

OPINION NO. 89-048**Syllabus:**

1. When voters have approved a sales tax levy for a regional transit authority pursuant to R.C. 306.70 and R.C. 5739.023 and no bonds or notes in anticipation of bonds have been issued under R.C. 306.40 without a vote of the electors while the tax has been in effect, the board of trustees of the regional transit authority may, at any time while the tax is in effect, by resolution fix the rate of the tax at any rate authorized by R.C. 5739.023 and not in excess of the rate approved by the voters; the tax rate may, by resolution, be changed to any permissible rate pursuant to the procedure set forth in R.C. 5739.023.
2. R.C. 306.71 authorizes voters to initiate an election with respect to a continuing sales tax under R.C. 5739.023 to decrease the rate approved by the voters.
3. The sales tax rate fixed pursuant to R.C. 5739.023 may not exceed the rate approved by the voters, whether pursuant to the initial authorization of a levy under R.C. 5739.023 or pursuant to a decrease adopted in accordance with R.C. 306.71.

To: Lee C. Falke, Montgomery County Prosecuting Attorney, Dayton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 25, 1989

I have before me your request for an opinion concerning a sales tax levied in Montgomery County for the Miami Valley Regional Transit Authority ("MVRTA"). You have informed me that the voters of Montgomery County approved a continuing one-half percent (1/2%) sales tax for the MVRTA pursuant to R.C. 5739.023. You have raised the following questions:

1. May the MVRTA, by resolution of the board of trustees, reduce the rate of the tax to one-quarter percent (1/4%) or zero percent

(0%) where no bonds or notes in anticipation of bonds of the MVRTA have been issued under R.C. 306.40 without a vote of the electors while the tax has been in effect?

2. If the answer to the first question is in the affirmative, may the MVRTA, by resolution of the board of trustees, increase the rate of the tax subsequent to reducing the tax so long as the rate is in one-quarter percent (1/4%) multiples and does not exceed the originally approved rate of one-half percent (1/2%)?

R.C. 5739.023 authorizes the adoption of a sales tax to provide additional general revenues for a transit authority¹ and to pay the expenses of administering the levy. The tax may be levied "at a rate of not more than one and one-half per cent at any multiple of one-fourth of one per cent and may increase the existing rate of tax to not more than one and one-half per cent at any multiple of one-fourth of one per cent." R.C. 5739.023(A)(1). The tax may be for a specified number of years or for a continuing period of time. R.C. 306.70; R.C. 5739.023(A)(1).

In the situation that you have described, the electors approved a continuing sales tax levy of one-half percent. You have asked whether the MVRTA, by resolution of the board of trustees, may reduce the rate of the tax to one-quarter percent or zero percent, where no bonds or notes in anticipation of bonds have been issued under R.C. 306.40 without a vote of the electors while the tax has been in effect. The statutory scheme clearly provides for such a reduction. R.C. 306.70 states that the ballot language authorizing a tax levy under R.C. 5739.023 shall provide for "a rate not exceeding" the rate specified on the ballot. R.C. 5739.023 states expressly that "[t]he legislative authority² may, at any time while the tax is in effect, by resolution fix the rate of the tax at any rate authorized by this section and not in excess of that approved by the voters" pursuant to R.C. 306.70. R.C. 5739.023(B) (emphasis and footnote added). R.C. 5739.023(B) contains the following language governing changes in the rate of the tax:

Any change in the rate of the tax shall be made effective on the first day of the month specified in the resolution but not sooner than the first day of the month next following the sixtieth day following the certification of the resolution to the tax commissioner; provided, that in any case where bonds, or notes in anticipation of bonds, of a regional transit authority have been issued under section 306.40 of the Revised Code without a vote of the electors while the tax proposed to be reduced was in effect, the board of trustees of the regional transit authority shall continue to levy and collect under authority of the original election authorizing the tax a rate of tax which the board of trustees reasonably estimates will produce an amount in that year

¹ R.C. 5739.023(A)(1) adopts the definition of "transit authority" set forth in R.C. 5739.01. R.C. 5739.01(U) states:

"Transit authority" means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit board is appointed pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority which includes territory in more than one county must include all the area of the most populous county which is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

² R.C. 5739.01(V) provides that, as used in R.C. 5739.01-.31, "[l]egislative authority' means, with respect to a regional transit authority, the board of trustees thereof, and with respect to a county which is a transit authority, the board of county commissioners."

equal to the amount of principal of and interest on those bonds as is payable in that year.

There is, accordingly, clear statutory authority, where no bonds or notes in anticipation of bonds have been issued under R.C. 306.40 without a vote of the electors while the tax was in effect, for the board of trustees of a regional transit authority to change the rate of the tax by resolution, provided that the tax is set at a rate authorized by R.C. 5739.023 and not in excess of the rate approved by the voters pursuant to R.C. 306.70. Such a resolution may increase or decrease the rate, as long as it fixes a rate that is authorized by R.C. 5739.023 and does not exceed the rate approved by the voters. *See generally, e.g.,* 1989 Op. Att'y Gen. No. 89-047, slip op. at 5 (discussing provisions that authorize "the levy of a [real property] tax at an amount not in excess of a particular rate" and stating that the "taxing authority is authorized to annually levy the tax at the rate specified in the resolution and ballot or at any lesser rate"); 1986 Op. Att'y Gen. No. 86-021 at 2-113 n. 5 (discussing ballot language authorizing the levy of real property tax at a rate "not exceeding" the amount specified and stating that such authorization "does not mean that the entire amount must be levied"). Thus, where the voters have, pursuant to R.C. 5739.023, approved a one-half percent sales tax, the rate may, by resolution, be fixed at one-half percent, one-quarter percent, or zero percent, and may be changed from time to time in the manner set forth in R.C. 5739.023(B), provided that there has been no issuance of bonds or notes in anticipation of bonds that would restrict the authority of the board of trustees to change the amount of the levy. The answers to both of your questions are, accordingly, in the affirmative.

You have indicated that your concern with respect to the proper interpretation of R.C. 5739.023(B) arises from the existence of R.C. 306.71, which provides for an election on the question of the decrease of the rate of a tax approved for a continuing period of time under R.C. 5739.023. R.C. 306.71 states:

The question of the decrease of the rate of a tax approved for a continuing period of time by the voters of a county or regional transit authority pursuant to sections 5739.023 and 5741.022³ of the Revised

³ R.C. 5741.022 states, in part:

For the purpose of providing additional general revenues for the transit authority and paying the expenses of administering such levy, *any transit authority as defined in division (L) of section 5741.01 of the Revised Code which levies a tax pursuant to section 5739.023 of the Revised Code shall levy a tax at the same rate levied pursuant to such section on the storage, use, or other consumption in the territory of the transit authority of motor vehicles acquired on or after June 29, 1974 by a transaction subject to the tax imposed by section 5739.02 of the Revised Code, and, in addition to that imposed by section 5741.02 of the Revised Code, on the storage, use or other consumption in the territory of the transit authority of tangible personal property which is subject to the tax levied by this state as provided in section 5741.02 of the Revised Code, and on the storage, use, or other consumption in the territory of the transit authority of tangible personal property, purchased in another county within this state, by a transaction subject to the tax imposed by section 5739.02 of the Revised Code. The tax shall be in effect at the same time and at the same rate and shall be levied pursuant to the resolution of the legislative authority of the transit authority levying a sales tax pursuant to section 5739.023 of the Revised Code.* (Emphasis added.)

Your questions do not relate specifically to a tax imposed under R.C. 5741.022, and I am not directly considering such a tax. It appears, however, that the analysis set forth in this opinion is applicable to such a tax. *See generally* 1977 Op. Att'y Gen. No. 77-045.

Code may be initiated by the filing of a petition with the board of elections of the county, or in the case of a regional transit authority with the board of elections as determined pursuant to section 3505.071 of the Revised Code, prior to the seventy-fifth day before the general election in any year requesting that an election be held on such question. *Such petition shall state the amount of the proposed decrease in the rate of the tax and shall be signed by at least ten per cent of the number of qualified electors residing in such county, or in the territory of the regional transit authority, who voted at the last general election.*

After determination by it that such petition is valid, the board of elections shall submit the question to the electors of the county or regional transit authority at the next succeeding general election. *The election shall be conducted, notice thereof shall be given, and the results thereof shall be certified in the manner provided in section 306.70 of the Revised Code. If a majority of the qualified electors voting on such question approve the proposed decrease in rate, such decrease in rate shall become effective on the first day of the second January after such election.*

In any case where bonds, or notes in anticipation of bonds, of a regional transit authority have been issued under section 306.40 of the Revised Code without a vote of the electors while the tax proposed to be reduced was in effect, the board of trustees of the regional transit authority shall continue to levy and collect under authority of the original election authorizing the tax a rate of tax in each year which the authority reasonably estimates will produce an amount in that year equal to the amount of principal of and interest on such bonds as is payable in that year. (Emphasis and footnote added.)

R.C. 306.71 thus provides for an election in the manner provided in R.C. 306.70 on the question of decreasing the rate of a tax approved for a continuing period of time pursuant to R.C. 5739.023.

You suggest that R.C. 306.71 may conflict with R.C. 5739.023 so that, notwithstanding the language of R.C. 5739.023(B), the rate of a sales tax adopted under R.C. 5739.023 may be reduced only pursuant to an election held under R.C. 306.71. I find, instead, that the provisions of R.C. 306.71 and R.C. 5739.023 may be harmonized and read as part of a consistent scheme. *See generally, e.g., State ex rel. Adsmond v. Board of Education*, 135 Ohio St. 383, 387, 21 N.E.2d 94, 96 (1939) (sections that are *in pari materia* "must be construed together and harmonized if possible"). R.C. 5739.023 permits the board of trustees, by resolution, to change the rate of the sales tax levied under R.C. 5739.023, provided that the rate fixed is authorized by R.C. 5739.023 and not in excess of the rate approved by the voters. R.C. 306.71, in contrast, authorizes voters to initiate an election to decrease a sales tax rate approved for a continuing period of time. The effect of R.C. 306.71 was described by the Ohio Legislative Service Commission in *Summary of 1974 Enactments January-July* 119, 121 (1974) (Am. Sub. S.B. 544), as follows: "The act also provides for an initiative petition to reduce tax levies by the electors of a regional transit authority levying a sales tax for a continuing period of time." *See generally, e.g., State ex rel. Brettell v. Canestraro*, 32 Ohio St. 3d 190, 513 N.E.2d 956 (1987) and *State ex rel. Vanderwerf v. Warren*, 20 Ohio St. 2d 9, 252 N.E.2d 164 (1969) (relating to the procedure for submitting a county sales tax to a referendum under R.C. 305.31-.41); *Cook-Johnson Realty Co. v. Bertolini*, 15 Ohio St. 2d 195, 239 N.E.2d 80 (1968) (discussing powers of initiative and referendum); 1985 Op. Att'y Gen. No. 85-023. R.C. 306.71 grants voters who have approved a continuing tax levy under R.C. 5739.023 an opportunity to decrease the maximum tax that has been approved. It does not authorize the voters to fix the actual rate levied within the range that has been approved.

If an election is held under R.C. 306.71 (in the manner provided in R.C. 306.70) and a decrease in rate is approved by the voters, the trustees will be bound by that lower rate in fixing a rate under R.C. 5739.023. The existence of R.C. 306.71 does not, however, restrict a board of trustees from fixing any sales tax rate that is permitted under R.C. 5739.023(B). R.C. 5739.023 clearly permits the trustees to vary the rate of the sales tax, provided that the rate fixed is authorized by R.C. 5739.023 and does not exceed the rate approved by the voters, whether pursuant to

the initial authorization of a levy under R.C. 5739.023 or pursuant to a decrease adopted in accordance with R.C. 306.71.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. When voters have approved a sales tax levy for a regional transit authority pursuant to R.C. 306.70 and R.C. 5739.023 and no bonds or notes in anticipation of bonds have been issued under R.C. 306.40 without a vote of the electors while the tax has been in effect, the board of trustees of the regional transit authority may, at any time while the tax is in effect, by resolution fix the rate of the tax at any rate authorized by R.C. 5739.023 and not in excess of the rate approved by the voters; the tax rate may, by resolution, be changed to any permissible rate pursuant to the procedure set forth in R.C. 5739.023.
2. R.C. 306.71 authorizes voters to initiate an election with respect to a continuing sales tax under R.C. 5739.023 to decrease the rate approved by the voters.
3. The sales tax rate fixed pursuant to R.C. 5739.023 may not exceed the rate approved by the voters, whether pursuant to the initial authorization of a levy under R.C. 5739.023 or pursuant to a decrease adopted in accordance with R.C. 306.71.