OPINION NO. 87-006

Syllabus:

Pursuant to the terms of Sub. H.B. 39, 116th Gen. A. (1986) (eff. Feb. 21, 1987) (section three, uncodified), the local option election questions specified in R.C. 4301.351 and R.C. 4305.14 may appear on the ballot at the primary election, to be held on May 5, 1987, in an election precinct to which the four year prohibitions of R.C. 4301.37(A) and R.C. 4301.37(B) would otherwise apply.

To: Sherrod Brown, Secretary of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 6, 1987

You have requested my opinion regarding the application of Sub. H.B. 39, 116th Gen. A. (1986) (eff. Feb. 21, 1987), which amends, inter alia, several sections of the Revised Code addressed to local option elections. Specifically, you wish to know whether Sub. H.B. 39 permits placement of Sunday sales or beer sale questions, which are the subjects of R.C. 4301.351 and R.C. 4305.14 respectively, on the May 5, 1987, primary

ballot in an election precinct in which a local option election was held thereon during the previous four years. In particular, your question is prompted by sections three and four (uncodified) of Sub. H.B. 39, which permit the holding of such local option elections not otherwise permitted by the express terms of R.C. 4301.32 (local option elections as to the sale of intoxicating liquors) and R.C. 4301.37 (local option elections effective for four years), and the fact that Sub. H.B. 39 becomes effective on February 21, 1987, two days after the petition filing deadline of February 19, 1987, as established by R.C. 4301.33 and R.C. 4305.14, for placing such issues before the electorate at the next primary election.[1] In this regard, sections three and four of Sub. H.B. 39 read as follows:

> Section 3. Notwithstanding sections 4301.32 and 4301.37 of the Revised Code, a local option election, other than an election held under section 4301.352 of the Revised Code, may be held pursuant to sections 4301.32 to 4301.41 of the Revised Code in an election precinct in which such an election was held during the previous four years on a question or questions specified in section 4301.35, 4301.351, or 4305.14 of the Revised Code, upon presentation of a petition to the appropriate board of elections signed by qualified electors in the election precinct equal in number to at least sixty per cent of the total number of votes cast in the precinct for the office of Governor at the preceding general election for that office. If the petition is sufficient, the board to which the petition has been presented shall order the holding of a special election in the election precinct for the submission of the question or questions specified in section 4301.35, 4301.351, or 4305.14 of the Revised Code as designated on the petition, on a day designated in the petition which shall be on the same day as the primary[2] or general election. The time

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[1] R.C. 4301.33 and R.C. 4305.14 provide, in pertinent part, that petitions for local option elections under R.C. 4301.351 and R.C. 4305.14 shall be presented to the board of elections of the county where the precinct in question is located "not later than four p.m. of the seventy-fifth day before the day of a general or primary election." R.C. 3501.01(E) states, in part, that primary elections "shall be held on the first Tuesday after the first Monday in May of each year," which, in 1987, is May 5. Thus, with reference to the primary election date of May 5, 1987, the petition filing deadline established by R.C. 4301.33 and R.C. 4305.14 is February 19, 1987.

[2] As used in those sections of the Revised Code relating to elections and political communications, R.C. 3501.01(E) defines a "primary" or "primary election" as an election "held for the purpose of nominating persons as candidates of political parties for election to offices, and for the purpose of electing persons as members of the controlling committees of political parties and as delegates and alternates to the conventions of political parties." Thus, the local option questions referred to in Sub. H.B. 39 may appear on the May 5, 1987, ballot only in those precincts in which a primary election, as defined in R.C. 3501.01(E), will otherwise be held.

> deadlines and petitioning procedure established in section 4301.33 of the Revised Code apply to any election held under this section. Except as otherwise provided in this section, an election held under this section shall be governed by sections 4301.32 to 4301.41 of the Revised Code. An election held under this section may be held only once in the same election precinct during the period in which this section is in effect.
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> Section 4. Section 3 of this act applies to every local option election held pursuant to that section for a period ending one year after the effective date of this act. (Footnote added.)

You wish to know whether Sub. H.B. 39, including uncodified sections three and four thereof, commencing on its effective date of February 21, 1987, permits placement of the local option election questions specified in R.C. 4301.351 and R.C. 4305.14 on the May 5, 1987, primary ballot in an election precinct to which the four year prohibition of R.C. 4301.37 otherwise applies.

Resolution of your question requires, in part, that I briefly review the specific terms of several of the Revised Code provisions referred to in Sub. H.B. 39. R.C. 4301.32 confers upon the electors of an election precinct "[t]he privilege of local option as to the sale of intoxicating liquors." The types of local option questions that may be submitted to the electors of a particular precinct pursuant to R.C. 4301.32 are further described in R.C. 4301.321, R.C. 4301.322, R.C. 4301.331, R.C. 4301.332, R.C. 4301.35-.353, and R.C. 4305.14. With respect to the question propounded in your letter, R.C. 4301.351 provides for the submission to the electors of a given precinct of the question whether the sale of intoxicating liquor shall be permitted therein on a Sunday, and R.C. 4305.14 provides for the submission to the electors of a given precinct of the question whether the sale of beer shall be permitted therein. R.C. 4301.33 and R.C. 4301.34 further describe rules and procedures to be followed in circulating among the electors, and filing with the board of elections, petitions for a Sunday sale election under R.C. 4301.351, and R.C. 4305.14 provides similar petition procedures and rules for beer sale elections held pursuant to that section.[3]

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[3] With respect to the validation of petitions pertaining to local option questions under R.C. 4301.35 and R.C. 4301.351, R.C. 4301.33(A) states that the board of elections shall examine and determine the sufficiency of the signatures and determine the validity of the petitions "not later than the sixty-sixth day before the day of the general or primary election, whichever occurs first, for which the petition qualified." With reference to the May 5, 1987, primary election, such day is February 28, 1987. R.C. 4301.33(B) further states that if the petition is sufficient, the board of elections shall order the holding of a special election on such questions on the day of the next general or primary election, whichever occurs first.

With respect to the validation of petitions pertaining to local option questions under R.C. 4305.14, R.C. 4305.14(B)(1) states that the board of elections shall examine and determine the sufficiency of the signatures and

Certain restrictions also apply with respect to the frequency with which local option elections may be held. See generally 1971 Op. Att'y Gen. No. 71-064. As pertains to local option elections under R.C. 4305.14 and R.C. 4301.351 respectively, R.C. 4301.37 provides, in part, as follows:

> (A) When a local option election, other than an election under section 4301.351, 4301.352, or 4301.353 of the Revised Code, is held in any precinct, the result of the election shall be effective in the precinct until another election is called and held pursuant to sections 4301.32 to 4301.36 of the Revised Code, but no such election shall be held in any precinct on the same question more than once in each four years.
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> (B) When a local option election under section 4301.351 of the Revised Code is held in any precinct, the result of the election shall be effective in the precinct until another election is called and held pursuant to sections 4301.32 to 4301.361 of the Revised Code, but no such election shall be held in any precinct on the same question more than once in each four years. (Emphasis added.)

See also R.C. 4305.14 (providing that no local option election on the sale of beer "shall be held more often than once in each four years"). Thus, R.C. 4301.37(A) permits a local option election under R.C. 4305.14, inter alia, in the same precinct only once in each four year period, and R.C. 4301.37(B) imposes an identical restriction with respect to a local option election held pursuant to R.C. 4301.351.[4]

I now direct my attention to your specific question, whether the application of Sub. H.B. 39, including uncodified sections three and four thereof, commencing upon its effective date of February 21, 1987, permits placement of the local option election questions specified in R.C. 4301.351 and R.C. 4305.14 on the May 5, 1987, primary ballot in an election precinct to which the four year prohibitions of R.C. 4301.37(A) and R.C. 4301.37(B) would otherwise apply. I note initially that Sub. H.B. 39, by its express terms, materially affects the operation of R.C. 4301.37. In particular, the practical effect of uncodified sections three and four of Sub. H.B. 39 is to suspend temporarily, for a one year period, the directives set forth in R.C. 4301.37(A) and R.C. 4301.37(B) that the local option elections in question may be held in the same precinct only once every four years. During the one year period it is in effect, therefore, uncodified section three of Sub. H.B. 39

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determine the validity of the petitions "not later than the sixty-ninth day before the day of a general or primary election, whichever occurs first." With reference to the May 5, 1987, primary election, such day is February 25, 1987. R.C. 4305.14(B)(2) further states that if the petition is valid, the board of elections shall order the holding of a special election on such question on the day of the next general or primary election, whichever occurs first.

[4] R.C. 4301.37(C) and R.C. 4301.37(D) impose the same four year restriction upon local option elections under R.C. 4301.352 and R.C. 4301.353 respectively.

permits a local option election under R.C. 4301.35, R.C. 4301.351, or R.C. 4305.14 in any precinct in which such an election would otherwise be prohibited by the time restrictions of R.C. 4301.37. Such an election, however, may be held only once in the same precinct during the one year period section three of Sub. H.B. 39 is in effect.

Ohio Const. art. II, §28 states a general principle that the General Assembly "shall have no power to pass retroactive laws," and consonant with this constitutional mandate the General Assembly has, in R.C. 1.48, declared that a "statute is presumed to be prospective in its operation unless expressly made retrospective." The essential question posed by your request, therefore, is whether placement of the local option election questions addressed in R.C. 4301.351 and R.C. 4305.14 on the May 5, 1987, primary ballot, pursuant to the terms of Sub. H.B. 39, results in an impermissible retroactive application of that law, insofar as Sub. H.B. 39 becomes effective two days subsequent to the deadline established by R.C. 4301.33 and R.C. 4305.14 for filing with the board of elections petitions pertaining to such questions. See note one, supra.

With respect to the question of what constitutes a law having a retroactive application within the purview of the constitutional prohibition, the Ohio Supreme Court has long declared that, "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Weil v. Taxicabs of Cincinnati, Inc., 139 Ohio St. 198, 203, 39 N.E.2d 148, 151 (1942) (quoting from Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814)(No. 13,156)). See also Lakengren, Inc. v. Kosydar, 44 Ohio St. 2d 199, 339 N.E.2d 814 (1975); Wheatley v. A. I. Root Co., 147 Ohio St. 127, 69 N.E.2d 187 (1946); State ex rel. Szalay v. Zangerle, 137 Ohio St. 195, 28 N.E.2d 592 (1940); Miller v. Hixson, 64 Ohio St. 39, 59 N.E. 749 (1901); 1982 Op. Att'y Gen. No. 82-070 at 2-195. Such a characterization reflects the underlying intent of the constitutional prohibition that the vested rights of individuals shall not be adversely disturbed, impaired, or nullified by a law's retroactive application. State ex rel. South Euclid v. Zangerle, 145 Ohio St. 433, 62 N.E.2d 160 (1945); State ex rel. Outcalt v. Guckenberger, 134 Ohio St. 457, 17 N.E.2d 743 (1938). Thus, for example, the court has established the principle that the prohibition of Ohio Const. art. II, §28 applies only to legislation affecting substantive rights and not to laws of a remedial or procedural nature, such as those providing rules of practice, courses of procedure, or methods of review. Wilfong v. Batdorf, 6 Ohio St. 3d 100, 103-4, 451 N.E.2d 1185, 1188-89 (1983); Denicola v. Providence Hospital, 57 Ohio St. 2d 115, 117, 387 N.E.2d 231, 233 (1979); Gregory v. Flowers, 32 Ohio St. 2d 48, 52-3, 290 N.E.2d 181, 184 (1972); Kilbreath v. Rudy, 16 Ohio St. 2d 70, 242 N.E.2d 658 (1968) (syllabus, paragraph one); State ex rel. Slaughter v. Industrial Commission, 132 Ohio St. 537, 9 N.E.2d 505 (1937) (syllabus, paragraph three). See also 1975 Op. Att'y Gen. No. 75-064 at 2-263; 1975 Op. Att'y Gen. No. 75-042 at 2-160; 1974 Op. Att'y Gen. No. 74-087 at 2-359.

Applying the foregoing principles to the present circumstances, I conclude that placement of the local option election questions addressed by R.C. 4301.351 and R.C. 4305.14 on the May 5, 1987, primary ballot, pursuant to the terms of Sub. H.B. 39, does not constitute a retroactive application of the law, notwithstanding that Sub. H.B. 39 becomes effective two days subsequent to the deadline established by R.C. 4301.33 and R.C. 4305.14 for filing with the board of elections petitions pertaining to such questions. I am persuaded that such action will neither impair any vested rights under existing laws nor create any new obligations or liabilities in respect to past transactions or conduct. Cf., e.g., 1974 Op. Att'y Gen. No. 74-087 (syllabus, paragraph one) (neither Ohio Const. art. II, §28 nor any other constitutional provision prohibits the Elections Commission from taking jurisdiction of an alleged violation of the election laws that occurred prior to the effective date of the legislation that established the Commission). Rather, I believe such action to be consistent with the evident intent of the General Assembly, as plainly expressed in the language of sections three and four of Sub. H.B. 39 itself, that the time strictures of R.C. 4301.37 otherwise applicable in this regard shall be suspended for the one year period that section three of Sub. H.B. 39 is in effect, and that the electorate shall thereby be afforded the opportunity to consider such questions at a special election on the same day as either the primary or general election. Sub. H.B. 39, for example, does not alter or suspend the authority otherwise conferred upon a board of elections by R.C. 4301.33, R.C. 4301.351, and R.C. 4305.14 to accept for filing, and subsequently validate, petitions that propose to place such local option questions upon the ballot at the May 5, 1987, primary election, and it further does not prohibit any interested party from circulating such petitions with the understanding that such questions shall appear on the ballot at that election, or otherwise alter the petitioning process as described in R.C. 4301.33, R.C. 4301.351, and R.C. 4305.14.

Further, I believe such a result accords with the court's frequent recitation that, as a general matter, the election laws should be construed, when possible, so as to be operable. See generally State ex rel. Grace v. Board of Elections, 149 Ohio St. 173, 76 N.E.2d 38 (1948) (noting that constitutional and statutory provisions should, if possible, be so construed as to give them reasonable and operable effect); State ex rel. Harsha v. Troxel, 125 Ohio St. 235, 181 N.E. 16 (1932) (noting that laws relative to filling vacancies in elective offices should be construed so as to give the electorate the opportunity to choose at the earliest possible time the successor to an official they have previously chosen); Jones v. City of Cleveland, 124 Ohio St. 544, 179 N.E. 741 (1932); State ex rel. Eavey v. Smith, 107 Ohio St. 1, 140 N.E. 737 (1923). In this regard, uncodified section three of Sub. H.B. 39 shall be in effect for one year only, commencing upon February 21, 1987, and thus, since it will not be in effect at the time of the 1988 primary election, I believe it is reasonable that the electors of an affected precinct be permitted the opportunity to consider these local option questions at the 1987 primary election. See, e.g., 1974 Op. Att'y Gen. No. 74-061 at 2-255 (noting that a board of county commissioners may certify to the board of elections a levy for a community mental health and retardation program even though the statutory amendment permitting such levy becomes effective after the date of certification but before the election, since "[a]ny other

interpretation would render the amendment inoperable for at least the first year of its existence").[5]

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[5] I am aware of one instance in which it was determined that an amendment of the law pertaining to the conduct of an election addressing the adoption of a municipal tax levy, which became effective in advance of the scheduled date of such election, would, nevertheless, be deemed not to apply to that election, since the pertinent resolutions proposing the tax levy in question had been considered and enacted by the municipality's legislative authority prior to the effective date of the amendment. State ex rel. Harshman v. Lutz, 42 Ohio App. 345, 182 N.E. 134 (Montgomery County 1932). My review of the decision in State ex rel. Harshman v. Lutz persuades me that the court's holding therein is compatible with the conclusion I have reached in this opinion. In State ex rel. Harshman v. Lutz a city commission, acting pursuant to G.C. 5625-15, the statutory predecessor of R.C. 5705.19, adopted a resolution favoring an increase in the amount of tax imposed upon taxable property within the city and the submission of such proposed increase to the electorate. The question was included on the ballot at the November general election, and was approved by slightly more than a majority vote of fifty-four per cent. The county auditor, however, thereafter refused to include the additional levy of taxes on the tax duplicates of the county. In this regard, the county auditor noted that at its most recent session the General Assembly had amended G.C. 5625-18 (now R.C. 5705.191), the law governing such elections, so as to require fifty-five per cent of the electors voting upon a levy necessary to carry a proposal submitted under G.C. 5625-15, and that such amendment was in effect when the electors of the city voted at the November general election on such proposal. The county auditor, therefore, argued that the proposal favoring an increase in the property tax levy had actually failed, insofar as it did not receive an affirmative vote of at least fifty-five per cent.

The court, however, rejected this argument, and relied therefor upon G.C. 26, the statutory predecessor of R.C. 1.58, which, at that time, provided, in pertinent part, that, "[w]henever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal." In this regard, the court stated as follows:

> From a consideration of the authorities we are of opinion that Section 5625-18, General Code, as it existed at the time of the passage of the resolution, controls this proceeding, and that the subsequent amendment of such statute does not affect proceedings which were instituted prior to October 14, 1931, the date such amendment became effective. It therefore follows, the majority of the electors voting at such election having voted in favor thereof, that the taxing authorities of the municipality could levy a tax within such subdivision for such additional purpose and have the same placed upon the tax duplicate as provided by law.

Accordingly, based upon the foregoing, it is my opinion, and you are advised that pursuant to the terms of Sub. H.B. 39, 116th Gen. A. (1986) (eff. Feb. 21, 1987) (section three, uncodified), the local option election questions specified in R.C. 4301.351 and R.C. 4305.14 may appear on the ballot at the primary election, to be held on May 5, 1987, in an election precinct to which the four year prohibitions of R.C. 4301.37(A) and R.C. 4301.37(B) would otherwise apply.

State ex rel. Harshman v. Lutz, 42 Ohio App. at 351, 182 N.E. at 137.

In the present case, however, application of Sub. H.B. 39 so as to permit placement of the local option election questions specified in R.C. 4301.351 and R.C. 4305.14 on the ballot at the May 5, 1987, primary election in an election precinct to which the four year prohibitions of R.C. 4301.37(A) and R.C. 4301.37(B) would otherwise apply will not affect any pending actions or proceedings related thereto, and, as I have already noted, such action will not impair any vested rights or create any new obligations in respect to past transactions or conduct.