

OPINION NO. 73-031

Syllabus:

A board of county commissioners may repeal by resolution a tax which was enacted pursuant to R.C. 5739.021. The failure to hold public hearings prior to the repeal of the tax does not invalidate that repeal.

To: Robert J. Kosydar, Tax Comm'r., Dept. of Taxation, Columbus, Ohio
By: William J. Brown, Attorney General, April 10, 1973

Your request for my opinion reads as follows:

The Board of County Commissioners of Warren County enacted the county sales tax in October 1971 and notified this office by means of a certified copy of the resolution. Collection of the additional one-half of one percent tax became effective January 1, 1972. In November, the Board of County Commissioners adopted a resolution which repealed the county sales tax

as of January 1, 1973, and this office was notified by a certified copy of the resolution. We thereupon advised the vendors of Warren County to discontinue collection of the county sales tax effective January 1, 1973.

There is a possibility that legal action may be initiated questioning the legality of the repeal. The basis is, we are told, that the procedure of newspaper publication and public hearings which are required for enactment of the tax was not followed in the repealing action and that such procedure is necessary. The pertinent sections of the law, sections 5739.021 and 5739.022 of the Revised Code, do not set forth a procedure for repeal of the tax.

Your opinion on whether the tax has been properly repealed is respectfully requested.

Permission for the levy of a "permissive" sales tax has been granted to the counties by the General Assembly under the following language of R.C. 5739.021:

For the purpose of providing additional general revenues for the county and paying the expenses of administering such levy, any county may levy a tax at the rate of one-half of one per cent in addition to the tax imposed by section 5739.02 of the Revised Code upon every retail sale, except sales of motor vehicles, made in the county. The tax shall be levied pursuant to a resolution of the county commissioners and a certified copy thereof shall be delivered to the tax commissioner either personally or by certified mail not later than the sixtieth day prior to the date on which the tax is to become effective. Prior to the adoption of any such resolution, the board of county commissioners shall conduct two public hearings thereon, * * *

A resolution levying a sales tax pursuant to this section shall become effective on the first day of the month following the expiration of sixty days from the date of its adoption, subject, to a referendum as provided in sections 305.31 to 305.41, inclusive, of the Revised Code, unless such resolution is adopted as an emergency measure necessary for the immediate preservation of the public peace, health, or safety, in which case it shall go into effect on the first day of the month following the expiration of five days from the date of notice by the board of county commissioners to the tax commissioner of its adoption.

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Where such a "niggy-back" sales tax has been adopted by a board of county commissioners as an emergency measure, thus

precluding the possibility of the referendum by the electorate of the county provided for in the above section, R.C. 5739.022 permits the question of repeal of the tax to be submitted to the voters pursuant to an initiative petition signed by ten per cent of the qualified electors. As you point out, aside from this instance in which the tax has been adopted as an emergency measure, the Revised Code provides no procedure for a repeal of the tax. But the authority to enact a law necessarily implies the power to amend or repeal it, State, ex rel. Youngstown v. Jones, 136 Ohio St. 130, 136 (1939), State, ex rel. Crull v. Fidgeboss, 108 Ohio St. 493, 496 (1923), provided the amendment or repeal does not interfere with vested rights or impair the obligations of existing contracts, State, ex rel. Youngstown v. Jones, supra. The specific repealer provision of R.C. 5739.022 was inserted by the General Assembly only to preserve the initiative and referendum rights of the electorate when a board of commissioners has adopted a "piggy-back" sales tax as an emergency measure, and I see nothing to indicate any intention to deprive the commissioners of their own implied power to repeal any legislation they were empowered to enact. It should be noted that, under R.C. 5739.021, this tax is entirely permissive, and that the board may adopt it to augment the general revenues of the county. The only question, therefore, is whether the same procedure is required for the repeal as was required for the original enactment, i.e., two hearings preceded by public notice before vote on the measure.

It has been said that, "To repeal a law requires the same exercise of power as to enact it; * * *." C. O. & Z. Railroad Co. v. Commissioners of Clinton County, 1 Ohio St. 77, 91 (1852). Put this means that the body which possesses legislative authority cannot delegate that power to some other body. It does not mean that the manner of the enactment of a repeal must exactly parallel the manner of the original enactment. It has been held that a city ordinance, adopted pursuant to an initiative of the voters, can be repealed by later ordinances adopted by the city council. State, ex rel. Singer v. Cartledge, 129 Ohio St. 279, 282-286 (1935). State, ex rel. Flinn v. Wright, 7 Ohio St. 333, 335-336 (1857), and State v. Finnerger, 46 Ohio St. 570, 574-575, both hold that a law, requiring a two-thirds majority for enactment, can be repealed by a simple majority. See two Opinions of my predecessors, cited at page 287 in the Singer case, supra, Opinion No. 19, Opinions of the Attorney General for 1933, and Opinion No. 593, Opinions of the Attorney General for 1923; cf. also Opinion No. 5031, Opinions of the Attorney General for 1942. I conclude, therefore, that the procedure for a repeal need not necessarily be the same as that required for the original enactment.

In view of the purpose of the statutes, and upon examination of the alleged defects of the repeal here, i.e., lack of notice and hearings, I am convinced that my conclusion is applicable in this case. The purpose of a public hearing is to provide an opportunity for interested persons to appear and express their views pro and con regarding proposed legislative action. A legislative body may take testimony, but, in the absence of statutory requirement, it is not obliged to do so. Schlagheck v. Winterfeld, 108 Ohio App. 299, 306 (1958). Although there is no express provision authorizing the county commissioners to repeal the resolution enacting the tax, the permissive nature of the tax implies such authority, and P.C. 305.35 speaks of a

repeal by the commissioners as pre-empting a vote on the tax pursuant to a referendum petition filed under R.C. 305.31 et seq. There is, however, no mention at all of the need for a public hearing prior to repealing the resolution.

Furthermore, this was a resolution enacting a tax, and thereby imposing a burden on the taxpayer. Because of this, laws providing for the levy of a tax must be construed strictly in favor of the taxpayer and against the taxing authority. Weiss v. Porterfield, 27 Ohio St. 2d 117, 119 (1971); In re Estate of Lange, 164 Ohio St. 500 (1956); McNally v. Evatt, 146 Ohio St. 443 (1946). The concern of the General Assembly to protect the taxpayer against the unwanted and unneeded imposition of such burdens is evident in its requirement in R.C. 5739.021 that public hearings be held, and that notice be given of such hearings, prior to the enactment of the resolution imposing the tax. Likewise, the legislature provided in R.C. 5739.021, 5739.022, and 305.31 for the right to a referendum or initiative vote on such resolution. All of these provisions are obviously designed to protect the taxpayer in the spirit of the above cited cases on statutory construction.

However, where such a resolution is to be repealed, the question is not whether a tax burden is to be imposed, but whether it is to be removed. The two situations are clearly distinguishable, and the protections provided in the enactment of the resolution do not necessarily apply to its repeal. To say that the repeal is invalid unless the same procedure is followed as in the enactment of the tax could result in the repealing resolution being subject to a referendum vote, since the procedure for enactment of the tax may include submission of the resolution to the voters pursuant to R.C. 5739.021 or R.C. 305.31. But there is no provision for a right to a referendum on such a resolution. It has been repeatedly held that the right to a referendum or initiative must be specifically provided for, and, in the absence of such provision, there is no right. State, ex rel. Bramlette v. Vordy, 24 Ohio St. 2d 147 (1970); Dubyak v. Kovach, 164 Ohio St. 247 (1955); Opinion No. 70-014, Opinions of the Attorney General for 1970. I must conclude, therefore, that the procedure adhered to in enacting the tax under R.C. 5739.021 is not mandatory in repealing that tax. Failure to hold public hearings prior to the passage of the repealing resolution would not invalidate that resolution or the repeal of the tax.

It has been suggested that the case of Reiff v. City Council of Hamilton, Ohio, 32 Ohio App. 2d 224 (1972), provides a basis for requiring public hearings prior to the repeal of the resolution. If so read, the case would appear to be in conflict with the Supreme Court opinions set out above. I think, however, that it is distinguishable. The court of appeals, in holding that a city ordinance could not be repealed on a motion for reconsideration, stated that, in the absence of legislative authorization, the procedural requirements for enactment of an ordinance must also be followed to repeal the ordinance. The court's concern was to prevent repeals of ordinances by simple motions for reconsideration. To that end it relied on 56 Am. Jur. 2d 453, Section 411, as authority for the argument that "absent legislation to the contrary, a new ordinance is required to expressly repeal an existing ordinance." Here, however, the county commissioners repealed the resolution enacting the tax by another resolution and not by a simple motion or reconsideration vote. There has been no suggestion that the resolution was

not recorded properly, or that other requirements of R.C. Chapter 305, regarding proceedings of the board, were not complied with. It would appear, therefore, that the Rieff case, supra, is not in point.

In specific answer to your question it is my opinion, and you are so advised, that a board of county commissioners may repeal by resolution a tax which was enacted pursuant to R.C. 5739.021. The failure to hold public hearings prior to the repeal of the tax does not invalidate that repeal.