

OPINION NO. 88-018**Syllabus:**

A county has no authority to deposit revenues derived from county sales and use taxes pursuant to R.C. 5739.021, 5739.026, 5739.211, 5741.023, and 5741.031 into a revenue sharing fund from which moneys are to be distributed, according to a stated formula of entitlement, to townships and municipalities within the county, for such purposes as the recipients determine.

To: William L. Thomas, Belmont County Prosecuting Attorney, St. Clairsville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 30, 1988

I have before me your letter requesting an opinion, as follows:

This will request an opinion as to whether a county may establish a separate fund from income derived from the so-called "piggyback" sales tax which may be imposed by the county commissioners. Part of said fund, however it may be designated, would be distributed to townships, cities and villages on a formula to be decided upon.

You have informed me that the proposal in question is for the board of county commissioners to use revenues from county sales and use taxes pursuant to R.C. 5739.021, 5739.026, 5739.211, 5741.023, and 5741.031, or other applicable sections, to establish a "Local Government Revenue Sharing Fund" to be used for distribution to townships and municipalities within the county. The moneys in the Local Government Revenue Sharing Fund would remain separate from other general fund moneys at all times. A distribution formula would be established, so that each township or municipality would be entitled to a certain amount from the Fund, to be used for such purposes as the recipient might determine. Warrants would be issued to the townships and municipalities from the Fund.

It is firmly established that a board of county commissioners is a creature of statute and, as such, has only such powers, express or implied, as it is granted by statute. *See, e.g., State ex rel. Shriver v. Board of Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947); 1987 Op. Att'y Gen. No. 87-048. Particularly in financial transactions, county commissioners may act only where their authority is clear and

is distinctly granted. *See, e.g., State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 115 N.E. 571 (1916); 1983 Op. Att'y Gen. No. 83-042; 1982 Op. Att'y Gen. No. 82-024. I have examined the arrangement that you have proposed, and I am unable to find statutory authority which would permit its implementation.

R.C. 5739.021 authorizes a county to levy a sales tax "[f]or the purpose of providing additional general revenues for the county and paying the expenses of administering such levy." R.C. 5739.211(A) specifies that moneys derived under R.C. 5739.021 may be expended for any purpose for which general fund moneys of the county may be used, including the acquisition or construction of permanent improvements. R.C. 5739.211(A) states:

The moneys received by a county levying an additional sales tax pursuant to section 5739.021 of the Revised Code shall be deposited in the county general fund to be expended for any purpose for which general fund moneys of the county may be used, including the acquisition or construction of permanent improvements or in the bond retirement fund for the payment of debt service charges on notes or bonds of the county issued for the acquisition or construction or [sic] permanent improvements. The amounts to be deposited in each of such funds shall be determined by the board of county commissioners.

R.C. 5739.026(A) authorizes a board of county commissioners to levy a sales tax:

to pay the expenses of administering the tax and for any one or more of the following purposes:

(1) To provide additional revenues for the payment of bonds or notes issued in anticipation of bonds issued by a convention facilities authority established by the board of county commissioners under Chapter 351. of the Revised Code and to provide additional operating revenues for the convention facilities authority;

(2) To provide additional revenues for a transit authority operating in the county;

(3) To provide additional revenue for the county's general fund;

(4) To provide additional revenue for permanent improvements within the county to be distributed by the community improvements board in accordance with section 307.283 and to pay principal, interest, and premium on bonds issued under section 133.312 of the Revised Code;

(5) To provide additional revenue to a county with a population of one hundred seventy-five thousand or less..., 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 Chapter 133. of the Revised Code for the acquisition, construction, equipping, or repair of the specific permanent improvement or class or group of permanent improvements.

R.C. 5741.023 authorizes a county to levy use taxes "[f]or the same purposes for which it has imposed a tax under section 5739.026 of the Revised Code."

R.C. 5739.211 and R.C. 5741.031 govern the manner in which funds derived under R.C. 5739.026 and R.C. 5741.023 are to be deposited and distributed. R.C. 5739.211(B) states, in part:

The moneys received by a county levying an additional sales tax pursuant to section 5739.026 of the Revised Code shall be deposited in a separate fund, which shall be allocated and distributed in accordance with the resolution adopted under such section. Moneys allocated for

the purpose of division (A)(4) of section 5739.026 of the Revised Code shall be transferred to and disbursed from the community improvements fund in the county treasury.

R.C. 5741.031(B) states, in part:

The moneys received by a county levying an additional use tax pursuant to section 5741.023 of the Revised Code shall be deposited in a separate fund, which shall be allocated, distributed, and used in accordance with the resolution adopted under section 5739.026 of the Revised Code. Moneys allocated for the purpose of division (A)(4) of section 5739.026 of the Revised Code shall be transferred to and disbursed from the community improvements fund in the county treasury.

The General Assembly has, thus, specified the purposes for which the taxes in question are to be used and the manner in which the proceeds are to be deposited and distributed. Under the Constitution of Ohio, the proceeds of a tax may be used only for the purposes for which the tax was imposed. *See* 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"). *See generally, e.g.,* Op. No. 87-048; 1965 Op. Att'y Gen. No. 65-50. R.C. 5739.021, R.C. 5739.026, R.C. 5739.211, R.C. 5741.023, and R.C. 5741.031 set forth certain purposes for which taxes may be levied. These statutes do not, however, authorize a county to levy a tax for the purpose of distributing the proceeds to townships and municipalities for such purposes as the recipients may determine.

It might be argued that the provision of moneys to townships and municipalities, to permit them to carry out their statutory functions, in itself constitutes a proper county purpose, so that county general fund moneys may be expended for such a purpose. I cannot, however, accept that argument as a basis for the establishment by a county of a Local Government Revenue Sharing Fund. It is clear that a county may have a legitimate concern about the financial status of subdivisions within its boundaries. Indeed, the General Assembly has provided various means by which a county may assist its townships and municipalities with respect to specific projects or needs. *See, e.g.,* R.C. 307.10(B) ("[t]he board [of county commissioners], by resolution, may transfer real property in fee simple belonging to the county and not needed for public use...to municipal corporations or other governmental subdivisions of the state for public purposes upon the terms and in the manner that it may determine to be in the best interests of the county, without advertising for bids"); R.C. 307.692 ("[t]he legislative authority of a county may appropriate moneys from its general fund to be expended...by joint agreement with one or more other political subdivisions...for the public purpose of encouraging economic development of the county or area through promotion of tourism"); R.C. 307.77 ("[t]he board of county commissioners of any county may give aid to any of the units of government set forth in division (A) of this section [including municipal corporations and other political subdivisions of this state] by the appropriation of money or by the issuance of bonds and payment of proceeds as provided by section 307.771 of the Revised Code" for certain public improvements related to water management, where the general public benefit to the county will be in an amount at least as great as the amount of aid which the county will contribute); R.C. 307.85(A) ("[t]he board of county commissioners of any county may...give financial assistance to...other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted by the congress of the United States..."); R.C. 307.85(B) ("[t]he board [of county commissioners] may...give financial assistance to...public...agencies and organizations in establishing and operating programs to provide necessary social services to meet the needs of older persons or to provide emergency food to needy persons..."); R.C. 5535.01(C) ("[t]he board of county commissioners may assist the board of township trustees in maintaining all [township] roads"); R.C. 5535.08 ("[t]he...county...may, by agreement, expend any funds available for road construction, improvement, or repair upon roads inside a village"); Op. No. 87-048 at 2-315 n. 1. The General Assembly has not, however, identified responsibility for the general financial needs of townships and

municipalities as a county purpose.¹ In the absence of statutory language indicating that a county may levy taxes to which its townships and municipalities are entitled, I must decline to recognize that as a proper expenditure for county funds. *See generally, e.g.*, 1981 Op. Att'y Gen. No. 81-035; 1979 Op. Att'y Gen. No. 79-045 (syllabus, paragraph 2) ("[a]bsent express statutory authorization, county commissioners may not make contributions to, or share proceeds of a road levy with, township trustees for the purpose of any construction, improvement, or repair, of county roads"); 1949 Op. Att'y Gen. No. 948, p. 587; 1928 Op. Att'y Gen. No. 1826, vol. I, p. 627; 1921 Op. Att'y Gen. No. 1929, vol. I, p. 258 (syllabus) ("[c]ounty commissioners are without authority to adopt a general plan of returning to one or more of the townships of the county the amount of money raised and procured in such township or townships by [certain] county levies..."). *See also* Op. No. 82-024; 1982 Op. Att'y Gen. No. 82-006; 1966 Op. Att'y Gen. No. 66-160; Op. No. 65-50.

The statutory provisions discussed above do permit the use of tax proceeds for various purposes that may result in benefits to townships and municipalities within the county. For example, R.C. 5739.211 permits proceeds derived under R.C. 5739.021 "to be expended for any purpose for which general fund moneys of the county may be used, including the acquisition or construction of permanent improvements." Similarly, R.C. 5739.026(A)(3) and R.C. 5741.023 authorize the levy of taxes to provide revenues for the county's general fund. The use of such proceeds for certain types of permanent improvements may have the practical effect of benefiting townships and municipalities. Alternatively, such proceeds may be expended directly for a project within a township or municipality pursuant to a statute that authorizes such an expenditure. *See, e.g.*, R.C. 307.692; R.C. 5535.01(C); R.C. 5535.08. In addition, R.C. 5739.026(A)(4) and R.C. 5741.023 authorize the use of tax proceeds to "provide additional revenue for permanent improvements within the county to be distributed by the community improvements board." R.C. 5739.026(A)(4). Under R.C. 307.283, a community improvements board created under R.C. 307.282 may award grants for permanent improvement projects to be undertaken by political subdivisions within the county.

You have indicated that your county is not interested in these indirect methods of applying county tax proceeds to the needs of townships and municipalities, but, seeks, instead, a means of entitling the townships and municipalities to certain proceeds from county sales and use taxes, to be expended by the recipients for such purposes as they determine. The Ohio Revised Code provides no means for depositing the proceeds of county sales and use taxes into a fund for such purpose.

Materials supplied with your request present the proposal that the county auditor establish, for revenue sharing purposes, a separate general fund account similar to that permitted for bridge construction under Op. No. 81-035. Op. No. 81-035 concluded that county general fund moneys could be used for the construction of bridges in the county, provided that the particular moneys used were not precluded by law from being expended for such purpose, and provided that the

¹ Certain revenues derived from state taxes are made available to political subdivisions within the state. *See, e.g.*, R.C. 5735.23 and .27 (motor vehicle fuel excise taxes); R.C. 5747.46-.49 (library and local government support fund, to be distributed among the county, boards of public library trustees, municipal corporations, and boards of township park commissioners in accordance with R.C. 5705.32); R.C. 5747.50-.55 (local government fund, to be distributed among the county, townships, municipal corporations, and park districts). *See generally* R.C. 5707.03; R.C. 5725.18; R.C. 5725.24; R.C. 5739.21; R.C. 5747.01(Q); R.C. 5747.02-.03. *See also* Am. Sub. H.B. 171, 117th Gen. A. (1987) (eff., in part, July 1, 1987) (Sec. 3.03-.05) (enacting R.C. 5747.61 and amending related provisions, effective July 1, 1989, to create, in the state treasury, the local government revenue assistance fund, to be allocated among the counties for distribution to political subdivisions).

particular moneys used had not been commingled with moneys that were precluded from being used for such purpose. Op. No. 81-035 also concluded that moneys derived from county sales and use taxes pursuant to R.C. 5739.211 and 5741.031 and deposited in the general fund could be used for bridge construction, provided that they had not been commingled with moneys that were precluded from being used for such purpose. With respect to the creation of a separate account, Op. No. 81-035 described a procedure that "would permit certain moneys which are ordinarily accounted for in the general fund to be used for road and bridge purposes while avoiding the difficulties entailed with segregating moneys within the general fund or attempting to establish the origin of particular moneys once they have been commingled with other general fund moneys." Op. No. 81-035 at 2-138. Op. No. 81-035 states:

R.C. 5705.12 provides that, with the approval of the Bureau of Inspection and Supervision of Public Offices, the taxing authority of a subdivision may set up special funds directly into which moneys from sources other than the general property tax may be paid. See 1956 Op. No. 6183. Such a procedure would prevent such moneys, for example, those derived from sales and use taxes, from becoming commingled with other restricted moneys within the general fund, and would thus alleviate the potential problem with distinguishing sources.

Id. at 2-138. *See* R.C. 5705.12. *See generally* 1981 Op. Att'y Gen. No. 81-037. It is clear that a special fund may be established under R.C. 5705.12 only for a purpose for which the moneys placed into the fund may properly be used. In the situation that you have described, there is no authority to expend the moneys for the desired purpose. Accordingly, there is no basis upon which to create a fund for that purpose.

It is, therefore, my opinion, and you are hereby advised, that a county has no authority to deposit revenues derived from county sales and use taxes pursuant to R.C. 5739.021, 5739.026, 5739.211, 5741.023, and 5741.031 into a revenue sharing fund from which moneys are to be distributed, according to a stated formula of entitlement, to townships and municipalities within the county, for such purposes as the recipients determine.