

OPINION NO. 89-013**Syllabus:**

1. R.C. 5709.62 and R.C. 5709.63 do not authorize an enterprise zone agreement to specify that property remains taxable, but at a different tax rate than the rate effective for the taxing district in which the property is located.
2. R.C. 5709.62 and R.C. 5709.63 do not authorize an enterprise zone agreement to specify that while property is exempt, the enterprise must pay an amount equal to a particular millage in lieu of taxes.
3. Under R.C. 5709.62 and R.C. 5709.63, an enterprise zone agreement may grant a tangible personal property tax exemption that is effective more than ten years after the agreement is entered into, provided the exemption itself does not exceed ten years.
4. Under R.C. 5709.62 and R.C. 5709.63, an exemption does not inure to tangible personal property used after an expansion begins but prior to an enterprise zone agreement.
5. Under R.C. 5709.62 and R.C. 5709.63, an exemption may inure to tangible personal property used by an enterprise prior to an expansion and subsequent to an enterprise zone agreement, provided that the property is first used as the result of a project as defined in R.C. 5709.61(I).

6. Under R.C. 5709.62 and R.C. 5709.63, an enterprise zone agreement cannot grant a tangible personal property tax exemption that is effective for a year preceding the year in which the agreement is entered into.
7. Whether an enterprise zone agreement is effective, for purposes of the tangible personal property tax exemption provisions of R.C. 5709.62 and R.C. 5709.63, before the parties affixed their signatures to the agreement is a matter to be determined on a case by case basis.
8. Unless an enterprise zone agreement provides otherwise, a tangible personal property tax exemption granted in an enterprise zone agreement may be assigned, provided the rights of the municipality or county that granted the exemption under R.C. 5709.62 and R.C. 5709.63 are not harmed and provided that all necessary enterprise zone statutory criteria are fulfilled.
9. An owner of real property who is granted an enterprise zone tax exemption under R.C. 5709.62 or R.C. 5709.63 is required to file an application for exemption with the tax commissioner pursuant to R.C. 5715.27.

To: Joanne Limbach, Tax Commissioner, Department of Taxation, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 22, 1989

I have before me your request for my opinion concerning the Ohio urban jobs and enterprise zone program, which is set forth in R.C. 5709.61-.66. The purpose of the program is to encourage businesses to establish, expand, renovate, and occupy facilities and to create jobs within economically distressed zones. See 1981-1982 Ohio Laws, Part II, 2480 (Am. Sub. H.B. 351, eff. March 17, 1982). Under the program, a business enterprise may enter into an agreement with a municipal legislative authority or board of county commissioners whereby the enterprise agrees to establish or expand a business within a designated zone in return for certain property tax incentives. R.C. 5709.62; R.C. 5709.63. You have asked several questions, which I have rephrased as follows:

1. May an agreement specify that property remains taxable but at a different rate than the effective tax rate for that taxing district?
2. May an agreement specify that property is exempt but require an enterprise to pay an amount equal to a particular millage, for example the school millage, in lieu of taxes?
3. May an agreement grant personal property tax exemptions that are effective more than ten years after the agreement is entered into?
4. If an enterprise is expanding a business, does an exemption inure to personal property used after the expansion begins but prior to an enterprise zone agreement? Does an exemption inure to personal property used in business by the enterprise prior to the expansion?
5. May an agreement be effective as of a date in a year preceding the year in which an agreement is entered into? May an agreement be effective as of a date prior to the date that the parties affixed their signatures to an agreement?
6. May an enterprise zone personal property exemption be assigned?
7. If a real property exemption is granted, is the owner of the

property required to file an application for exemption with the county auditor and the tax commissioner?

Legislative authorities of municipal corporations and boards of county commissioners may designate areas as proposed urban jobs and enterprise zones pursuant to R.C. 5709.62 (municipalities) and R.C. 5709.63 (counties). Once a zone is designated, the director of development must determine whether it meets the criteria set forth in R.C. 5709.61(A), which requires consideration of factors such as population, unemployment rate, median income, vacant or undeveloped lands and abandoned or demolished structures, to determine whether the area is in economic distress or decline.

Once a zone is certified, the legislative authority or board of commissioners may enter into an agreement with an enterprise. The agreement must include an estimate of the number of employees the enterprise intends to hire or retain and the resulting payroll, R.C. 5709.62(B)(1), and an estimate of the amount to be invested in by the enterprise in its facilities, R.C. 5709.62(B)(2). R.C. 5709.62(C), which authorizes municipal legislative authorities to enter into enterprise zone agreements, provides in pertinent part:

the legislative authority may, on or before December 31, 1992, enter into an agreement with the enterprise under which the enterprise agrees to establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees, in return for one or more of the following incentives:

(1) *Exemption for a specified number of years, not to exceed ten, of a specified portion, up to one hundred per cent, of tangible personal property first used in business at the project site as a result of the agreement.* An exemption granted pursuant to this division applies to inventory required to be listed pursuant to sections 5711.15 and 5711.16 of the Revised Code, except, in the instance of an expansion or other situations in which an enterprise was in business at the facility prior to the establishment of the zone, the inventory which is exempt is that amount or value of inventory in excess of the amount or value of inventory required to be listed in the personal property tax return of the enterprise in the return for the tax year in which the agreement is entered into.

(2) *Exemption for a specified number of years, not to exceed ten, of a specified portion, up to one hundred per cent, of real property constituting the project site;*

(3) Provision for a specified number of years, not to exceed ten, of any optional services or assistance that the municipal corporation is authorized to provide with regard to the project site.

After an agreement is entered into under this division, if the legislative authority revokes its designation of a zone, or if the director of development revokes the zone's certification, any entitlements granted under the agreement shall continue for the number of years specified in the agreement. (Emphasis added.)

See also R.C. 5709.62(D) (establishing local tax incentive review councils to annually review outstanding agreements); R.C. 5709.62(E) (requiring copies of all agreements to be sent to the director of development and the tax commissioner); R.C. 5709.62(F) (requiring enterprises to file informational tax returns setting forth costs and values of exempt property).

R.C. 5709.63(A), which authorizes boards of county commissioners to enter into enterprise agreements, provides in pertinent part:

the board may, on or before December 31, 1992, and with the consent of the legislative authority of each affected municipal corporation or of the board of township trustees:

(1) Enter into an agreement with the enterprise under which the enterprise agrees to establish, expand, renovate, or occupy a facility in the zone and hire new employees, or preserve employment

opportunities for existing employees, in return for the following incentives:

(a) When a designated zone is located in a municipal corporation, the board may enter into an agreement for one or more of the incentives provided in division (C) of section 5709.62 of the Revised Code;

(b) When a designated zone is located in an unincorporated area, the board may enter into an agreement for one or more of the following incentives:

(i) *Exemption for a specified number of years, not to exceed ten, of a specified portion, up to seventy-five per cent, of tangible personal property first used in business at a project site as a result of the agreement.* An exemption granted pursuant to this division applies to inventory required to be listed pursuant to sections 5711.15 and 5711.16 of the Revised Code, except, in the instance of an expansion or other situations in which an enterprise was in business at the facility prior to the establishment of the zone, the inventory which is exempt is that amount or value of inventory in excess of the amount or value of inventory required to be listed in the personal property tax return of the enterprise in the return for the tax year in which the agreement is entered into.

(ii) *Exemption for a specified number of years, not to exceed ten, of a specified portion, up to seventy-five per cent, of real property constituting the project site;*

(iii) Provision for a specified number of years, not to exceed ten, of any optional services or assistance the board is authorized to provide with regard to the project site.

(2) Enter into an agreement with an enterprise that plans to purchase and operate a large manufacturing facility that has ceased operation or has announced its intention to cease operation, in return for exemption for a specified number of years, not to exceed ten, of a specified portion, up to one hundred per cent, of tangible personal property used in business at the project site as a result of the agreement, or of real property constituting the project site, or both.

After an agreement under this section is entered into, if the board of county commissioners revokes its designation of the zone, or if the director of development revokes the zone's certification, any entitlements granted under the agreement shall continue for the number of years specified in the agreement. (Emphasis added.)

Thus, legislative authorities of municipalities and boards of county commissioners may enter into agreements whereby they grant exemptions for up to ten years of specified portions of certain real property and tangible personal property.

In your first question, you ask whether an enterprise zone agreement may specify that property remains taxable, but at a different rate than the effective tax rate for that taxing district. An example of this problem is an agreement that exempts property from all taxes except the school tax, which thus reduces the overall tax rate for the property. In R.C. 5709.62(C)(1), the General Assembly provided that a legislative authority may grant an "[e]xemption for a specified number of years, not to exceed ten, of a specified portion, up to one hundred per cent, of tangible personal property first used in business at the project site as a result of the agreement." R.C. 5709.62(C)(2) permits "[e]xemption for a specified number of years, not to exceed ten, of a specified portion, up to one hundred per cent, of real property constituting the project site." See also R.C. 5709.63(A)(1)(a) (where a zone is in a municipal corporation, county commissioners may grant the exemptions specified in R.C. 5709.62); R.C. 5709.63(A)(1)(b)(i) (where a zone is in an unincorporated area, a board of county commissioners may grant an "[e]xemption for a specified number of years, not to exceed ten, of a specified portion, up to seventy-five per cent, of tangible personal property first used in business at a project site as a result of the agreement"). It is well established that a statute that purports to grant a tax exemption is to be strictly construed. *Craftsman Type, Inc. v. Lindley*, 6 Ohio St. 3d 82, 84, 451 N.E.2d 768, 770 (1983); *National Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952) (syllabus, paragraph two). Under the above statutory provisions, the amount of time for which an exemption is granted and the amount of the property that is exempted may vary. However, these

provisions do not authorize the effective tax rate to be varied. Under the plain language of these statutes, therefore, legislative authorities and boards of county commissioners are not authorized to enter into agreements whereby they specify that property remains taxable, but at a different tax rate than that in effect for the taxing district.

Moreover, the exemption method set forth in the enterprise zone statutes guarantees that if millages are reduced or eliminated, they are reduced or eliminated proportionately. Various entities, such as boards of education, mental health boards, and joint boards of county commissioners, may have the authority to levy taxes within a particular district. R.C. 5705.01; R.C. 5705.03. If an agreement exempts a portion of the property, the millage collected by each taxing authority will be reduced but not eliminated. On the other hand, agreements that vary the tax rate by eliminating certain millages permit the legislative authority or board of commissioners to unilaterally decide which levies will be retained and which will be eliminated. This allows the legislative authorities and boards of commissioners to unevenly reduce or eliminate taxes lawfully levied by various entities. Thus, such an agreement contravenes the taxing scheme set forth in R.C. Chapter 5705 as well as the plain language of the enterprise zone statutes. I conclude, therefore, that under R.C. 5709.62 and R.C. 5709.63, legislative authorities and boards of county commissioners are not authorized to enter into agreements whereby they specify that property remains taxable, but at a different tax rate than the rate effective for the taxing district in which the property is located.

In your second question, you ask whether an agreement may specify that property is exempt, but require an enterprise to pay an amount equal to a particular millage in lieu of taxes. You provide, as an example, the situation where an agreement exempts property, but requires payments to be made in lieu of taxes in the amount of the computed taxes for the school district millage.

One cannot lawfully do indirectly what one cannot lawfully do directly. *City of Parma Heights v. Schroeder*, 26 Ohio Op. 2d 119, 196 N.E.2d 813 (C.P. Cuyahoga County 1963). I have concluded that R.C. 5709.62 and R.C. 5709.63 do not authorize agreements that exempt property for purposes of certain tax millages but not others. Therefore, agreements that indirectly exempt property for purposes of certain millages but not others are also not authorized under R.C. 5709.62 and R.C. 5709.63. Furthermore, the enterprise zone statutes do not provide for payments in lieu of taxes, although other Revised Code provisions specifically do so. For example, R.C. 5709.42 provides that a municipal corporation that has declared an improvement to be a public purpose may require an owner of a structure located on the parcel to make payments in lieu of taxes. See also R.C. 725.04 (a purchaser who is granted a real property tax exemption under an urban redevelopment agreement shall make payments in lieu of taxes); R.C. 1728.11 (in certain situations a community urban redevelopment corporation shall make payments to the county treasurer in lieu of real property taxes). It is apparent that if the General Assembly had intended to permit enterprise zone agreements to permit payments in lieu of taxes, it could easily have found the means to express that intention, having used such language in other statutes. See *Lake Shore Electric Ry. Co. v. PUCO*, 115 Ohio St. 311, 154 N.E. 239 (1926) (had the General Assembly intended a term to have a particular meaning, it could easily have found language to express that purpose, having used such language in other connections). In light of the foregoing, I find that R.C. 5709.62 and R.C. 5709.63 do not authorize an agreement to specify that while property is exempt, the enterprise must pay an amount equal to a particular millage in lieu of taxes.¹

¹ I note that an additional problem arises if agreements authorize payments in lieu of school tax millages: these agreements lead to a distortion of the school foundation formula. The amount of state funds to be distributed to each school district is calculated pursuant to R.C. 3317.022, which sets forth the school foundation formula. Under the formula, lower taxable value of property in a district results in distribution of a greater amount of state funds to that district. Thus, if an enterprise zone agreement exempts property but requires payments in lieu of taxes for school district purposes, the formula will be distorted and certain school districts will receive state overpayments.

In your third question, you ask whether an agreement may grant tangible personal property tax exemptions that are effective more than ten years after the agreement is entered into. You provide the following example:

If an agreement requires a \$100,000 investment, can the agreement provide that property acquired in year one at a cost of \$33,000 is exempt for ten years from the date of acquisition and, subsequently, property costing \$34,000 is acquired in year two and also is to be exempt for a full ten years and, in the third year, another \$33,000 is spent to acquire property and a third "ten-year period" begins? Or does the exemption period end for all property in the tenth year following year one?

R.C. 5709.62(C)(1) provides that a legislative authority may enter into an agreement which grants "[e]xemption for a specified number of years, not to exceed ten, of a specified portion, up to one hundred per cent, of tangible personal property first used in business at the project site as a result of the agreement." R.C. 5709.63(A)(1)(b)(i) provides that a board of county commissioners may enter into an agreement which grants "[e]xemption for a specified number of years, not to exceed ten, of a specified portion, up to seventy-five per cent, of tangible personal property first used in business at a project site as a result of the agreement." These statutes do not require an exemption to expire within ten years after the agreement is entered into. These statutes also do not require that exemptions be granted for up to ten years "from the date of the agreement." Thus, the statutes do not require that a ten-year exemption start in the year which the agreement is entered and expire within ten years after the year in which the agreement is entered. Therefore, I conclude that under R.C. 5709.62(C) and R.C. 5709.63(A), an agreement may grant a tangible personal property tax exemption that is effective more than ten years after the agreement is entered into, provided the exemption itself does not exceed ten years. *See also* R.C. 5709.62(C) and R.C. 5709.63(A) (if zone certification or designation is revoked, "any entitlements granted under the agreement shall continue for the number of years specified in the agreement").

Your fourth question concerns an enterprise that is expanding a business in an enterprise zone. You ask whether in that situation an exemption inures to personal property used by the same enterprise in the business after the expansion begins but prior to an enterprise zone agreement. R.C. 5709.62(C)(1) and R.C. 5709.63(A)(1)(b)(i) provide that an exemption may be granted for "tangible personal property first used in business at the project site *as a result of the agreement.*" Clearly, property that is used prior to an enterprise zone agreement is not used as a result of the agreement. Therefore, I conclude that an exemption does not inure to personal property used after an expansion begins but prior to an enterprise zone agreement.

You also ask whether an exemption inures to personal property used in business by the same enterprise prior to the expansion. Because I have concluded that the property must first be used as a result of an agreement, I interpret your question as asking whether an exemption inures to property used after an agreement is entered into but before an expansion begins.

As I noted above, R.C. 5709.62 and R.C. 5709.63 require that the personal property be "first used in business at the project site as a result of the agreement." R.C. 5709.61(O) provides that "[f]irst used in business" means that the property referred to *has not been used in business in this state by the enterprise* that owns it, or by an enterprise that is an affiliate or subsidiary of such an enterprise, other than as inventory, *prior to being used in business at a facility as the result of a project.*" (Emphasis added.) Thus, exempt property must first be used in business in Ohio by the enterprise at a facility as the result of a project, except that the property may have been used as inventory prior to the project. R.C. 5709.61(I) defines "project" as "any undertaking to establish a facility or to improve a project site by expansion, renovation, or occupancy." R.C. 5709.61(C) defines "facility" as "an enterprise's place of business in a zone, including land, buildings, machinery, equipment, and other materials, except inventory, used in business." Accordingly, personal property qualifies for exemption if it is first used as a result of an enterprise zone agreement and if it is first used to establish a place of business in a zone or first used to improve a place of business by expansion, renovation, or

occupancy. Your question concerns personal property used as the result of an agreement but prior to an expansion. If the expansion is the sole project under the agreement, then the property used prior to the expansion is not first used as the result of a project. Therefore, that personal property does not qualify for an exemption under R.C. 5709.62 or R.C. 5709.63. On the other hand, if the expansion is only part of the project under the agreement, then property used prior to the expansion may qualify as first used as the result of a project if it is first used in another phase of the project. Thus, that personal property may qualify for an exemption under R.C. 5709.62 and R.C. 5709.63.

In your fifth question, you ask whether an agreement may be effective as of a date in a year preceding the year in which an agreement is entered into. You also ask whether an agreement may be effective as of a date prior to the date that the parties affixed their signatures to the agreement. A member of your staff has indicated that your questions concern only the effective dates of tangible personal property exemptions.

I turn first to your question of whether an agreement may grant a personal property exemption that is effective for a year preceding the year in which the agreement is entered into. R.C. 5709.01(B) states that unless otherwise exempted, "[a]ll personal property located and used in business in this state...[is] subject to taxation, regardless of the residence of the owners thereof." (Emphasis added.) R.C. 5709.62 and R.C. 5709.63 authorize exemptions on "personal property first used in business at the project site as a result of the agreement." (Emphasis added.) Thus, an enterprise that was taxed on property at the site in previous years used the property in business at the site before the agreement. The property fails to qualify for an enterprise zone exemption under the language of R.C. 5709.62 and R.C. 5709.63. All non-inventory property that was previously taxed at any other site also fails to qualify for exemption, because R.C. 5709.01(O) excludes property, other than inventory, used in business anywhere in Ohio from the definition of "first used in business." Thus, under the enterprise zone statutes, exemptions for all non-inventory personal property are clearly prospective only.

Exemption for inventory is specifically addressed in the enterprise zone statutes. R.C. 5709.62(C)(1) and R.C. 5709.63(A)(1)(b)(i) provide that if an enterprise was in business at a facility prior to the establishment of a zone, the exemption for inventory is the amount or value of the inventory in excess of the amount or value required to be listed in the tax return "for the tax year in which the agreement is entered into." (Emphasis added.) Here too, it is clear from the language of the enterprise zone statutes that the exemption is prospective only. However, the enterprise zone statutes do not address the situation in which an enterprise used the property as inventory and thus was taxed on the property, moved the property to the project site, and first used the property at the site as the result of the agreement.² In this situation, the property would qualify as first used in business at the project site as a result of the agreement. The question thus remains as to whether an enterprise zone agreement may grant an exemption on this property for a year prior to the agreement.

Before further analysis, it is necessary to present a brief overview of the procedures regarding taxation of personal property. Taxpayers are required to file annual returns, usually between February fifteenth and April thirtieth, in which they list their taxable personal property. R.C. 5711.01; R.C. 5711.04. Except as otherwise provided, the property must be listed as to ownership or control, valuation, and taxing district as of either December thirty-first or January first. R.C. 5711.03. Taxes are paid during the year for that year. See R.C. 5719.02. An enterprise that is granted an enterprise zone exemption must file an informational return with each regular return, setting forth the costs and values of the exempt property. R.C. 5709.62(F); R.C. 5709.63(E). The county auditor is to make a list of all exempt property within his county. R.C. 5713.08.

² I assume, in such a case, that the property was previously taxed within the jurisdiction of the legislative authority or board of commissioners that is attempting to grant the exemption for the previous year. Obviously, they would be without authority to exempt property from taxes outside their jurisdiction.

The above statutory scheme does not provide for a retroactive exemption of property that was properly listed in previous years. The following language of R.C. 5713.08, in particular, suggests that exemptions may not be granted for previous years. R.C. 5713.08(A), which requires the county auditor to list all exempt property, provides that the list "shall be corrected *annually* by adding thereto the items of property which have been exempted *during the year....*" (Emphasis added.) Further, the language of the enterprise statutes indicate that an exemption may only be granted prospectively from the time of the enterprise agreement. See discussion *supra*. See generally *State ex rel. Struble v. Davis*, 132 Ohio St. 555, 9 N.E.2d 684 (1937) (holding that a statute that exempted certain railroad property from taxation after such taxes had been assessed violated the constitutional prohibition against retroactive laws); *Tri-County Lift Truck Service, Inc. v. Lindley*, No. 82-B-149 (Board of Tax Appeals March 8, 1985) (unreported) (concluding that a sales tax exemption certificate acts only prospectively and has no retroactive effect). In light of the foregoing discussion I conclude that an enterprise zone agreement cannot grant a personal property tax exemption on either inventory or non-inventory that is effective for a year preceding the year in which the agreement is entered into.

You also ask whether an agreement may be effective prior to the date on which the parties affixed their signatures to the agreement. In other words, you ask whether an agreement may grant an exemption for personal property that is used at the project site before the parties have signed the agreement. The enterprise zone statutes require the property to first be used at the project site as a result of the agreement. These statutes make no requirement concerning signatures on the agreement. Precisely when you have an agreement for enterprise zone exemption purposes is a factual determination which must be made on a case by case basis. See *Arnold Palmer Golf Co. v. Fuqua Industries*, 541 F.2d 584, 588 (6th Cir. 1976) ("the question whether the parties intended a contract is a factual one, not a legal one, and, except in the clearest cases, the question is for the finder of fact to resolve"). Ordinarily, contracting parties do not intend an agreement until they have signed such agreement. However, I cannot say as a matter of law that until signatures have been affixed to the agreement, there is no agreement for purposes of the enterprise zone statutes. See generally *Richard A. Berjian, D.O. Inc. v. Ohio Bell Telephone Co.*, 54 Ohio St. 2d 147, 152, 375 N.E.2d 410, 414 (1978) ("[s]imply because [a party] did not signify his acceptance by executing the agreement does not necessarily result in its unenforceability"); *Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union of North America*, 193 F.2d 209, 213 (6th Cir. 1952), *cert. denied*, 343 U.S. 966 (1952) (an agreement may be validly entered into even though the writing evidencing the terms of the agreement has not been executed by the parties). Cf. R.C. 1335.05 (under the statute of frauds, an agreement that is not to be performed within one year from the date of the agreement is only enforceable against a party that has signed the agreement or a note or memorandum thereof). Therefore, whether an enterprise zone agreement is effective, for purposes of the personal property exemption provisions, before the parties affix their signatures to the agreement must be determined on a case by case basis.

In your sixth question, you ask whether an enterprise zone personal property tax exemption may be assigned. This issue arises, for example, when an enterprise does not purchase machinery outright, but rather uses a sale and leaseback arrangement with a financial institution. The financial institution, as the owner and lessor of the machinery, is required to file a return and pay taxes on the machinery. See 9 Ohio Admin. Code 5703-3-14 (requiring the lessor of tangible personal property to file a return on the property unless the lessee is obligated to purchase the property). The question in this situation is whether an agreement may assign a tax exemption on the machinery to the financial institution.

I understand that in some instances the financial institution is a party to the original enterprise agreement and that the municipality or county grants an exemption in such agreement to the financial institution. In other instances, an exemption is granted in the original enterprise agreement and in a later agreement the exemption is assigned to a financial institution by the enterprise. Some of these latter assignments occur with the consent of the municipality or county that first granted the exemption, and some assignments occur without such consent.

I note first that in the situation where the municipality or county grants an exemption to the financial institution in the original enterprise agreement, there is no actual assignment. The question thus is whether the enterprise zone statutes permit a municipality or county to grant an exemption to an entity other than the enterprise that is agreeing to expand or establish a facility and hire new employees in the zone. R.C. 5709.62, for example, authorizes a municipality to enter into an agreement under which an enterprise agrees to expand a facility and hire new employees "in return for one or more of the following incentives: (1) Exemption for a specified number of years...of tangible personal property first used in business at the project site as a result of the agreement." Thus, as long as the enterprise agrees to expand and hire new employees, the municipality may in return offer exemption on certain property. The statute does not require that the exemption may be used only if it is the enterprise that owns the property. Compare R.C. 3735.67 (providing that an "owner of any real property in a community reinvestment area may file an application for an exemption"); R.C. 5709.081 (setting forth circumstances in which "property owned by a political subdivision that is a public recreational facility for athletic events shall be exempt from taxation"). (Emphasis added.)³ The statute also does not require the municipality to offer the exemption only to the enterprise itself. I conclude, therefore, that as long as the exemption is in return for the establishment, expansion, renovation, or occupation of a facility and the expansion of employment opportunities in the zone, a municipality or county may, in an enterprise zone agreement, offer exemption on certain personal property to an entity other than the enterprise itself.

I turn now to the situation where an exemption which was granted in the original enterprise agreement is subsequently assigned. As a general rule, contracts entered into by a governmental entity, "unless limited by positive provisions of statute law, are governed by the same principles as apply to contracts between individuals." *Phelps v. Logan Natural Gas & Fuel Co.*, 101 Ohio St. 144, 148, 128 N.E. 58, 59 (1920). The enterprise zone statutes do not address whether an exemption may be assigned. Further, I find no language in the statutes that implicitly prohibits assignment. As long as the rights of the municipality or county are not harmed, the statutory criteria are fulfilled, and the purpose of the statutes is furthered, assignment of an exemption appears to be permissible. See generally 3 S. Williston, *A Treatise on the Law of Contracts* §412 (3d ed. 1960) (a contract may be assigned unless the contract right is defined or limited by the personality of the original promisee or unless public policy prohibits the assignment). Of course, if an enterprise agreement provides that an exemption cannot be assigned, the provision in the agreement governs. See *American Bonding & Trust Co. v. Baltimore & Ohio Southwestern Ry. Co.*, 124 F. 866, 875 (6th Cir. 1903), cert. denied, 191 U.S. 575 (1903) (a right is assignable unless the contract evidences that the parties intended to make the right not assignable). Therefore, I conclude that unless an enterprise agreement provides otherwise, a personal property exemption granted in an enterprise agreement may be assigned to a third party as long as the rights of the municipality or county are not harmed and the statutory criteria are fulfilled.

In your last question, you ask whether an owner who is granted an enterprise zone exemption on real property is required to file an application with the county auditor and the tax commissioner pursuant to R.C. 5713.08 and R.C. 5715.27. I understand that such an application is made on DTE Form 23, which is an application for real property tax exemption and remission. This form is submitted to the county auditor, who forwards it to the tax commissioner.

³ One provision in the enterprise zone statutes that mentions ownership is R.C. 5709.61(O), which provides that "'[f]irst used in business' means that the property referred to has not been used in business in this state by the enterprise that owns it...prior to being used in business at a facility as a result of a project." (Emphasis added.) I do not read this language as requiring an exemption to be granted only to the owner of the property. Rather, this provision permits property formerly used by another entity in the state of Ohio to qualify for exemption.

R.C. 5713.08, which imposes on the county auditor the duty of making a list of all exempt property in his county, provides in pertinent part:

(A) The county auditor shall make a list of real and personal property in his county, including money, credits, and investments in bonds, stocks, or otherwise, which is exempted from taxation. Such list shall show the name of the owner, the value of the property exempted, and a statement in brief form of the ground on which such exemption has been granted. It shall be corrected annually by adding thereto the items of property which have been exempted during the year, and by striking therefrom the items which in the opinion of the auditor have lost their right of exemption and which have been reentered on the taxable list. No additions shall be made to such exempt lists and no additional items of property shall be exempted from taxation without the consent of the tax commissioner as is provided for in section 5715.27 of the Revised Code.... (Emphasis added.)

Thus, the tax commissioner must approve the listing of exempt property. The procedure for obtaining this approval for real property is set forth in R.C. 5715.27.

R.C. 5715.27(A) provides that the owner of real property may file for exemption with the tax commissioner on forms prescribed by the commissioner. Boards of education may request notification of applications for exemption, R.C. 5715.27(B), and may participate in any hearing on the applications. R.C. 5715.27(C). R.C. 5715.27 further provides:

(D) The commissioner shall not hold a hearing on or grant or deny an application for exemption of property in a school district whose board of education has requested notification under division (B) of this section until the end of the period within which the board may submit a statement with respect to that application under division (C) of this section. The commissioner may act upon an application at any time prior to that date upon receipt of a written waiver from each such board of education, or, in the case of exemptions authorized by section 725.02, 1728.10, 3735.67, 5709.41, 5709.62, or 5709.63 of the Revised Code, upon the request of the property owner.

As seen above, R.C. 5715.27(D) specifically mentions enterprise zone exemptions granted pursuant to R.C. 5709.62 and R.C. 5709.63. It is implicit in this language that the General Assembly intended that owners who are granted real property enterprise zone exemptions would follow the procedure set forth in the statute. This is in accord with R.C. 5709.66(A), which provides that the tax commissioner shall administer tax incentives provided under R.C. 5709.61-.66. In light of the foregoing, I conclude that an owner of real property who is granted an enterprise zone exemption under R.C. 5709.62 or R.C. 5709.63 must file an application for exemption with the tax commissioner pursuant to R.C. 5715.27.

Accordingly, it is my opinion and you are advised that:

1. R.C. 5709.62 and R.C. 5709.63 do not authorize an enterprise zone agreement to specify that property remains taxable, but at a different tax rate than the rate effective for the taxing district in which the property is located.
2. R.C. 5709.62 and R.C. 5709.63 do not authorize an enterprise zone agreement to specify that while property is exempt, the enterprise must pay an amount equal to a particular millage in lieu of taxes.
3. Under R.C. 5709.62 and R.C. 5709.63, an enterprise zone agreement may grant a tangible personal property tax exemption that is effective more than ten years after the agreement is entered into, provided the exemption itself does not exceed ten years.
4. Under R.C. 5709.62 and R.C. 5709.63, an exemption does not

inure to tangible personal property used after an expansion begins but prior to an enterprise zone agreement.

5. Under R.C. 5709.62 and R.C. 5709.63, an exemption may inure to tangible personal property used by an enterprise prior to an expansion and subsequent to an enterprise zone agreement, provided that the property is first used as the result of a project as defined in R.C. 5709.61(l).
6. Under R.C. 5709.62 and R.C. 5709.63, an enterprise zone agreement cannot grant a tangible personal property tax exemption that is effective for a year preceding the year in which the agreement is entered into.
7. Whether an enterprise zone agreement is effective, for purposes of the tangible personal property tax exemption provisions of R.C. 5709.62 and R.C. 5709.63, before the parties affixed their signatures to the agreement is a matter to be determined on a case by case basis.
8. Unless an enterprise zone agreement provides otherwise, a tangible personal property tax exemption granted in an enterprise zone agreement may be assigned, provided the rights of the municipality or county that granted the exemption under R.C. 5709.62 and R.C. 5709.63 are not harmed and provided that all necessary enterprise zone statutory criteria are fulfilled.
9. An owner of real property who is granted an enterprise zone tax exemption under R.C. 5709.62 or R.C. 5709.63 is required to file an application for exemption with the tax commissioner pursuant to R.C. 5715.27.