

OPINION NO. 81-022**Syllabus:**

1. A municipality that enacts an ordinance levying a three percent excise tax pursuant to R.C. 5739.024(B) is required to deposit at least fifty percent of the revenue from the tax into a separate fund, which shall be spent solely to make contributions to convention and visitors' bureaus operating within the county in which the municipality is wholly or partly located.
2. The legislative authority of a municipal corporation may enact an ordinance levying an excise tax pursuant to R.C. 5739.024(B) regardless of whether there is a convention and visitors' bureau operating within the county in which such municipality is wholly or partly located.
3. A municipality levying an excise tax pursuant to R.C. 5739.024(B) may not use more than fifty percent of the revenue derived from the tax for its own purposes. Regardless of whether convention and visitors' bureaus exist in the county at a particular time, the legislative authority of the municipal corporation must deposit at least fifty percent of the revenue derived from the tax into a separate fund to be spent solely to make contributions to convention and visitors' bureaus operating within the county.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, April 28, 1981

By way of letter dated December 11, 1980, you requested an informal response to the following questions:

- 1) Whether a municipality that enacts an ordinance levying a three percent (3%) excise tax pursuant to ORC §5739.024 is required to contribute at least fifty percent of the revenue from the tax to the county convention and visitors' bureau?
- 2) If the county has not established a convention and visitors' bureau may a municipality enact an ordinance to establish a three percent (3%) excise tax pursuant to ORC §5739.024?
- 3) If the answer to question #2 is in the affirmative, is the municipality obligated to contribute at least fifty percent of the revenue from the tax to the county in anticipation of the establishment of a convention and visitors' bureau or may the municipality keep the entire amount of the tax revenue for its own purposes?

Since, as your letter indicated, the questions are a matter of statewide concern, I have elected to respond to them by means of a formal opinion.

R.C. 5739.024(B), which authorizes the legislative authority of a municipality or the board of trustees of a township 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, provides as follows:

- (B) On or after July 1, 1980, the legislative authority of a municipal corporation or the board of trustees of a township that is not wholly or partly located in a county that has in effect a resolution

levying an excise tax pursuant to division (A) of this section may by ordinance or resolution 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. The legislative authority of the municipal corporation or township shall deposit at least fifty per cent of the revenue from the tax levied pursuant to this division into a separate fund, which shall be spent solely to make contributions to convention and visitors' bureaus operating within the county in which the municipal corporation or township is wholly or partly located, and the balance of such revenue shall be deposited in the general fund. The municipal corporation or township shall establish all regulations necessary to provide for the administration and allocation of the tax. The levy of a tax under this division is in addition to any tax imposed on the same transaction by a municipal corporation or a township as authorized by division (C)(1) of section 5739.02 of the Revised Code.

In interpreting the meaning of the language employed in the above statute, I have primarily been guided by the rule of statutory construction set forth in paragraph five of the syllabus of Wachendorf v. Shaver, 149 Ohio St. 231, 232, 78 N.E.2d 370, 372 (1948):

The court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act, and in the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.

Bearing in mind the admonition of the above cited case I turn now to the questions you pose.

With respect to your first question, R.C. 5739.024(B) provides that:

The legislative authority of the municipal corporation or township shall deposit at least fifty percent of the revenue from the tax levied pursuant to this division into a separate fund, which shall be spent solely to make contributions to convention and visitors' bureaus operating within the county in which the municipal corporation or township is wholly or partly located. . . . (Emphasis added.)

The significance of the word "shall" in the above excerpt cannot be overemphasized. In statutory construction, "the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage." Dorrian v. Scioto Conserv. Dist., 27 Ohio St. 2d 102, 102 271 N.E.2d 834, 835 (1971). See also Cleveland Ry. Co. v. Brescia, 100 Ohio St. 267, 126 N.E. 51 (1919).

There being no basis for concluding that the legislature intended that the word "shall," as used in R.C. 5739.024(B), be construed as merely permissive, it must be interpreted as imposing a mandatory duty. In answer to your first question I, therefore, conclude that a municipality that enacts an ordinance levying a three percent excise tax pursuant to R.C. 5739.024(B) is required to deposit at least fifty percent of the revenue from the tax into a separate fund, which shall be spent solely to make contributions to convention and visitors' bureaus operating within the county in which the municipality is wholly or partly located.

Your second question asks whether the existence of a convention and visitors' bureau within a county is a prerequisite to the enactment by a municipality of an ordinance levying the excise tax contemplated by R.C. 5739.024(B).

The provisions of R.C. 5739.024(B) are very clear and unambiguous insofar as they impose any preconditions on a municipal corporation's authority to levy the excise tax that is the subject of that division. The preconditions incorporated into the statute are twofold: the municipality may not levy the tax prior to July 1, 1980, and the municipality may not levy the tax if the county within which it is wholly or partly located has in effect a resolution levying the excise tax authorized by R.C. 5739.024(A). Aside from the two preconditions set forth above, neither R.C. 5739.024, nor any other statutory or constitutional provision of which I am aware, qualifies or limits the authority of a municipality to enact the tax contemplated by R.C. 5739.024(B).

I recognize that it may seem unreasonable to presume that the legislature intended to provide for the levying of a tax in a situation in which the taxing authority, at the moment the tax is levied, has no power to spend at least fifty percent of the revenue derived from the tax. It would, however, be reasonable to presume that the General Assembly intended to permit a municipality or township to amass revenues in order to precipitate the establishment of a convention and visitors' bureau. Thus, the conclusion based upon the clear and unambiguous provisions of R.C. 5739.024 to the effect that a municipality's authority to levy the tax in question is not limited to situations in which there is a convention and visitors' bureau operating within the county in which it is wholly or partly located is not unreasonable. I, therefore, conclude that the legislative authority of a municipal corporation may enact an ordinance levying an excise tax pursuant to R.C. 5739.024 regardless of whether there is a convention and visitors' bureau operating within the county in which such municipality is wholly or partly located.

Your third question asks whether a municipality that enacts an excise tax pursuant to R.C. 5739.024(B) in a situation in which there is no convention and visitors' bureau operating within the county in which such municipality is wholly or partly located may use all of the revenues derived from the tax for its own purposes. As I stated above, R.C. 5739.024(B) clearly precludes the expenditure of more than fifty percent of the revenue derived from the tax for general municipal purposes. R.C. 5739.024(B) provides in pertinent part that "the legislative authority of the municipal corporation. . .shall deposit at least fifty per cent of the revenue from the tax levied pursuant to this division into a separate fund, which shall be spent solely to make contributions to convention and visitors' bureaus operating within the county. . ." (emphasis added). Pursuant to the language of R.C. 5739.024 at least fifty percent of the revenue arising from the tax is to be deposited into a separate fund. Thereafter, that portion of the tax revenue may be spent solely to make contributions to convention and visitors' bureaus operating within the county in which the municipality is wholly or partly located. If, as in the situation envisioned, no convention and visitors' bureaus exist at a particular time, obviously the tax revenue earmarked for their use cannot be spent at that time. Regardless of that fact, however, the earmarked revenue cannot be diverted to any other use. To permit the legislative authority of a municipal corporation or township to apply the tax levied pursuant to R.C. 5739.024(B) to any object other than convention and visitors' bureaus operating in the county would clearly violate Ohio Const. art. XII, §5, which provides: "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." Thus, in light of Ohio Const. art. XII, §5, a municipality or township may not use more than fifty percent of the revenue derived from the tax authorized by R.C. 5739.024(B) for its own purposes.

In reaching this conclusion, I am not unmindful of the fact that half of the revenue derived from the tax levied pursuant to R.C. 5739.024(B) could remain in the special fund indefinitely if no convention and visitors' bureau were created in the county. This situation is entirely possible because there exists no legal duty to create such bureaus. The answer to this potential problem is unclear. Neither the Ohio Constitution nor the Ohio Revised Code provides an answer. Very likely remedial legislation would be required to free the earmarked funds, since it is well settled that the court may not enlarge upon the statutory provisions which have

been enacted by the legislature in order to provide for situations not within the manifest intention of the legislature. State ex rel. Foster v. Evatt, 144 Ohio St. 65, 56 N.E.2d 245 (1944). Even as a court may not presume to enlarge upon the statutory provisions enacted by the General Assembly, my interpretation of such provisions is also so limited. The General Assembly clearly has not provided for the disposition of funds collected pursuant to R.C. 5739.024(B) in a county without a convention and visitors' bureau. It has not required the creation of such a bureau, nor has it provided for a limited period of time during which the funds may be held pending the establishment of a bureau, and I am unable to read such provisions into the statute.

In summary, it is my opinion, and you are advised, that:

1. A municipality that enacts an ordinance levying a three percent excise tax pursuant to R.C. 5739.024(B) is required to deposit at least fifty percent of the revenue from the tax into a separate fund, which shall be spent solely to make contributions to convention and visitors' bureaus operating within the county in which the municipality is wholly or partly located.
2. The legislative authority of a municipal corporation may enact an ordinance levying an excise tax pursuant to R.C. 5739.024(B) regardless of whether there is a convention and visitors' bureau operating within the county in which such municipality is wholly or partly located.
3. A municipality levying an excise tax pursuant to R.C. 5739.024(B) may not use more than fifty percent of the revenue derived from the tax for its own purposes. Regardless of whether convention and visitors' bureaus exist in the county at a particular time, the legislative authority of the municipal corporation must deposit at least fifty percent of the revenue derived from the tax into a separate fund to be spent solely to make contributions to convention and visitors' bureaus operating within the county.