003

You have requested an opinion concerning the disbursement of proceeds from a county excise tax levied upon the lodging of hotel guests. Your letter states that the Holmes County Commissioners have levied a three percent county hotel lodging excise tax pursuant to R.C. 5739.09(A)(1). A portion of the revenue derived from this tax is contributed to the Holmes County Chamber of Commerce, a nonprofit corporation. The chamber of commerce operates an organization known as the Holmes County Travel and Tourism Bureau, also a nonprofit corporation, that is recognized by the board of county commissioners as a convention and visitors' bureau.¹ Pursuant to an agreement entered into between the board of county commissioners and the chamber of commerce, the convention and visitors' bureau is required to use the moneys received from the county hotel lodging excise tax to foster and promote tourism, visitors, and conventions within Holmes County.²

In order to promote tourism within Holmes County, the board of county commissioners would like to use revenue derived from the county hotel lodging excise tax to fund the Holmes County Rails-to-Trails Coalition, which is a county agency established by the board of county commissioners under R.C. 301.26³ to operate and maintain county parks.⁴ Accordingly, a question has arisen whether a nonprofit corporation such as the Holmes County Travel and Tourism Bureau may contribute revenue it receives from the county hotel lodging excise tax to the Holmes County Rails-to-Trails Coalition for the purpose of operating and maintaining county parks.⁵

¹Because no statutes provide for the creation, organization, or operation of a convention and visitors' bureau, a board of county commissioners has discretionary authority to disburse the excise tax revenues payable to a convention and visitors' bureau under R.C. 5739.09(A)(1) to a private nonprofit corporation that will use such funds for a public purpose. *See* 1983 Op. Att'y Gen. No. 83-054 at 2-214; 1981 Op. Att'y Gen. No. 81-093 at 2-357; *see also* 1999 Op. Att'y Gen. No. 99-028 at 2-187.

²An opinion of the Attorney General cannot make findings of fact when facts are in dispute, *see* 2003 Op. Att'y Gen. No. 2003-019 at 2-145, or determinations regarding the rights of parties under a particular contract or agreement, 1983 Op. Att'y Gen. No. 83-087 at 2-342. This opinion thus does not address the rights of the nonprofit corporation under the agreement to use revenue derived from the county hotel lodging excise tax levied pursuant to R.C. 5739.09(A)(1) for a particular purpose. Rather, the opinion is limited to a discussion of the general principles of law applicable to the disposition of such revenue by a nonprofit corporation.

³R.C. 301.26 states that, "[t]he board of county commissioners of any county may acquire, construct, improve, maintain, operate, and protect parks, parkways, and forests, and provide an agency for their administration."

⁴It is our understanding that the parks are not under the jurisdiction of a park district, *see* R.C. Chapter 1545, a township park district, *see* R.C. 511.18-.99, a township, *see* R.C. 505.26; R.C. 505.261; R.C. 755.12, a municipal corporation, *see* R.C. 735.27; R.C. Chapter 755, or a joint recreation district, *see* R.C. 755.16. In addition, the parks are not jointly operated and maintained by the county and another governmental entity. *See* R.C. 755.16.

⁵R.C. 307.693 permits a board of county commissioners to "appropriate moneys from the general fund to make contributions to convention and visitors' bureaus operating within the county." You have not indicated that the Holmes County Commissioners have contributed pursuant to R.C. 307.693 moneys from the county's general fund to the Holmes County

County Hotel Lodging Excise Tax

We will begin with a brief overview of R.C. 5739.09(A)(1), which provides, in part, as follows:

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.... Except as provided in divisions (A)(2), (3), (4), and (5) of this section, 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, including a pledge and contribution of any portion of the remainder pursuant to an agreement authorized by section 307.695 of the Revised Code.

R.C. 5739.09(A)(1) authorizes a board of county commissioners to levy an excise tax not to exceed three percent on transactions by which lodging by a hotel is or is to be furnished to transient guests. Except as provided in divisions (A)(2), (3), (4), and (5) of R.C. 5739.09,⁶ after deductions for the cost of administering the county hotel lodging excise tax have been paid, and payments to municipal corporations and townships not levying a hotel lodging excise tax have been made, the board of county commissioners must contribute the remainder of the revenue arising from the county hotel lodging excise tax to the convention and visitors' bureau operating within the county. *See* 1981 Op. Att'y Gen. No. 81-093 at 2-356. *See generally* Ohio Const. art. XII, § 5 (“[n]o tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied”); R.C. 5705.10 (“[a]ll revenue derived from a special levy shall be credited to a special fund for the purpose for which the levy was made”); *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph one) (“all public property and public moneys ... constitute a public trust fund.... Said trust fund can be disbursed only by clear authority of law”).

A Nonprofit Corporation That Is Recognized by a Board of County Commissioners as a Convention and Visitors' Bureau Must Use Public Moneys for the Public Purposes of Conventions and Tourism

Prior opinions of the Attorneys General have determined that public moneys contributed to a nonprofit corporation must be used by the corporation for a public purpose. 1983

Travel and Tourism Bureau. This opinion, therefore, does not address the authority of the Holmes County Travel and Tourism Bureau to use such moneys.

⁶Divisions (A)(2), (3), and (4) of R.C. 5739.09 authorize a board of county commissioners to increase the rate of a tax levied under R.C. 5739.09(A)(1) and provide for the disbursement of revenue resulting from an increased tax rate. R.C. 5739.09(A)(5) authorizes a board of county commissioners to designate the use of some or all of the tax revenue collected under R.C. 5739.09(A)(1) to pay the operating expenses of a port authority.

Op. Att’y Gen. No. 83-054; 1981 Op. Att’y Gen. No. 81-093. As explained in 1981 Op. Att’y Gen. No. 81-093 at 2-357:

[S]ince R.C. 5739.024(A) [now R.C. 5739.09(A)] clearly intends the referenced convention and visitors’ bureau to be the recipient of a public grant, one important limitation on the nature of that entity is necessarily implied. That limitation is imposed by Ohio Const. art. VIII, § 6, which provides in part that “[n]o laws shall be passed authorizing any county, city, town or township ... to raise money for, or to loan its credit to, or in aid of, any ... company, corporation or association....” This constitutional provision prohibits a county from furnishing money or credit for the benefit of a private enterprise. As I indicated in 1977 Op. Att’y Gen. No. 77-049, however, *the Ohio Supreme Court has held that, while art. VIII, § 6 forbids the giving or loaning of aid or credit to or in aid of a private enterprise, it does not prohibit such a gift or loan to a public organization created for a public purpose or to a private non-profit organization for a public purpose.* (Citations omitted and emphasis added.)

Accord 1983 Op. Att’y Gen. No. 83-054 at 2-214. *See generally* 2003 Op. Att’y Gen. No. 2003-019 at 2-150 (“it has been found that, in the case of a nonprofit corporation, the existence of a valid public purpose overcomes constitutional prohibitions against the giving or lending of credit”); 1999 Op. Att’y Gen. No. 99-016 at 2-125 n.6 (“[p]ublic aid to a private nonprofit entity has been permitted under [Ohio Const. art. VIII, § 6], but only when it serves a public purpose”). Thus, a nonprofit corporation that receives public moneys from a board of county commissioners must use such moneys for a public purpose.

A recent Attorney General opinion reiterated the principle that public moneys must be used only for public purposes and stated:

The principle that public funds may be expended only for a public purpose has been firmly established under Ohio Law. The principle has been explained as follows:

“Public purpose” is an amorphous concept that often assumes various dimensions in different contexts. As a limitation on the expenditure of public funds, it is commonly recognized to be a doctrine based on due process of law. It has been held that the Fourteenth amendment to the United States Constitution requires that the taking of one’s money by taxation is lawful only when the expenditure of those monies fulfills a public purpose. Loan Association v. Topéka, 20 Wall. 655, 22 L. Ed. 455 (1874).

1977 Op. Att’y Gen. No. 77-049, at 2-175....

The determination of a public purpose is made with a view to the needs of the public, and may change as the conditions and practices of society change. *The determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts, and such a determination will not be reversed by the courts unless it is manifestly arbitrary or unreasonable. Thus, a legislative body has broad discretion in determining what constitutes a public purpose.* (Citations omitted and emphasis added.)

2003 Op. Att’y Gen. No. 2003-019 at 2-150 and 2-151. Accordingly, the General Assembly has broad discretion in determining what constitutes a public purpose, and such determination will not be reversed by the courts unless it is manifestly arbitrary or unreasonable.

With respect to your specific inquiry, the General Assembly has, by the enactment of R.C. 5739.09(A)(1), determined that conventions and tourism are valid public purposes for which public moneys distributed to a convention and visitors’ bureau must be used. 1983 Op. Att’y Gen. No. 83-054 at 2-214; 1981 Op. Att’y Gen. No. 81-093 at 2-357; *see also* R.C. 307.692 (“[t]he legislative authority of a county may appropriate moneys from its general fund to be expended by the county ... for the public purpose of encouraging economic development of the county or area through promotion of tourism”⁷); R.C. 307.693 (“[a] board of county commissioners may appropriate moneys from the general fund to make contributions to convention and visitors’ bureaus operating within the county”); *cf. Bazell v. City of Cincinnati*, 13 Ohio St. 2d 63, 233 N.E.2d 864 (1968) (charter municipality may expend public moneys for construction of a sports stadium), *cert. denied*, 391 U.S. 601 (1968); 1927 Op. Att’y Gen. No. 393, vol. I, p. 678 (the expenditure of public moneys for the purpose of paying the cost of a municipal exhibit at an industrial exhibition is an expenditure for a public purpose). It follows, therefore, that a nonprofit corporation that is recognized by a board of county commissioners as a convention and visitors’ bureau and receives public funds from a county hotel lodging excise tax levied pursuant to R.C. 5739.09(A)(1) may use such funds for tourism.⁸ 1983 Op. Att’y Gen. No. 83-054 at 2-214; 1981 Op. Att’y Gen. No. 81-093 at 2-357.

A major aspect of tourism and its promotion involves encouraging persons to travel from their homes to particular places for pleasure, personal reasons, or recreational purposes. *See* R.C. 307.692; 1981 Op. Att’y Gen. No. 81-093 at 2-357; *see also* 1983 Op. Att’y Gen. No. 83-054 at 2-214. On this point, 1981 Op. Att’y Gen. No. 81-093 at 2-357 stated that, “one aspect inherent in the concept of ‘tourism’ is that potential tourists be given incentive to visit a particular area.” Accordingly, if county parks entice persons to visit the county or a particular area within the county, it seems reasonable for a nonprofit corporation that is recognized by a board of county commissioners as a convention and visitors’ bureau to use public funds from a county hotel lodging excise tax levied pursuant to R.C. 5739.09(A)(1) to operate and maintain the parks. *See generally* 1983 Op. Att’y Gen. No. 83-054 at 2-214 (“the expenditure of funds to maintain a county building used as a museum and for the performing arts would promote tourism and would, thus, be a permissible expenditure of funds which are levied and distributed to a convention and visitors’ bureau pursuant to R.C. 5739.024(A)”); 1981 Op. Att’y Gen. No. 81-093 (syllabus) (“[r]evenue derived from the tax levied pursuant to R.C. 5739.024(A) and contributed to a convention and visitors’ bureau may be used by such bureau to aid in the support of a local historical museum”). *See generally also City of Cleveland v. Coughlin*, 16 Ohio N.P. (n.s.) 468, 26 Ohio Dec. 181 (C.P.

⁷As used in R.C. 307.692, “promotion of tourism” means “the encouragement through advertising, educational and informational means, and public relations, both within the state and outside of it, of travel by persons away from their homes for pleasure, personal reasons, or other purposes, except to work, to the county, or to the local area.” R.C. 307.692.

⁸In accordance with R.C. 5739.09, the agreement entered into between the Holmes County Commissioners and the Holmes County Chamber of Commerce requires the convention and visitors’ bureau operated by the chamber of commerce to use the moneys received from the county hotel lodging excise tax to foster and promote tourism, visitors, and conventions within Holmes County.

Cuyahoga County 1914) (celebration of the centennial anniversary of Perry's victory on Lake Erie held valid public purpose).

In addition, the fact that the county parks in question are operated and maintained by a county agency established by the board of county commissioners under R.C. 301.26 further supports the conclusion that the operation and maintenance of these parks serve the public purpose of tourism. *See generally* 1983 Op. Att'y Gen. No. 83-054 at 2-214 (“[t]he fact that the General Assembly has expressly authorized the county to purchase, construct, equip and furnish a public auditorium or exhibition hall, R.C. 307.02, further supports the conclusion that the maintenance of such a facility constitutes a public purpose”); 1981 Op. Att'y Gen. No. 81-093 at 2-357 (“the fact that the museum is a part of and administered by the Ohio Historical Society adds credence to the fact that the furtherance of the purposes of the museum is a valid public purpose”). Because a nonprofit corporation that is recognized by a board of county commissioners as a convention and visitors' bureau may use county hotel lodging excise tax revenues for the public purpose of tourism, it follows that such a corporation may contribute a portion of such tax revenues to a county agency established by the board of county commissioners under R.C. 301.26 to operate and maintain county parks.

Limitations Imposed by R.C. 307.695 and R.C. 5739.09(A)(2)

Although county hotel lodging excise tax revenues distributed to a convention and visitors' bureau may be used to operate and maintain county parks, there are two instances in which these revenues may not be used for this purpose. First, pursuant to R.C. 307.695(B)(1), a board of county commissioners and a convention and visitors' bureau may enter into an agreement whereby the “bureau agrees to construct and equip a convention center in the county and to pledge and contribute from the tax revenues received by it under [R.C. 5739.09(A)] not more than such portion thereof that it is authorized to pledge and contribute for the purpose described in [R.C. 307.695(C)].”⁹ The purpose of the pledge and contribution described in R.C. 307.695(B)(1) “is payment of principal, interest, and premium, if any, on bonds and notes issued by or for the benefit of the bureau to finance the construction and equipping of a convention center.” R.C. 307.695(C).

Thus, if a board of county commissioners and a nonprofit corporation that is recognized by the board as a convention and visitors' bureau have entered into an agreement pursuant to R.C. 307.695, revenue received by the corporation pursuant to a county hotel lodging excise tax levied pursuant to R.C. 5739.09(A) that is pledged to pay the principal, interest, and premium, if any, on bonds and notes issued by or for the benefit of the nonprofit corporation to finance the construction and equipping of a convention center must be used for that purpose. R.C. 307.695. In such a situation, the nonprofit corporation is not permitted to contribute the pledged portion of tax revenues received by it pursuant to R.C. 5739.09(A) to a county agency established by the board of county commissioners under R.C. 301.26 to operate and maintain county parks.

⁹Under an agreement entered into between a board of county commissioners and a convention and visitors' bureau pursuant to R.C. 307.695, “[t]he board agrees to levy a tax under [R.C. 5739.09(C)] and pledge and contribute the revenues therefrom for the purpose described in [R.C. 307.695(C)].” R.C. 307.695(B)(2). *See generally* R.C. 5739.09(C) (“[a]ll revenues arising from the tax [levied pursuant to R.C. 5739.09(C)] shall be expended in accordance with [R.C. 307.695]”). You have informed us that the Holmes County Commissioners and the Holmes County Travel and Tourism Bureau have not entered into an agreement pursuant to R.C. 307.695.

The second instance in which county hotel lodging excise tax revenues contributed to a nonprofit corporation that is recognized by the board of county commissioners as a convention and visitors' bureau may not be used to operate and maintain county parks is when the revenues are contributed to the nonprofit corporation pursuant to R.C. 5739.09(A)(2). This division of R.C. 5739.09 provides, in part:

A board of county commissioners that levies an excise tax under [R.C. 5739.01(A)(1)] on June 30, 1997, at a rate of three per cent, and that has pledged revenue from the tax to an agreement entered into under [R.C. 307.695], may amend the resolution levying that tax to provide for an increase in the rate of the tax up to five per cent on each transaction; to provide that revenue from the increase in the rate *shall be spent solely to make contributions to the convention and visitors' bureau operating within the county to be used specifically for promotion, advertising, and marketing of the region in which the county is located*]. (Emphasis added.)

Under R.C. 5739.09(A)(2), any revenue derived from an increase in the rate of the tax levied pursuant to R.C. 5739.09(A)(1) must be used by a nonprofit corporation that is recognized by the board as a convention and visitors' bureau to promote, advertise, and market the region in which the county is located.¹⁰

In common parlance, the promotion, advertising, and marketing of the region in which a county is located involves making persons informed of the region's benefits and resources and the goods and services provided by private and public entities in the region through, *inter alia*, printed or broadcast announcements, educational and informational means, publicity, and public relations. See *Webster's Third New International Dictionary* 31 (1993) ("advertising" means, *inter alia*, "the action of calling something ... to the attention of the public esp. by means of printed or broadcast paid announcements"); *id.* at 1383 ("marketing" means, *inter alia*, "an aggregate of functions involved in ... moving goods from producer to consumer"); *id.* at 1815 ("promotion" means, *inter alia*, "active furtherance of sale of merchandise through advertising or other publicity **syn see PUBLICITY**"). See generally R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"); R.C. 307.692 (as used in R.C. 307.692, "promotion of tourism" means "the encouragement through advertising, educational and informational means, and public relations, both within the state and outside of it, of travel by persons away from their homes for pleasure, personal reasons, or other purposes, except to work, to the county, or to the local area"). The concepts of promotion, advertising, and marketing do not, in our view, reasonably include the provision of funding for the operation and maintenance of county parks since the operation and maintenance of county parks is not intended as a means by which a convention and visitors' bureau provides information about the county or region to the public. Accordingly, when a board of county commissioners increases the rate of the county hotel lodging excise tax levied under R.C. 5739.09(A)(1) in accordance with R.C. 5739.09(A)(2), no portion of the revenue derived from the increase in the rate of the tax may be used by a nonprofit corporation that is recognized by the board as a convention and visitors' bureau to fund a county agency established by the board of county commissioners under R.C. 301.26 to operate and maintain county parks.¹¹

¹⁰According to your letter, the board of county commissioners has not increased the rate of the tax levied under R.C. 5739.09(A)(1) in accordance with R.C. 5739.09(A)(2).

¹¹A portion of the revenue derived when a board of county commissioners increases the rate of the county hotel lodging excise tax levied under R.C. 5739.09(A)(1) in accordance

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, except as provided in R.C. 307.695 and R.C. 5739.09(A)(2), a nonprofit corporation that is recognized by a board of county commissioners as a convention and visitors' bureau and receives public funds from a county hotel lodging excise tax levied pursuant to R.C. 5739.09(A)(1) may contribute a portion of such funds to a county agency established by a board of county commissioners under R.C. 301.26 to operate and maintain county parks.

with R.C. 5739.09(A)(2) may be used by a nonprofit corporation that is recognized by the board as a convention and visitors' bureau to promote, advertise, and market county parks under the administration of a county agency established by the board of county commissioners pursuant to R.C. 301.26.