

OPINION NO. 2000-044**Syllabus:**

1. Revenue derived from the portion of a sales tax and use tax levied pursuant to R.C. 5739.021 and R.C. 5741.021, respectively, to provide additional general revenues may be used by a county to purchase and install a 9-1-1 system.
2. Revenue derived from the portion of a sales tax and use tax levied pursuant to R.C. 5739.021 and R.C. 5741.021, respectively, to support "criminal and administrative justice services" may not be used by a county to purchase and install a 9-1-1 system.

To: Mark A. Ochsenbein, Jackson County Prosecuting Attorney, Jackson, Ohio
By: Betty D. Montgomery, Attorney General, December 29, 2000

You have asked whether revenue collected from an increase in the county sales and use taxes approved at the November 4, 1997, election for the construction of a county jail, sheriff's office, and court facilities may be used to purchase and install a new 9-1-1 system.¹

The ballot language upon which the electors voted in 1997 reads as follows:

The Board of County Commissioners of Jackson County proposes to levy a sales and use tax in the amount of one-half of one percent (1/2%) for the purpose of CONSTRUCTION, EQUIPPING, AND FURNISHING A NEW JAIL, COURTS AND SHERIFF'S OFFICE FOR JACKSON COUNTY AND PAYING DEBT SERVICE ON BONDS OR NOTES ISSUED FOR SUCH PURPOSES AND PROVIDING REVENUE FOR THE OPERATION OR MAINTENANCE OF SUCH JAIL for a continuing period of years.

SHALL THE RESOLUTION OF THE JACKSON COUNTY COMMISSIONERS PROPOSING A ONE-HALF (1%/2%) PERCENT SALES AND USE TAX BE APPROVED?

¹A "9-1-1 system" is a system "through which individuals can request emergency service using the telephone number 9-1-1." R.C. 4931.40(A).

R.C. 5739.021 and R.C. 5741.021

In determining whether revenue from the county sales and use taxes may be used for a new 9-1-1 system, we begin with the fundamental principles of Ohio Const. art. XII, § 5, which states: "No 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." See *In re Petition for Transfer of Funds*, 52 Ohio App. 3d 1, 2, 556 N.E.2d 191, 192 (Montgomery County 1988) (Ohio Const. art. XII, § 5 "prevents taxes levied for a specific purpose which the voters approve being used for a purpose the voters did not approve"). We are also guided by the principle that taxing statutes are to be strictly construed and their application cannot be extended beyond the clear meaning of the statutory language used. *Clark Restaurant Co. v. Evatt*, 146 Ohio St. 86, 64 N.E.2d 113 (1945).

The sales tax and use tax approved by the Jackson County voters in 1997 for constructing, equipping, and furnishing a new jail, courts and sheriff's office, and for operation and maintenance of the jail, were levied, as stated in the resolution of the board of county commissioners, pursuant to R.C. 5739.021 and R.C. 5741.021, respectively. See R.C. 5739.021(E) (a county that levies a tax pursuant to R.C. 5739.021 "shall levy a tax at the same rate pursuant to [R.C. 5741.021]"); 1999 Op. Att'y Gen. No. 99-022. R.C. 5739.021 and R.C. 5741.021 authorize a county to levy a sales tax and use tax for "the purpose of providing additional general revenues for the county or supporting criminal and administrative justice services in the county, or both, and to pay the expenses of administering such levy" (emphasis added). The taxes may be levied pursuant to resolution of the board of county commissioners, or the board may, by resolution, submit the question of the levies to the voters for approval. *Id.* If the taxes are to be levied for both general revenues and criminal and administrative justice services, the resolution must state the rate or amount of the taxes to be apportioned to each purpose. *Id.*

Revenue derived from the portion of the sales tax and use tax levied to provide additional general revenues for the county must be deposited in the county general fund "to be expended for any purpose for which general fund moneys of the county may be used." R.C. 5739.211(A); R.C. 5741.031(A). See 1981 Op. Att'y Gen. No. 81-035 (moneys received from county sales and use taxes, when deposited in the general fund, may be used for any proper county purpose). Revenue derived from the portion of the sales tax levied to support criminal and administrative justice services must be deposited in a "special fund," R.C. 5739.021(E), as must revenue from the portion of the use tax levied for that purpose, R.C. 5741.021(C). See also R.C. 5705.09(F) (a subdivision must establish a special fund "for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose"); R.C. 5705.10 ("[m]oney paid into any fund shall be used only for the purposes for which such fund is established").²

²In 1999 Op. Att'y Gen. No. 99-022, we had occasion to address the issue whether revenue from these same taxes about which you now ask could be used to pay the salary of a jail administrator prior to completion of the jail. As explained in 1999 Op. Att'y Gen. No. 99-022, the language of the resolution passed by the board of county commissioners placing the question of the tax levies before the voters is rather ambiguous, and it appears that although the tax revenue was intended to fund criminal and administrative justice services, it was not placed in a special fund, as required by R.C. 5739.021 and R.C. 5741.021, but was deposited in the general fund and earmarked for the new jail, courts, and sheriff's office. 1999 Op. Att'y Gen. No. 99-022 advised that a special fund be established for the deposit of the tax revenues. *Id.* at 2-148 n.4. See also 1988 Op. Att'y Gen. No. 88-101 at 2-497 to 2-498 n.1 (money paid into the general fund may not be earmarked for a particular purpose); 1981 Op. Att'y

To the extent that any part of the 1997 sales tax and use tax was levied to provide additional general revenue for the county, *see note 2, supra*, such revenue may be used for the purchase and installation of a 9-1-1 system, since, as more fully discussed below, the provision of a 9-1-1 system is a proper county purpose. *See State ex rel. DiFrangia v. Trumbull County Board of Commissioners*, 99 Ohio App. 3d 569, 651 N.E.2d 447 (Trumbull County 1994) (county may rely solely on general fund revenues to finance a 9-1-1 system); 1998 Op. Att’y Gen. No. 98-032 at 2-181 n.2 (a county may fund a 9-1-1 system with moneys from its general fund).³

However, the issue remains whether revenue from the portion of the 1997 sales tax and use tax that was levied to support criminal and administrative justice services may be used to purchase and install a 9-1-1 system. “Criminal and administrative justice services” are defined for purposes of R.C. 5739.021 and R.C. 5741.021, *see* R.C. 5741.021(E), as:

the exercise by the county sheriff of all powers and duties vested in that office by law; the exercise by the county prosecuting attorney of all powers and duties vested in that office by law; the exercise by any court in the county of all powers and duties vested in that court; the exercise by the clerk of the court of common pleas, any clerk of a municipal court having jurisdiction throughout the county, or the clerk of any county court of all powers and duties vested in the clerk by law except, in the case of the clerk of the court of common pleas, the titling of motor vehicles or watercraft pursuant to Chapter 1548. or 4505. of the Revised Code; the exercise by the county coroner of all powers and duties vested in that office by law; making payments to any other public agency or a private, nonprofit agency, the purposes of which in the county include the diversion, adjudication, detention, or rehabilitation of criminals or juvenile offenders; the operation and maintenance of any detention facility, as defined in section 2921.01 of the Revised Code; and the construction, acquisition, equipping, or repair of such a detention facility, including the payment of any debt charges incurred in the issuance of securities pursuant to Chapter 133. of the Revised Code for the purpose of con-

Gen. No. 81-035 at 2-137 (“the legislature intended that revenues derived from sales and use taxes [deposited in the county general fund] may be expended for any purpose consistent with the purposes of the general fund,” which include “any proper county purpose”). As we have previously noted, the opinion-rendering function of the Attorney General is not an appropriate vehicle for making findings of fact. *See* 1991 Op. Att’y Gen. No. 91-016 at 2-82 n.2; 1983 Op. Att’y Gen. No. 83-057 at 2-232. Thus, we will not attempt to characterize the purpose of these particular levies. Rather, we will set forth the applicable law governing use of the proceeds from taxes levied pursuant to R.C. 5739.021 and R.C. 5741.021, and leave to the county application of the law to the revenue in question.

³Of course, such expenditures must be properly budgeted and appropriated. *See* R.C. 5705.41(B) (no subdivision shall “[m]ake any expenditure of money unless it has been appropriated as provided” in R.C. Chapter 5705). *See, e.g.,* R.C. 5705.28; R.C. 5705.29; R.C. 5705.36; R.C. 5705.38; R.C. 5705.39; R.C. 5705.392. R.C. 5705.40 provides for the amendment of any appropriation measure and transfers may be made by resolution from one appropriation item to another. *See also In the Matter of the Transfer of Funds*, No. 2-80-27, 1981 Ohio App. LEXIS 11096 (Auglaize County Feb. 24, 1981) at *14 (“[a]nticipated expenditures must sometimes be abandoned in favor of more urgent expenditures not previously anticipated,” and “[c]ontingencies are provided for in a budget and in appropriations”).

structing, acquiring, equipping, or repairing such a facility. (Emphasis added.)

R.C. 5739.021(H).

A 9-1-1 system is not expressly included within the meaning of "criminal and administrative justice services." It has been suggested, however, that because a "public safety answering point," with the requisite personnel, telecommunications equipment, and telephone network service, will be situated in the sheriff's office, installation of the 9-1-1 system falls within the purpose of "equipping" the sheriff's office, and thus may be funded with revenue from the sales tax and use tax, as authorized by R.C. 5739.021 and R.C. 5741.021, and the ballot language. As explained more fully below, a "public safety answering point" is a facility where 9-1-1 calls for a specific territory within the county are initially routed for response, and where personnel respond to requests for emergency service by dispatching or transferring the call to the appropriate emergency service provider. R.C. 4931.40(G) and (H).

The term, "criminal and administrative justice services," does include "the exercise by the county sheriff of all powers and duties vested in that office by law." However, nothing requires the county sheriff, as part of his statutory duties, *see* R.C. Chapter 311; R.C. Chapter 341, to operate a public safety answering point or otherwise provide for the installation, operation, and maintenance of a 9-1-1 system. Similarly, none of the other officers listed in R.C. 5739.021(H) are required or authorized, as part of their statutory duties, to do so. Although a public safety answering point must be operated by a county or other subdivision providing emergency service, *see* R.C. 4931.41(D), there is no statutory or operational requirement that a public safety answering point be located on the premises of the county sheriff's office.⁴

Thus, a 9-1-1 system does not fall within any of the purposes that constitute "criminal and administrative justice services," and may not be funded with revenue from the portion of a sales tax and use tax levied pursuant to R.C. 5739.021 and R.C. 5741.021 to support "criminal and administrative justice services." In this instance, if the taxes that were approved for the construction and maintenance of a jail, courts, and sheriff's office were used to finance a 9-1-1 system, then they would be used for a purpose other than that for which they were levied, in violation of Ohio Const. art. XII, § 5.

R.C. 5739.026 and R.C. 5741.023

Our conclusion that revenue derived from a sales tax and use tax levied pursuant to R.C. 5739.021 and R.C. 5741.021 may not be used to finance a 9-1-1 system, unless apportioned for general revenue, is supported by the fact that the General Assembly has authorized the use of revenue from a different sales tax and use tax to help fund a 9-1-1 system. R.C. 5739.026 and R.C. 5741.023 expressly authorize a board of county commissioners to levy a sales tax and use tax, respectively, to provide revenue for, among other purposes, the

⁴In fact, you have indicated that additional public safety answering points will be located in the offices of other law enforcement agencies, fire departments, and emergency services stations. *See* R.C. 4931.40(D) and (F) (subdivisions providing emergency service may include, in addition to the county, a municipal corporation, township, township fire district, joint fire district, township police district, joint ambulance district, joint emergency medical services district, state college or university, port authority, or park district). *See also* R.C. 4931.40(E) (defining "emergency service").

implementation and operation of a 9-1-1 system in the county.⁵ R.C. 5739.026(A)(6); R.C. 5741.023(A). *See* R.C. 5739.026(E) (“[a] county that levies a tax pursuant to this section shall levy a tax at the same rate pursuant to [R.C. 5741.023]”). Revenue from a sales tax levied under R.C. 5739.026 must be deposited in a “separate fund,” R.C. 5739.211(B), as must the revenue from a use tax levied under R.C. 5741.023, R.C. 5741.031(B). Unlike the taxes levied under R.C. 5739.021 and R.C. 5741.021, which may be adopted by resolution of the board of county commissioners or, at the discretion of the board, submitted to the voters for approval, taxes levied under R.C. 5739.026 and R.C. 5741.023 for a 9-1-1 system *must* be approved by the voters. R.C. 5739.026(A). A county may adopt sales and use taxes under both R.C. 5739.021 (and R.C. 5741.021) and R.C. 5739.026 (and R.C. 5741.023). *See* R.C. 5739.021(E); R.C. 5739.026(E); R.C. 5741.021(B); R.C. 5741.023(B).

Thus, it is apparent that if the General Assembly had intended to authorize the levy of a sales tax and use tax under R.C. 5739.021 and R.C. 5741.021 for the purpose of purchasing and installing a 9-1-1 system, it would have expressly so stated, as it has in R.C. 5739.026 and R.C. 5741.023. *See also* R.C. 5705.19(BB) (authorizing a property tax in excess of the ten-mill limitation for “the establishment and operation of a 9-1-1 system”). *See generally Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81, 83 (1927) (“[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended”); *Kiefer v. State of Ohio*, 106 Ohio St. 285, 139 N.E. 852 (1922).

Financing of a 9-1-1 System

Our conclusion is further supported by the fact that the General Assembly has carefully constructed a complex, detailed system for funding 9-1-1 systems, making it quite evident that sources of available revenue have been specifically identified and integrated as part of a comprehensive operational and financing scheme.

A 9-1-1 system operates countywide and includes all of the townships and municipalities in the county, except for any territory served by a telephone company that cannot meet the technical and economic requirements of providing the network portion of the system.

⁵Division (A)(6) of R.C. 5739.026 specifically authorizes a levy:

To provide revenue for the implementation and operation of a 9-1-1 system in the county. If the tax is levied or the rate increased exclusively for such purpose, the tax shall not be levied or the rate increased for more than five years. At the end of the last year the tax is levied or the rate increased, any balance remaining in the special fund established for such purpose shall remain in that fund and be used exclusively for such purpose until the fund is completely expended, and, notwithstanding section 5705.16 of the Revised Code, the board of county commissioners shall not petition for the transfer of money from such special fund, and the tax commissioner shall not approve such a petition.

If the tax is levied or the rate increased for such purpose for more than five years, the board of county commissioners also shall levy the tax or increase the rate of the tax for one or more of the purposes described in divisions (A)(1) to (5) of this section and shall prescribe the method for allocating the revenues from the tax each year in the manner required by division (C) of this section.

R.C. 4931.41. *See State ex rel. DiFrangia v. Trumbull County Board of Commissioners*, 99 Ohio App. 3d at 572, 651 N.E.2d at 450 (“[i]t is clear that in enacting R.C. 4931.40 et seq., the legislature envisioned the county itself as being the geographic boundary for each 9-1-1 system”). In order to establish a 9-1-1 system, a board of county commissioners must convene a 9-1-1 planning committee, which is responsible for developing a final plan for implementing the countywide system. R.C. 4931.42. In order to become effective, the final plan must be approved by the county and each municipality and township whose territory would be included therein. R.C. 4931.44.

The final plan must specify the location and number of public safety answering points (PSAP's). R.C. 4931.43(B)(2). As noted above, a PSAP is the facility to which 9-1-1 calls for a specific territory are routed for response. R.C. 4931.40(G). Each PSAP must be operated by a subdivision, R.C. 4931.41(D), and the final plan must specify which subdivision “will establish, equip, furnish, operate, and maintain each public safety answering point.” R.C. 4931.43(B)(3). *See* R.C. 4931.40(D) (defining “[s]ubdivision”). A subdivision that operates a PSAP must pay all of the costs associated therewith, including charges by the telephone company providing the premises equipment, but must “allocate those costs among itself and the subdivisions served by the answering point based on the allocation formula in a final plan.” R.C. 4931.41(D). *See* R.C. 4931.41(E) (obligation of each subdivision served by a PSAP to pay the subdivision operating the PSAP its share of the cost in accordance with the allocation formula). *See also* R.C. 4931.43(B)(4) and (5).

A county may fund its portion of the cost in a number of ways. As discussed above, it may use general revenue funds, pass an additional sales tax and use tax pursuant to R.C. 5739.026(A)(6) and R.C. 5741.023, or pass a property tax in excess of the ten-mill limitation pursuant to R.C. 5705.19(BB). In the alternative, one or more PSAP's may be financed by charges assessed by the board of county commissioners on improved real property in the county, rather than by an allocation of costs among participating subdivisions. R.C. 4931.51. The board's resolution fixing and imposing the charges is subject to a referendum unless the question of imposing the charges is submitted to and approved by the voters prior to implementation. R.C. 4931.51(D).

A final plan must specify whether the cost of operating each PSAP will be funded through charges imposed under R.C. 4931.51 or allocated among the subdivisions served by the PSAP, and if the latter, the formula for allocating such cost. R.C. 4931.43(B)(5). A final plan may be amended by convening a new 9-1-1 committee “to represcribe the funding of public safety answering points as between the alternatives” of cost allocation or charges on real property. R.C. 4931.45(A). *See State ex rel. DiFrangia v. Trumbull County Board of Commissioners* (a new 9-1-1 committee need not be convened and the final plan need not be amended when the county eliminates the R.C. 4931.51 charge on real property and relies solely on general fund revenues to fund the PSAP's).

The General Assembly has also provided two options for counties where a final plan has either not been approved or has not been implemented because of a lack of funding. In cases where the board of county commissioners has submitted to the voters at least once the question of raising funds under R.C. 4931.51 (charges on real property), R.C. 5705.19 (property tax in excess of the ten-mill limitation), or R.C. 5739.026 (sales tax) and the voters have disapproved the question each time it was submitted, R.C. 4931.52 authorizes the board of county commissioners to submit to the voters the question of imposing a monthly charge on telephone access lines to fund no more than three PSAP's. Sub. H.B. 152, 123rd Gen. A. (2000) (eff. Sept. 21, 2000) now authorizes a board of county commissioners to submit to the voters the question of imposing a monthly charge on telephone access lines to

fund no more than one PSAP (without the need of first submitting one or more of the other funding options to the voters). R.C. 4931.53.

Thus, it is apparent that the General Assembly has carefully and very specifically provided a comprehensive scheme for the funding of a 9-1-1 system, and that it has not included within that scheme revenue from a sales tax and use tax levied pursuant to R.C. 5739.021 and R.C. 5741.021.⁶

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

1. Revenue derived from the portion of a sales tax and use tax levied pursuant to R.C. 5739.021 and R.C. 5741.021, respectively, to provide additional general revenues may be used by a county to purchase and install a 9-1-1 system.
2. Revenue derived from the portion of a sales tax and use tax levied pursuant to R.C. 5739.021 and R.C. 5741.021, respectively, to support "criminal and administrative justice services" may not be used by a county to purchase and install a 9-1-1 system.