

# Medina County Commissioners

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February 4, 2007

Dean Holman, Prosecutor  
Office of the Prosecuting Attorney  
72 Public Square  
Medina, Ohio 44256

RE: Proposed Schools Sales Tax per ORC Section 5739.026 (A) (4)

Dear Dean,

Thank you for your January 29, 2007 letter responding to our request of January 9, 2007 regarding the proposed adoption of a limited sales and use tax under Section 5739.026(A)(4) for permanent improvements within Medina County, to be distributed by the community improvements board for school districts. I appreciate the promptness of your office staff in responding to our request.

I regret not involving your office in a legal evaluation of the issue much sooner in the process. When originally approached by the school districts in March 2006, I was comforted by the fact that Squires, Sanders, Dempsey, as well as Buckingham, Doolittle & Burroughs had conducted legal research on the matter for Summit County officials, which had successfully resulted in placement of this type and scope of issue under ORC Section 5739.026(A)(4) on the ballot in November 2002. Since discussions at that time included considerations of potential issuance of debt by the CIB, we asked Mike Sharb with Squires Sanders for a reaffirmation of that legal research on behalf of Medina County. I have included a copy of that correspondence for your information.

Let me assure you that our requested legal opinion from Squires Sanders did not reflect doubts on the professional capabilities of your staff nor lack of confidence in the timely manner in which those opinions could be rendered. In my mind, the services of Squires Sanders was engaged because of their experience in the Summit County issue, the familiarity with Medina County as our bond counsel, and the cost-effective and expedient manner in which the opinion could be conveyed to the Alternative School Funding Panel members working on the proposal. I apologize if we inadvertently conveyed any offense by our actions and again regret not formally involving the Office of the Prosecuting Attorney in the matter last December.

I would like to provide you with some additional information, as well as describe the current dilemma facing the school boards and the County Commissioners. It is my hope that you will be able to take into account recent changes in the proposed use of the sales tax revenues and the identification of other legal opinions potentially supporting our draft resolutions, in a reconsideration of at least some of the recommendations made in your letter of January 29.

Before outlining the changed conditions since your letter of January 29, permit me to provide some additional context on the dilemma currently facing the Medina County School Districts. I have no doubt that you are well aware that the Ohio Supreme Court's *DeRolph* decision criticizing the over reliance upon local property taxes as a means to fund public education has not been effectively addressed by the State of Ohio. Similarly, I know that a number of local school officials have communicated to you the financial conditions of their respective districts and the great need on their part to find alternatives to local property taxes. I am uncertain, however, if they have effectively communicated the precarious timing of this proposal in making it to the ballot, relative to the other numerous financial issues which they will be forced to likewise submit to the voters over the next several years.

The table below helps present the complexity of the timing issue for the schools boards. I have tabulated below the number of local voted property tax issues, which each district currently has in effect. The number does not represent voted bond issues, nor any consideration of new future tax requests. While some of these voted tax levies are continuing, the school districts are periodically faced with the challenge of placing them on the ballot as replacements given the yearly reductions in effective millage collected. Other issues are of limited duration and must be renewed or replaced, as well.

<b>School District</b>	<b>Number of Voted Tax Levies*</b>
Black River Local SD	4
Brunswick City SD	8
Buckeye Local SD	6
Cloverleaf Local SD*	6
Highland Local SD	8
Medina City SD	8
Wadsworth City SD	7
Medina County JVS	2
<b>Total</b>	<b>49</b>

\*Not including Bond Issues

As a consequence, submission of the proposed sales tax issue for the school districts has been cautiously planned for an election in which the least number of school districts will likely be on the ballot. As you can imagine, the task of getting unanimous agreement on the timing of an election issue was an astounding achievement for the Alternative School Funding Panel that brought the proposal to the Board of Commissioners.

At this point, two reasonable possibilities remain for the districts proposal to place the issue on the ballot. Their first preference would be on the May 8, 2007 ballot. In part, because of the reduced election costs to the public schools. Other anticipated issues on May 8 ballot include Medina County District Library (1.25 mill replacement), Wadsworth City (five-year, 2.3-mill EMS replacement levy), Brunswick City Schools (2.5 mill Emergency renewal), Medina Township (new millage for LST) and Buckeye Local (1% Earned Income Tax). Several of the school districts have expressly refrained from placing issues on the ballot in May. However, school districts like Wadsworth City need to have the proposed Permanent Improvements Sales Tax issue resolved before the fall election, because of current levies scheduled for expiration. For a number of reasons, the November election of 2007 is not a viable option for the school districts.

Given your recent recommendation of waiting for an opinion from the Ohio Attorney General, the second option for the school districts is placing the issue on a countywide ballot for a special election in August. However, it is likely that far fewer public entities will be involved to share in the election costs as in May, therefore placing the financial burden almost entirely on the seven school districts. At present the Board of Elections estimates the costs of conducting an election to be around \$1,200 per precinct, bringing the total cost to the county to be nearly \$180,000.

I don't expect your office to use these timing and financial considerations in your legal evaluation of the proposed ballot issue. However, I would contend that it should be one consideration in balancing the public risk and benefit that you used to make the recommendation to obtain a formal OAG opinion before moving forward. However, conditions have significantly changed which might affect the relative importance to those considerations.

Based upon the January 29<sup>th</sup> letter and Mr. Thorne's discussion with the Board of Commissioners last week your foremost concerns involved the financial impact of debt incurred by a school district in reliance upon the proposed sales tax, should the levy thereafter be found by some future court action to be improper and uncollectible. Based upon this information, the Medina City School District Board of Education held a special meeting on Friday, February 2, 2007 to formally retract their prior intentions to borrow against the proposed sales tax revenues. With that action, there is no school district that intends to incur debt against the anticipated annual grants from the CIB sales and use tax revenues. I believe that this should alleviate your primary concern and minimize any actual risk to the school districts, should a future court action potentially reverse approval of the levy.

As we understand it, your office could not find specific authority to limit the sales tax proceeds to one legally qualified class of subdivision, i.e. school districts. But your office did find analogous law supporting the proposition that the sales tax under ORC Section 5739.026 could be limited with voter approval. Unfortunately, your reference to an OAG opinion dealing specifically with this issue failed to list a citation of that opinion. I did request copies or at least a list of the OAG opinions used in your staff's analysis last Tuesday, but as of Friday had not received any response. My apologies if my questions and legal references are redundant to your research. Based upon a similar legal analysis by Summit County, our presumption is that you were referring to 1988 OAG Opinion No. 88-018.

I would like to offer several points found in other citations for your legal consideration of this matter. Much of my comments are based upon a more recent analysis of this issue 2006 Ohio Op. Atty. Gen. No. 2006-028 which I have attached for your use.

It appears from that opinion, the county could have the authority to adopt resolutions limiting the expenditures of a sales tax under ORC Section 5739.026, as well as giving the voters the opportunity to see ballot language properly reflecting those restrictions. As noted:

2006 Ohio Op. Atty. Gen. No. 2006-028 “[FN11] . When a tax levy is imposed, the resolution adopting the levy must be consistent with the taxing authority granted by statute, though it may, in proper circumstances, adopt more limited purposes than the range of purposes authorized by statute. .... When a levy is submitted to the voters, the ballot language may, similarly, limit the expenditure of funds to purposes more narrow than the range of purposes authorized by statute, but only to the extent that the resolution provides for such limitation. As a general rule, the resolution and the ballot language must be consistent in expressing the purpose for which a particular tax is levied.”

Mr. Thorne has suggested that the resolutions could be legally enacted if any reference to the school districts was stricken from the enabling sales and use tax legislation and of course the ballot language. He has further offered that the most recent resolution creating the Community Improvements Board would suffice with a limitation on restricting the funds for school districts contained within an attached Exhibit A.

Isn't there a potential legal problem with that approach? The most noticeable predicament is not one of obtaining voter approval in May, but rather the misleading nature of the ballot language and enacting resolutions with the intent to restrict the funds expressed in the CIB resolution and attached exhibit. I believe that should a ballot issue not mention the intent to restrict the funds to the school districts, all other local political subdivisions that typically would have a right to apply for annual grants from the CIB would have legal standing to challenge the restrictions.

As stated in *State ex rel. Minus v. Brown*, 30 Ohio St. 2d 75, 80-81, 283 N.E.2d 131 (1972) (“[t]he basic premise of R.C. 3505.06 is that the electorate have the right to know what it is that they are being asked to vote upon. O.R.C. 3505.06 serves to inform and protect the voter and presupposes a condensed text which is fair, honest, clear and complete, and from which no essential part of the proposed amendment is omitted”<sup>1</sup> See also *Markus v. Trumbull County Bd. of Elections*, 22 Ohio St. 2d 197, 254 N.E.2d 501 (1970) and *Jurcisin v. Cuyahoga County Bd. of Elections*, 35 Ohio St. 3d 137, 141-42, 519 N.E.2d 347 (1988) (applying a three-step test for evaluating ballot language - that it must fairly inform the voter of the subject on the ballot, refrain from the use of persuasive or argumentative language, and not have a fraudulent, confusing, or misleading effect). Clearly, it could be argued that if the ballot language and tax enacting resolutions did not list the restrictions of CIB funding of permanent improvements for school districts, it would fail these essential tests.

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<sup>1</sup> As cited in 2006 Ohio Op. Atty. Gen. No. 2006-028, **Ballot language to levy sales and use taxes**. Some statutes that authorize the submission of tax levies or other issues to voters prescribe the language that must appear on the ballot. See, e.g., [R.C. 511.28](#); [R.C. 5705.215](#); [R.C. 5705.218](#); [R.C. 5705.25](#); [R.C. 5705.251](#); [R.C. 5739.022](#). The statutes here at issue - namely, [R.C. 5739.021](#), [R.C. 5739.026](#), [R.C. 5741.021](#), and [R.C. 5741.023](#) - do not prescribe ballot language. Therefore, the ballot language for voter approval of these sales and use taxes is determined under the general provisions of [R.C. 3505.06](#), governing the questions and issues ballot.

In addition,

1987 Op. Att'y Gen. No. 87-096, at 2-639 (“[t]he ballot language thus parrots the language of the resolution and constitutes notice to the public of the purpose for which funds generated by the levy would be used”). Thus, when it is stated that “no levy moneys may be expended for purposes that are not within the ballot language,” and “if the ballot language is more narrow than the statutory language, that narrow language restricts the permissible expenditures of levy moneys,” it is understood that the ballot language is consistent with the language of the resolution and that the resolution and ballot language, working together, may restrict the use of levy proceeds to purposes more narrow than the range of purposes authorized by statute. 1990 Op. Att'y Gen. No. 90-069, at 2-292; *accord* 2005 Op. Att'y Gen. No. 2005-044, at 2-481; 2005 Op. Att'y Gen. No. 2005-011, at 2-115;...

Given these supporting OAG opinions and case law, I believe that the sales tax and therefore the county and school districts would be exposed to the same risk of repeal by court action, should the ballot language as well as the resolutions enacting the sales and use tax not specifically indicate the restrictions to one type of political subdivision, i.e. school districts.

In summary, I am requesting a re-examination of your recommendation to withhold action on the most recent drafts of the proposed resolutions (attached) pending a formal opinion from the Attorney General. While an OAG opinion may have some value in performing another legal analysis on the issues involved, it is neither the definitive legal authority on the matter nor would it protect the county from litigation on the issue should the ballot proposal be adopted.<sup>2</sup>

It is not that an additional legal review by the OAG would be improvident. It is most likely that the OAG opinion would be a redundant legal analysis and of limited value in the political decision-making facing the Board of Commissioners. In addition, the added cost to the public school districts in submitting the proposal to a special election in August would be unnecessarily

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<sup>2</sup> As cited in 2006 Ohio Op. Atty. Gen. No. 2006-028 “We note that the Attorney General is unable, by means of a formal opinion, to make a definitive determination regarding the construction of a particular county resolution, to determine the rights or obligations of voters or taxpayers under a particular ballot issue or levy, or to determine the obligations or liabilities of county officials in particular circumstances. Those determinations require findings of fact and consideration of particular circumstances that can be made only by persons with the necessary knowledge or, ultimately, by the courts. See, e.g., 2005 Op. Att'y Gen. No. 2005-002, at 2-12 (“[w]e are not able, by means of this opinion, to make findings of fact or to determine the rights of particular parties”); 2004 Op. Att'y Gen. No. 2004-022, at 2-186 (“[c]learly, we cannot predict what a court might decide in a particular case”); 1986 Op. Att'y Gen. No. 86-039, at 2-198 (the Attorney General is “unable to use the opinion-rendering function of this office to make determinations concerning the validity of particular documents, or the rights of persons under such documents”); 1983 Op. Att'y Gen. No. 83-087, at 2-342 (“[t]he determination of particular parties' rights is a matter which falls within the jurisdiction of the judiciary”); 1983 Op. Att'y Gen. No. 83-057, at 2-232 (“[t]his office is not equipped to serve as a fact-finding body; that function may be served by your office or, ultimately, by the judiciary”); 1979 Op. Att'y Gen. No. 79-012, at 2-40 (the Attorney General does not have the authority to determine whether public officials have acted in bad faith or have abused their discretion; “[o]nly a court can make this type of determination”). Therefore, this opinion simply sets forth our analysis of the questions you have presented, for application to particular facts as appropriate.”

problematic. Instead, I believe it could be argued that there is already sufficient legal guidance for us on this issue from the other OAG opinions and case law which I have cited, as well as the opinion from Squires Sanders for us to proceed cautiously. The school districts as well as the Board of Commissioners have been duly advised of the potential risks in adopting the sales tax issue as restricted according to the stated resolutions. Another OAG opinion affirming those risks will not alter the legal exposure or demonstrably influence the potential outcome in any court proceedings.

Recent changes in the proposed use of the sales and use tax revenues by the Medina City School District, pursuant to concerns from your department, as well as a more complete explanation of the context and risks involved in delaying submittal of the proposal to the ballot, should hopefully provide you a basis for re-examining the recommendations in your letter of January 29<sup>th</sup>.

I thank you in advance for your expeditious review of these matters and respectfully request your reconsideration of the opinions expressed in your January 29, 2007 correspondence.

Very truly yours,

A handwritten signature in black ink that reads "Steve Hambley". The signature is written in a cursive, flowing style.

Steve Hambley  
Medina County Commissioner

Cc: Bill Thorne, Chris Jakab, Pat Geissman, Sharon Ray

March 31, 2006

**CONFIDENTIAL**  
**ATTORNEY CLIENT PRIVILEGE**

**VIA E-MAIL AND REGULAR U.S. MAIL**

Christopher A. Jakab  
Director of Finance  
Medina County, Ohio  
Medina County Administration Building  
144 North Broadway, Room 205  
Medina, OH 44256

**Re: Medina County, Ohio**  
**School Financings and County Sales Tax**

Dear Chris:

You inquired regarding the possibility of providing financial assistance to school districts through the levy of a sales tax.

The State of Ohio levies a sales tax under Section 5739.02 of the Revised Code: “for the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter . . . .” That tax was reduced by ½% (from 6% to 5½%) beginning July 1, 2005, as a result of passage of the recent State “budget bill.”

Similarly, each county in the State may levy a sales tax up to 1% pursuant to Section 5739.021 of the Revised Code “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 . . . .” The revenue generated by this sales tax is used by a county for its general operation, which would not include provision of financial assistance to school systems in the county. Counties are creatures of statute and can generally do only what has been authorized by statute. Because there is no statutory authority under

Section 5739.021 for a county to use such sales tax revenues to assist school systems, the county would not be able to provide funding for school purposes from this source. Such expenditures for public education would not be a "county purpose" but rather a school district purpose.

The Ohio Attorney General has concluded that a county has no authority to deposit revenues derived from county sales tax pursuant to Sections 5739.021, 5739.026 and other sections of the Revised Code into a revenue sharing fund for which money would be distributed to townships and municipalities in the county to be used as the recipients determined.

Counties do, however, have further authority to levy an additional sales tax up to ½% for the various other purposes set forth in Section 5739.026. The purposes relevant to this discussion include:

- “(2) To provide additional revenues for a transit authority operating in the county;
- (3) To provide additional revenue for the county’s general fund;
- (4) To provide additional revenue for permanent improvements within the county to be distributed by the community improvements board in accordance with section 307.283 and to pay principal, interest, and premium on bonds issued under section 307.284 of the Revised Code;
- (5) To provide additional revenue for the acquisition, construction, equipping, or repair of any specific permanent improvement or any class or group of permanent improvements ... .”

Under this statute, a county may levy a ½% sales tax for any one or more of the purposes listed.

The purpose listed as “(3)” would require the county to use its general fund revenues, which is a problem as noted above. We believe that the “permanent improvements” discussed under purpose “(5)” are those of the county itself rather than those of other subdivisions.

This leaves purpose “(4),” which refers only to “permanent improvements” and not to general financial assistance. Under this provision, sales tax revenues could be used to fund permanent capital improvements of the county and other political subdivisions, including school districts, within the county. The funds would be distributed by a community improvement board created under Section 307.282 of the Revised Code. The community improvement board consists of nine members. Three members are appointed by the mayor of the city with the largest population. The board of county commissioners appoints the other six members, which

are to include the mayor of another municipal corporation in the county, a township trustee and one member appointed from among the following: “a chief executive of a municipal corporation in the county that is not the municipal corporation with the greatest population residing in the county, a trustee of a township in the county, a representative of a major business trade association located in the county, or a representative of a labor organization located in the county.”

The sales tax revenues are distributed by the community improvement board annually through grants to the county and the other political subdivisions in the county.

The statute does not provide directions on the grant application process or procedures for selecting the projects to be funded. Presumably, those are to be developed by the board. There may be some concern that the revenues be made available to all subdivisions in the county, but it is also possible that a board could determine that the first priority is education and thus determine to fund only educational projects. It could also determine that certain school districts in the county should have priority for that funding. For example, the Ohio School Facilities Commission provides State funds to school districts for capital projects on the basis of priority of need and other criteria. The community improvement board could adopt this prioritization and provide part of the required local matching funds for the projects funded by the Commission. The county commissioners by unanimous vote may disallow a grant awarded by the board.

The levy of this additional tax must be approved by the voters of the county. Clearly, there is the potential for “political” considerations. The composition of the board as well as the priority for funding projects may well have to be negotiated and established prior to the election on the issue of levying the additional sales tax.

Thus, under existing law, Section 5739.026(A)(4) provides a mechanism for raising additional revenues that could be used to provide financial assistance to a school system in the form of permanent improvements.

There is, of course, the possibility of requesting the General Assembly to amend the Revised Code to provide statutory authority to use a county sales tax to finance schools more generally. One approach would be to create a new section to provide such authorization. This would permit, for example, the levy of a full ½% or even a full 1% for this purpose without sharing it with other purposes. The new section could provide in somewhat more detail the procedures for providing such financial assistance to the various school districts within the county.

It should not, however, be unexpected that the General Assembly may balk at such a proposal to create a new funding mechanism for schools or, much less, allow each of the 88 counties to create its own procedures. As you know, the State’s own school funding mechanism

Christopher A. Jakab  
March 31, 2006  
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has been under attack for many years and remains so. The statutory process often requires considerable time before a proposal is eventually enacted into law.

I trust this letter will serve your needs. Of course, should you have any further questions or require additional information, please give me a call.

Very truly yours,



Michael L. Sharb



2006 Ohio Op. Atty. Gen. 2-246, 2006 Ohio Op. Atty. Gen. No. 2006-028,  
2006 WL 1722440 (Ohio A.G.)

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(Cite as: 2006 Ohio Op. Atty. Gen. 2-246, 2006 Ohio Op. Atty. Gen. No. 2006-028, 2006 WL 1722440 (Ohio A.G.))

2006 Ohio Op. Atty. Gen. 2-246, 2006 Ohio Op. Atty. Gen. No. 2006-028, 2006 WL 1722440 (Ohio A.G.)

Office of the Attorney General  
State of Ohio  
Opinion No. 2006-028

June 8, 2006

## SYLLABUS

1. Resolution 98-616 of the Delaware County Board of Commissioners, as approved by the voters in November of 1998, provides for the continuation of an additional 3/4% sales and use tax, with revenues generated from tax at the rate of 1/2% to be allocated for the maintenance and improvement of county roads and bridges, and revenues generated from tax at the rate of 1/4% to be allocated to the county general fund.

2. The term “maintenance,” as it appeared in ballot language for the continuation of an additional 3/4% sales and use tax in Delaware County in 1998, incorporated Resolution 98-616 of the Delaware County Board of Commissioners which, in turn, provided for revenues from tax at the rate of 1/2% to be used for the maintenance and improvement of county roads and bridges, thereby including such improvements to existing county roads and bridges as widening or adding drainage.

The Honorable Dave Yost  
Delaware County Prosecuting Attorney  
140 North Sandusky Street  
Delaware, Ohio 43015

Dear Prosecutor Yost:

We have received your request for a formal opinion concerning a sales and use tax that was

approved by the voters of Delaware County on November 3, 1998. You have asked the following questions:

1) The ballot language for the 1998 Tax specifies that revenues generated by the tax will be used for “maintenance of the county’s roads and bridges.” Does the term “maintenance” as it appears in the ballot language for the 1998 Tax include improvements to existing county roads and bridges, such as adding drainage or widening...

2) Where the ballot language for the 1998 Tax was controlled by and derived from Resolution 98-616 and Resolution 98-616 provides specific and adequate notice of the actual allocation of revenues generated by the 1998 Tax, is there an incorporation of the terms of Resolution 98-616 into the ballot language such that the actual allocation of funds is supported by the ballot language... More precisely, is the current actual allocation of funds generated from the 1998 Tax supported by the combination of Resolution 98-616 and the ballot language...

Your questions relate to a complicated set of facts outlined later in this opinion.

On the basis of the analysis set forth below, we conclude that Resolution 98-616 of the Delaware County Board of Commissioners, as approved by the voters in November of 1998, provides for the continuation of an additional 3/4% sales and use tax, with revenues generated from tax at the rate of 1/2% to be allocated for the maintenance and improvement of county roads and bridges, and revenues generated from tax at the rate of 1/4% to be allocated to the county general fund. We conclude, further, that the term “maintenance,” as it appeared in ballot language for the continuation of an additional 3/4% sales and use tax in Delaware County in 1998, incorporated Resolution 98-616 of the Delaware County Board of Commissioners which, in turn, provided for revenues from tax at the rate of 1/2% to be used for the maintenance and improvement of county roads and bridges, thereby

(Cite as: 2006 Ohio Op. Atty. Gen. 2-246, 2006 Ohio Op. Atty. Gen. No. 2006-028, 2006 WL 1722440 (Ohio A.G.))

including such improvements to existing county roads and bridges as widening or adding drainage.

#### **Background and facts**

In 1996, the Board of County Commissioners of Delaware County approved Resolution 96-534, which provided for a two-year sales and use tax in the amount of three-fourths of one percent (3/4%) (referred to in this opinion as the "1996 Tax") and a reduction in the real property tax in the amount of one mill. Resolution 96-534 stated, in part:

For the purpose of providing *additional revenue for the maintenance and improvement of county roads*, the Board of County Commissioners does hereby impose an additional 0.75% tax (three-quarters of one percent) tax pursuant to Ohio Revised Code Sections 5739.021, 5739.026(A)(3), 5741.021 and 5741.023 with *revenues generated from 0.50% (one-half of one percent) of the additional tax to be allocated from the general fund for the maintenance and improvement of county roads, and revenues generated from 0.25% (one-quarter of one percent) of the additional tax to be allocated to the county's general fund.* (Emphasis added.)

Thus, revenues generated from an additional sales and use tax at the rate of 1/2% were allocated to the maintenance and improvement of county roads, and revenues generated from an additional sales and use tax at the rate of 1/4% were allocated to the county's general fund. In a "WHEREAS" clause, Resolution 96-534 described the allocation of the 1/2% tax as being for the maintenance and improvement of "the county's roads and bridges," and you have informed us that revenues from the 1/2% tax have been used for bridge as well as road purposes. Under the resolution, the allocation of the 1/4% tax to the county's general fund was made "to compensate for an expected corresponding loss to that fund from the property tax reduction." [FN1] The real property tax was reduced by one mill pursuant to R.C. 5705.313. By its terms, the 1996 Tax expired on September 30, 1998.

As the expiration of the 1996 Tax approached, the Delaware County Board of Commissioners

approved Resolutions 98-616 and 98-617 in order to keep the sales and use tax revenue stream flowing. Resolution 98-616 provided for submitting the question of continuing the 1996 Tax to the voters in November of 1998 (referred to in this opinion as the "1998 Tax"). Resolution 98-617 provided for the continuation of the 1996 Tax for a three-month period beginning on October 1, 1998 (referred to in this opinion as the "Interim Tax"), in order to bridge the period between the expiration of the 1996 Tax and the effective date of the 1998 Tax.

Resolution 98-616, which provided for the submission of the 1998 Tax to the voters, contained language that was similar, but not identical, to the language of Resolution 96-534 that adopted the 1996 Tax. The precise language contained in Resolution 98-616 is integral to your questions, and particular provisions are discussed later in this opinion as necessary. The language appearing on the ballot for the vote on the 1998 Tax stated:

The Board of County Commissioners of Delaware County proposes the continuation of an existing sales and use tax in the amount of 3/4 percent for the purpose of MAINTENANCE OF THE COUNTY'S ROADS AND BRIDGES for a period of 10 years beginning January 1, 1999.

If approved, the real property tax will be reduced by 1 mill effective for the term of the sales and use tax.

SHALL THE RESOLUTION OF THE DELAWARE COUNTY COMMISSIONERS PROPOSING A 3/4 PERCENT SALES AND USE TAX, BE APPROVED...

The voters approved the 1998 Tax. [FN2]

You have informed us that the proceeds of the 1998 Tax have been allocated in the same manner as the proceeds of the 1996 Tax - that is, with revenues generated from tax at the rate of 1/2% allocated for the maintenance and improvement of county roads and bridges, and revenues generated from tax at the rate of 1/4% allocated to the county general fund. However, questions regarding this allocation have arisen because the 1998 ballot language did not specify this allocation.

#### **Current controversy**

(Cite as: 2006 Ohio Op. Atty. Gen. 2-246, 2006 Ohio Op. Atty. Gen. No. 2006-028, 2006 WL 1722440 (Ohio A.G.))

You have informed us that a controversy has developed as Delaware County is embarking on a major construction project of a new road extending the existing Sawmill Parkway. A group of opponents of the road extension asked you to bring a taxpayers' suit against the Delaware County Board of Commissioners and the Delaware County Engineer to prevent those officials from using revenues from the 1998 Tax to fund the construction of new roads. The opponents' contention is that the purpose of the 1998 Tax is limited to "maintenance," and the construction of a new road or "improvement" is not included within the authorized purpose. Your office declined to file a taxpayers' suit, based on your judgment that the suit would not be successful. *See* R.C. 309.12-.13. Without agreeing with the opponents' argument, but to avoid any appearance of impropriety, you advised the Delaware County Engineer to segregate the revenues generated by the 1998 Tax from other funds appropriated to the County Engineer, and to refrain from using 1998 Tax revenues in connection with "new construction," as opposed to mere "improvements." [FN3]

In addition, the Auditor of State has raised questions concerning the actual allocation of the revenue from the 1998 Tax pursuant to the provisions of Resolution 98-616 as compared with the ballot language. The State Auditor reviewed the proposed segregation of the 1998 Tax revenues and raised the issue with the Delaware County Auditor. You advised the Delaware County Auditor that the actual allocation of the 1998 Tax was supported by the language of Resolution 98-616 and the 1998 ballot language.

You have asked for a formal opinion on the two questions outlined above. We note that the Attorney General is unable, by means of a formal opinion, to make a definitive determination regarding the construction of a particular county resolution, to determine the rights or obligations of voters or taxpayers under a particular ballot issue or levy, or to determine the obligations or liabilities of county officials in particular circumstances. Those determinations require findings of fact and consideration of particular circumstances that can be made only by persons with the necessary

knowledge or, ultimately, by the courts. *See, e.g.*, 2005 Op. Att'y Gen. No. 2005-002, at 2-12 ("[w]e are not able, by means of this opinion, to make findings of fact or to determine the rights of particular parties"); 2004 Op. Att'y Gen. No. 2004-022, at 2-186 ("[c]learly, we cannot predict what a court might decide in a particular case"); 1986 Op. Att'y Gen. No. 86-039, at 2-198 (the Attorney General is "unable to use the opinion-rendering function of this office to make determinations concerning the validity of particular documents, or the rights of persons under such documents"); 1983 Op. Att'y Gen. No. 83-087, at 2-342 ("[t]he determination of particular parties' rights is a matter which falls within the jurisdiction of the judiciary"); 1983 Op. Att'y Gen. No. 83-057, at 2-232 ("[t]his office is not equipped to serve as a fact-finding body; that function may be served by your office or, ultimately, by the judiciary"); 1979 Op. Att'y Gen. No. 79-012, at 2-40 (the Attorney General does not have the authority to determine whether public officials have acted in bad faith or have abused their discretion; "[o]nly a court can make this type of determination"). Therefore, this opinion simply sets forth our analysis of the questions you have presented, for application to particular facts as appropriate.

**Sales and use tax under R.C. 5739.021 and R.C. 5741.021**

**at the rate of 1/2%**

Resolution 96-534, quoted in part above, adopted the 1996 Tax as a sales and use tax under R.C. 5739.021, R.C. 5739.026, R.C. 5741.021, and R.C. 5741.023, and provided for a one-mill reduction in real property taxes. Resolution 98-616, which provided for the 1998 Tax, described it as the continuation of that earlier 3/4% sales and use tax, and stated that the tax was levied pursuant to R.C. 5739.021, R.C. 5739.026, R.C. 5741.021, and R.C. 5741.023. Resolution 98-616 also provided for the same reduction in real property taxes pursuant to R.C. 5705.313. Thus, it is our understanding that the 1998 Tax consisted of sales and use tax at the rate of 1/2% levied pursuant to R.C. 5739.021 and R.C. 5741.021, and sales and use tax at the rate of 1/4% levied pursuant to R.C. 5739.026 and R.C.

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5741.023. [FN4]

The provisions of R.C. 5739.021 authorize a county to levy an additional sales tax “[f]or 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 related administrative costs. R.C. 5739.021(A). The tax is levied pursuant to a resolution of the board of county commissioners, stating the purpose of the tax and the number of years for which it is levied, or that it is for a continuing period of time. If the tax is to be levied for both the purpose of providing additional general revenues and the purpose of supporting criminal and administrative justice services, the resolution must state the rate or amount of the tax to be apportioned to each such purpose. R.C. 5739.021(A). If the resolution is not adopted as an emergency measure, it may provide for the question to be submitted to the voters for approval. R.C. 5739.021(B). A county that levies a sales tax pursuant to R.C. 5739.021 must also levy a corresponding use tax pursuant to R.C. 5741.021. *See* R.C. 5739.021(E); *see also, e.g.*, 2000 Op. Atty Gen. No. 2000-044, at 2-266; 1999 Op. Atty Gen. No. 99-022. [FN5]

Statutory provisions govern the disposition and use of county sales taxes. If any portion of the tax levied under R.C. 5739.021 is levied for the purpose of criminal and administrative justice services, the revenue from that portion of the tax “shall be credited to a special fund created in the county treasury for receipt of that revenue.” R.C. 5739.021(E). R.C. 5739.211 provides more generally that moneys received by a county levying an additional sales tax pursuant to R.C. 5739.021 “shall be deposited in the county general fund to be expended for any purpose for which general fund moneys of the county may be used,” including the acquisition or construction of permanent improvements, or in the bond retirement fund. The amount to be deposited in each of these funds is determined by the board of county commissioners. R.C. 5739.211(A).

Resolution 98-616 specified that the 1/2% tax was levied and submitted to the voters under R.C.

5739.021(B)(2)(a) (now R.C. 5739.021(B)(1)) and R.C. 5471.021, and that revenues from the 1/2% tax were “to be allocated from the general fund for the maintenance and improvement of county roads and bridges.” Thus, the county levied the 1/2% tax to provide additional general revenues for the county, and limited the use of those revenues to the road and bridge purposes authorized by Resolution 98-616, although that specific restriction of the use of tax proceeds was not expressly authorized by R.C. 5739.021. *See, e.g.*, 1981 Op. Atty Gen. No. 81-035, at 2-135 (moneys in the county general fund may be used for any proper county purpose, including road and bridge construction). [FN6]

With regard to the corresponding use tax levied pursuant to R.C. 5741.021, statutory language provides for revenues to be deposited in the county general fund to be expended for any purpose for which general fund moneys of the county may be used, including the acquisition or construction of permanent improvements, or in the bond retirement fund. R.C. 5741.031(A). Again, the amount to be deposited in each fund is determined by the board of county commissioners. *Id.*

If, as in the instant case, the county commissioners restrict the use of tax revenues through the resolution and ballot language, it is apparent that some accounting method is necessary to restrict the use of tax revenues to authorized purposes. *See* 2006 Op. Atty Gen. No. 2006-009; 1993 Op. Atty Gen. No. 93-075; 1981 Op. Atty Gen. No. 81-035 (syllabus, paragraph 2) (revenues from county sales and use taxes may be used for bridge construction, provided they have not been commingled with general fund moneys that may not be used for that purpose). [FN7] The question of precisely how this objective is to be achieved in the instant case exceeds the scope of this opinion. *See generally* 2006 Op. Atty Gen. No. 2006-009; 2000 Op. Atty Gen. No. 2000-044, at 2-266 n.2; 1999 Op. Atty Gen. No. 99-022; 1981 Op. Atty Gen. No. 81-035; *see also City of Lima v. Allen County Budget Comm'n*, 66 Ohio St. 3d 167, 610 N.E.2d 982 (1993); 1993 Op. Atty Gen. No. 93-075, at 2-371 (procedures for establishing special funds for sales and use tax revenues are the same as those used to establish special funds for property tax

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revenues).

**Sales and use tax under R.C. 5739.026 and R.C. 5741.023**

The provisions of R.C. 5739.026 authorize a county to levy an additional sales tax for any one or more of several listed purposes, and require that a corresponding use tax be levied pursuant to R.C. 5741.023. *See* R.C. 5739.026(A), (F). [FN8] Taxes for certain purposes must be submitted to the voters for approval, but taxes solely for the purpose of providing additional revenues for the county's general fund may be adopted by the board of county commissioners without voter approval. R.C. 5739.026(A).

Resolution 98-616 specified that tax at the rate of 1/4% was levied under division (A)(3) of R.C. 5739.026, which set forth the following purpose: "To provide additional revenue for the county's general fund." This purpose is consistent with the statement in the resolution that the 1/4% tax was to be allocated to the county's general fund "to compensate for an expected corresponding loss to that fund from the property tax reduction" adopted under the resolution.

R.C. 5739.211(B) provides that revenues from an additional sales tax under R.C. 5739.026 "shall be deposited in a separate fund, which shall be allocated and distributed in accordance with the resolution adopted under such section." R.C. 5739.026 provides various purposes for which a tax may be levied, but does not specifically list road and bridge purposes. The purpose stated in Resolution 98-616 is that set forth in division (A)(3) - to provide additional revenue for the county's general fund. Hence, no separate fund will be required in the instant case for revenues from the 1/4% tax under R.C. 5739.026. Revenues from the corresponding use tax levied pursuant to R.C. 5741.023 are deposited into a separate fund, which "shall be allocated, distributed, and used" in accordance with the resolution levying the tax. R.C. 5741.031(B). Because the purpose set forth in the resolution is to provide additional revenue for the general fund, no special fund is needed.

**Ballot language to levy sales and use taxes**

Some statutes that authorize the submission of tax levies or other issues to voters prescribe the language that must appear on the ballot. *See, e.g.,* R.C. 511.28; R.C. 5705.215; R.C. 5705.218; R.C. 5705.25; R.C. 5705.251; R.C. 5739.022. The statutes here at issue - namely, R.C. 5739.021, R.C. 5739.026, R.C. 5741.021, and R.C. 5741.023 - do not prescribe ballot language. Therefore, the ballot language for voter approval of these sales and use taxes is determined under the general provisions of R.C. 3505.06, governing the questions and issues ballot. [FN9]

R.C. 3505.06 states that the questions and issues ballot need not contain the full text of the proposal to be voted on. Instead, it is sufficient for the ballot to contain a "condensed text" that properly describes the question or issue and, in the case of a local question or issue, is "prepared and certified" by the board of elections. R.C. 3505.06(E); *see, e.g.,* 2005 Op. Atty Gen. No. 2005-011, at 2-116; 2000 Op. Atty Gen. No. 2000-048, at 2-297 (ballot language is not identical to language of board of county commissioners' resolution).

The board of elections is required to give approval to the ballot language and transmit it to the Secretary of State for the Secretary of State's final approval. R.C. 3501.05(J); R.C. 3501.11(V); *see Jurcisin v. Cuyahoga County Bd. of Elections*, 35 Ohio St. 3d 137, 141-42, 519 N.E.2d 347 (1988) (applying a three-step test for evaluating ballot language - that it must fairly inform the voter of the subject on the ballot, refrain from the use of persuasive or argumentative language, and not have a fraudulent, confusing, or misleading effect); *State ex rel. Minus v. Brown*, 30 Ohio St. 2d 75, 80-81, 283 N.E.2d 131 (1972) ("[t]he basic premise of R.C. 3505.06 is that the electorate have the right to know what it is that they are being asked to vote upon. R.C. 3505.06 serves to inform and protect the voter and presupposes a condensed text which is fair, honest, clear and complete, and from which no essential part of the proposed amendment is omitted" (citations omitted); *Markus v. Trumbull County Bd. of Elections*, 22 Ohio St. 2d 197, 254 N.E.2d 501 (1970) (syllabus, paragraph 4) ("[t]he text of a ballot statement resulting from a referendum petition must fairly and accurately present the

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question or issue to be decided in order to assure a free, intelligent and informed vote by the average citizen affected"); *State ex rel. Comm'rs of Sinking Fund v. Brown*, 167 Ohio St. 71, 74, 146 N.E.2d 287 (1957) (upholding condensed text against charges that it was improper, citing the fact that the full text was published in the newspaper and posted at the polls, and stating: "Of course a greater degree of accuracy of expression would have resulted if the ballot had contained the lengthy involved technical terms of the entire amendment, but this is the very difficulty sought to be avoided" by substituting a condensed text). Written notice of the levy question must also be submitted to the Tax Commissioner. R.C. 5739.021(B); R.C. 5739.026(D).

If other than a full text is used on the ballot, the full text of the proposed question or issue must "be posted in each polling place in some spot that is easily accessible to the voters." R.C. 3505.06(E). The posting must also set forth the percentage of affirmative votes necessary for passage. *Id.*

**Allocation of funds pursuant to Resolution 98-616 and 1998 ballot language**

In order to provide a clear discussion of the issues you have raised, it is helpful to begin with your second question, which asks about the interaction between the 1998 ballot language and the provisions of Resolution 98-616. Your precise question is whether the current actual allocation of funds generated from the 1998 Tax is supported by the combination of Resolution 98-616 and the ballot language. You ask more generally whether the terms of Resolution 98-616 were incorporated into the ballot language, given your premise that the 1998 Tax was controlled by and derived from Resolution 98-616, which provided specific and adequate notice of the actual allocation of revenues generated by the 1998 Tax.

It is important to note, initially, that the question that was presented to Delaware County voters in 1998 was whether to approve the resolution of the Delaware County Commissioners proposing a 3/4% sales and use tax. The ballot language contained a condensed summary of the resolution and concluded with this question: "SHALL THE

RESOLUTION OF THE DELAWARE COUNTY COMMISSIONERS PROPOSING A 3/4 PERCENT SALES AND USE TAX, BE APPROVED..." Thus, the voters were voting on the question whether to approve Resolution 98-616, and not on the question whether to adopt the condensed text set forth on the ballot. An affirmative vote on the ballot question resulted in the approval of Resolution 98-616. Therefore, in determining the precise terms of the tax that was levied, it is necessary to examine Resolution 98-616.

Resolution 98-616 included in its title the proposal to place on the ballot a question "REGARDING THE CONTINUATION OF A 3/4% SALES AND USE TAX FOR THE BENEFIT OF DELAWARE COUNTY, OHIO." It began with "WHEREAS" clauses indicating that the 1996 Tax was about to expire and setting forth the Board of County Commissioner's determination that current projected revenues would be insufficient to fund the county's projected budgets and responsibilities "in relation to the maintenance and improvements of county roads." It contained another "WHEREAS" clause stating that "the Board has determined that of this continuing 3/4% tax, 1/2% of the revenues thereby generated should be allocated from the general fund for the *maintenance and improvement of the county's roads and bridges*, and 1/4% of the revenues thereby generated should be allocated to the *county's general fund* to compensate for an expected corresponding loss to that fund from the property tax reduction adopted herein." (Emphasis added.) The clear intention was to present to the voters the question whether to continue the sales and use tax initially levied in 1996, allocated in the same manner. *See* note 1, *supra*.

The language of Resolution 98-616 stated, in Section 1, that "the Board of Commissioners of Delaware County, Ohio, does hereby determine that additional moneys are necessary for the purpose of providing additional general revenues for the county in order to maintain the county's roads and bridges." This section did not mention improvements. Section 2, likewise, spoke of "providing such additional revenues for the maintenance of the county's roads and bridges." The language referring only to maintenance of roads and

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bridges was apparently the language upon which the ballot's condensed text was based. However, Section 2 then went on to describe the 3/4% tax and to specify this allocation: "with revenues generated from 1/2% of the continuing of the tax to be allocated from the general fund for the maintenance and improvement of county roads, and revenues from 1/4% of the continuing tax to be allocated to the county's general fund." This language neglected to mention bridges, but it clearly included both maintenance and improvement of county roads. Further, Section 3 specified that, if the resolution was approved by the voters, "revenues generated by the additional taxes would be placed in the county's general fund, with 1/2% of the revenues generated from the continuing of the tax to be allocated from the general fund for the maintenance and improvement of county roads and bridges." Here both "roads and bridges" and "maintenance and improvement" were mentioned. *See* note 1, *supra*.

Clearly, there were various inconsistencies in the terms of Resolution 98-616. Terms that appeared in pairs at some points (roads and bridges; maintenance and improvement) appeared individually at other points. Further, the references to relevant statutes and documents were not precise. *See* note 4, *supra*. No doubt the resolution would have benefited from careful proofreading. The intent of the resolution, however, is not in doubt. The Board of County Commissioners proposed to continue the sales and use tax initially levied in 1996, and to continue to allocate the revenues generated by the tax in the same manner, with revenues generated from tax at the rate of 1/2% allocated for the maintenance and improvement of county roads and bridges and revenues generated from tax at the rate of 1/4% allocated to the county general fund. You have informed us that the 1998 Tax has been allocated in this manner. This is consistent with the fact that Resolutions 98-616 and 98-617 both indicated an intent to continue the 1996 Tax and both contained language supporting that allocation of the tax revenues. *Cf.* notes 1 and 4, *supra*.

The issue before us is whether the terms of the ballot language and the deficiencies in Resolution 98-616 were sufficient to negate the intent of the

Board of County Commissioners that the sales and use tax should continue, with revenues generated from the 1/2% tax allocated for the maintenance and improvement of county roads and bridges and revenues generated from the 1/4% tax allocated to the county general fund. We do not believe that the ballot language and inconsistencies within Resolution 98-616 were sufficient to negate this intent. Instead, we find that, in approving the ballot issue, the voters approved Resolution 98-616, and that, in spite of its obvious shortcomings, Resolution 98-616 expressed a clear intent to continue the 3/4% additional sales and use tax, with revenues generated from tax at the rate of 1/2% continuing to be allocated for the maintenance and improvement of county roads and bridges and revenues generated from tax at the rate of 1/4% continuing to be allocated to the county general fund.

We conclude, accordingly, that Resolution 98-616 of the Delaware County Board of Commissioners, as approved by the voters in November of 1998, provides for the continuation of an additional 3/4% sales and use tax, with revenues generated from tax at the rate of 1/2% to be allocated for the maintenance and improvement of county roads and bridges, and revenues generated from tax at the rate of 1/4% to be allocated to the county general fund.

**Use of the 1998 Tax for maintenance and  
improvement**

**of county roads and bridges**

We turn now to your remaining question, which asks if the term "maintenance," as it appears in the ballot language for the 1998 Tax, includes improvements to existing county roads and bridges, such as widening or adding drainage. As noted above, there are currently questions about whether the sales and use tax revenues may be used for new construction, as opposed to improvements of existing roads and bridges. For purposes of this opinion, you are not asking for an answer to those questions. Instead, you are asking only if the revenues may be used for such improvements to existing roads and bridges as widening or adding

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drainage. We believe that the term “maintenance,” as used in Resolution 98-616 and the accompanying ballot, is broad enough to include uses of this sort. [FN10]

As discussed above, the ballot language for the 1998 Tax stated as the purpose for the tax: “MAINTENANCE OF THE COUNTY’S ROADS AND BRIDGES.” This language was taken from Resolution 98-616 and was certified by the board of elections and approved by the Secretary of State. However, it was clearly a “condensed text” under R.C. 3505.06(E). This condensed text did not describe completely the purposes and allocation of the taxes levied under the resolution, for it did not list all possible uses of the 1/2% sales and use tax, nor did it mention the allocation of the 1/4% sales and use tax to the county general fund to compensate for the real property tax reduction. [FN11]

In order to determine the uses for which revenues from the 1998 Tax may be expended, it is necessary to look not only at the ballot language, but also at the language of Resolution 98-616, because voter approval of the ballot language resulted in the approval of Resolution 98-616. Hence, the term “maintenance,” as used in the ballot language, was a condensed term for the purposes contemplated by Resolution 98-616, which encompassed the use of the 1/2% tax for both maintenance and improvement. Therefore, revenues from the 1998 Tax may be used for both “maintenance” and “improvement,” as those terms are used in Resolution 98-616. *See generally* 2000 Op. Atty Gen. No. 2000-048, at 2-296 (to determine the purposes for which tax levy proceeds may be used, it is necessary to examine the precise language of the statute under which the tax was levied, “as well as the resolution and ballot language placing the question of the levy before the voters”); 1992 Op. Atty Gen. No. 92-058, at 2-239 (“[i]t is clear that the statement of the purpose of a proposed tax levy as set forth in the resolution and the ballot language must conform and be limited to the purposes authorized by statute”); 1982 Op. Atty Gen. No. 82-037, at 2-108 (“as a general rule, where the particular expenditures which a taxing authority wishes to make are not specifically enumerated in

the statement of purpose for the levy, whether the proposed expenditures may be made depends upon whether such uses come within the purpose as stated in the resolution and on the ballot”).

As discussed above, the statutes under which Delaware County levied the 1/2% tax for the maintenance and improvement of county roads and bridges authorized a tax to provide additional general revenues for the county, and permitted the expenditure of the tax revenues for any purpose for which general fund moneys of the county could be used, including the acquisition or construction of permanent improvements. R.C. 5739.021(A); R.C. 5739.211(A); R.C. 5741.021(A); R.C. 5741.031(A). The county chose to restrict revenues from that tax to specific purposes within the uses allowed for general revenues. *See, e.g.*, note 6, *supra*. Because the statutes under which the county enacted the 1/2% tax did not specify particular road and bridge uses, the county was permitted to determine the road and bridge uses for which the revenues could be expended. The analysis set forth above indicates that, notwithstanding various inconsistencies in language within Resolution 98-616, there was a clear intent to allocate the 1/2% tax for road and bridge maintenance and improvement. The Resolution did not contain a definition of the words “maintenance” and “improvement.” Therefore, it is assumed that these words were given their ordinary meanings. *See generally* R.C. 1.42.

The terms “maintenance” and “improvement” may be used in various senses, and the precise meaning may depend upon the context in which they are used. *See generally Landerhaven Country Club Estates, Ltd. v. First Assembly of God*, No. 64056, 1993 Ohio App. LEXIS 5563 (Cuyahoga County Nov. 18, 1993) (for purposes of construing a restrictive covenant requiring payment of costs for the care of a private road, the determination as to whether particular improvements constituted “repair and maintenance” within the meaning of the restricted covenant, or construction beyond the scope of the relevant language, was properly made by the judge on the basis of all facts and circumstances).

The term “maintenance” refers generally to the

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process of keeping something in proper condition. See 1994 Op. Atty. Gen. No. 94-025, at 2-110 (where “maintenance” is not specifically defined for purposes of R.C. Title 55, it is given its natural, literal, common, or ordinary meaning, which is the work of keeping something in proper condition); *Webster's Third New International Dictionary of the English Language Unabridged* 1362 (1993) (definition of “maintenance” includes “the labor of keeping something... in a state of repair or efficiency”). The term “improvement” extends more broadly to include changes and upgrades. *Webster's Third New International Dictionary of the English Language Unabridged* 1138 (1993) (definition of “improvement” includes “a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs”). Under the most basic understanding of the terms “maintenance” and “improvement,” they include such road and bridge improvements as widening or adding drainage.

The terms “maintenance” and “improvement” are defined in the Revised Code for various purposes, and the definitions apply as specified by statute. [FN12] Although no definition applies directly to the ballot language in question, the terms “maintenance” and “improvement” are used within the Revised Code in manners indicating that they include the widening or drainage of a road. For example, for purposes of provisions governing the authority of the board of county commissioners with respect to county roads, “*improvement*” is defined to mean “any location, establishment, alteration, *widening*, straightening, vacation, or change in the direction of a public road, or part thereof.” R.C. 5553.01 (emphasis added).

That the ordinary usage of the terms “maintenance” and “improvement” includes such operations as widening and providing drainage is evidenced also by the language of R.C. 5555.02, which authorizes the board of county commissioners to construct a public road:

by *improving*, reconstructing, or repairing any existing public road or part of an existing public road by *grading*, paving, *widening*,

altering, straightening, vacating, changing the direction, *draining*, dragging, graveling, macadamizing, resurfacing, applying dust preventives, or otherwise improving the same.... (Emphasis added.)

Under this provision, a road may be repaired or improved by widening or draining, as contemplated in the instant case. *Accord* R.C. 5555.06 (public road may be improved “by grading, draining, paving, straightening, or widening”); see also, e.g., 1981 Op. Atty. Gen. No. 81-039 (syllabus, paragraphs 2 and 3) (repair and maintenance of a road includes cleaning and maintaining the ditches that run along the side of the road for drainage purposes, and also cleaning, repairing, and replacing culverts on the road).

The term “maintenance” may, thus, be broad enough to encompass projects that provide for better drainage or the widening of a road or bridge. The need for drainage is part of the maintenance of a road or bridge, and the presence of adequate drainage is essential for adequate maintenance. Similarly, the widening of a road may be necessary to keep the road in proper condition and, thus, may be part of the maintenance of the road. Even if widening and adding drainage are not included as maintenance, however, they are clearly “improvements” in the ordinary sense of the word, for they improve the condition of the road or bridge, making it more useful and more valuable. Hence, the widening of a road or bridge or the provision of better drainage is included within the condensed term “maintenance,” which, as used in the ballot language, incorporated the term “improvement,” as used in Resolution 98-616. [FN13]

We conclude, accordingly, that the term “maintenance,” as it appeared in ballot language for the continuation of an additional 3/4% sales and use tax in Delaware County in 1998, incorporated Resolution 98-616 of the Delaware County Board of Commissioners which, in turn, provided for revenues from tax at the rate of 1/2% to be used for the maintenance and improvement of county roads and bridges, thereby including such improvements to existing county roads and bridges as widening or adding drainage.

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### Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Resolution 98-616 of the Delaware County Board of Commissioners, as approved by the voters in November of 1998, provides for the continuation of an additional 3/4% sales and use tax, with revenues generated from tax at the rate of 1/2% to be allocated for the maintenance and improvement of county roads and bridges, and revenues generated from tax at the rate of 1/4% to be allocated to the county general fund.

2. The term "maintenance," as it appeared in ballot language for the continuation of an additional 3/4% sales and use tax in Delaware County in 1998, incorporated Resolution 98-616 of the Delaware County Board of Commissioners which, in turn, provided for revenues from tax at the rate of 1/2% to be used for the maintenance and improvement of county roads and bridges, thereby including such improvements to existing county roads and bridges as widening or adding drainage.

Respectfully,

Jim Petro

Attorney General

[FN1]

. In the three Delaware County resolutions addressed in this opinion, there are various instances in which the language refers to 1/2% or 1/4% of the revenues generated by the increased sales and use tax, when it is apparent that the intent, in accordance with the overall tax scheme, was to refer to the revenues derived from tax at the rate of 1/2% or 1/4%. This opinion construes the language in accordance with its evident intent.

[FN2]

. We have been informed that newspaper publication contained a similar description of the ballot issue, stating: "THE BOARD OF COUNTY COMMISSIONERS OF DELAWARE COUNTY PROPOSES THE CONTINUATION OF AN EXISTING SALES AND USE TAX IN THE AMOUNT OF 3/4 PERCENT FOR THE PURPOSE OF MAINTENANCE OF THE

COUNTY'S ROADS AND BRIDGES FOR A PERIOD OF 10 YEARS BEGINNING JANUARY 1, 1999. IF APPROVED, THE REAL PROPERTY TAX WILL BE REDUCED BY 1 MILL EFFECTIVE FOR THE TERM OF THE SALES AND USE TAX." See R.C. 3501.11(G) (directing each board of elections to "[p]rovide for the issuance of all notices, advertisements, and publications concerning elections," except to the extent that the state has that responsibility under R.C. 3501.17(G) with regard to statewide ballot issues); see also R.C. 3501.03.

[FN3]

. Your description of the current controversy indicates that revenues from the 1/2% tax were initially included among other funds appropriated to the county engineer, and that the county engineer used these appropriated funds for maintenance and improvements, with improvements including both changes to existing roads and bridges (such as widening or providing for better drainage) and new construction. See, e.g., Ohio Const. art. XII, §5a; R.C. 4501.04(A) (use of county portion of auto registration distribution fund); R.C. 5735.27(A)(3)-(4) (use of county portion of gasoline excise tax fund); 1994 Op. Atty Gen. No. 94-025, at 2-115 to 2-117.

[FN4]

. Although Resolution 98-616 clearly stated, in Section 2, that the question to be submitted to the voters was "the question of continuing a 3/4 percent sales and use tax..., the 1/2% tax being under sections 5739.021(B)(2)(a) [now R.C. 5739.021(B)(1)] and 5741.021, and the 1/4% tax being under sections 5739.026(A)(3) and 5741.023," the title of the Resolution and its "WHEREAS" clauses referred only to R.C. 5739.021(B)(2) and R.C. 5741.021 as the provisions under which the tax would be levied. Because the 1998 Tax was plainly intended as the continuation of the 1996 Tax, we assume that the 1998 Tax was levied under all four of the sections under which the 1996 Tax was levied. We note, also, that Resolution 98-616 referred to the source of the 1996 Tax as Resolution 96-535, although the resolution that you provided is numbered 96-534.

[FN5]

. The tax levied pursuant to R.C. 5739.021 is "in addition to" the tax levied by R.C. 5739.02 and any

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tax levied pursuant to R.C. 5739.023 or R.C. 5739.026. R.C. 5739.021(E). The tax levied pursuant to R.C. 5741.021 is “in addition to” the tax levied by R.C. 5741.02 and, with limited exceptions, any tax levied pursuant to R.C. 5741.022 or R.C. 5741.023. R.C. 5741.02(B).

[FN6]

. Although R.C. 5739.021 does not expressly authorize a tax levy that restricts the use of sales and use tax revenues to specified purposes within the uses permitted of general revenues of the county, it appears that such restrictions have been imposed in other instances. For example, 2000 Op. Atty Gen. No. 2000-044 and 1999 Op. Atty Gen. No. 99-022 addressed a situation in which the authorized purpose of a sales and use tax under R.C. 5739.021 and R.C. 5741.021 was described on the ballot as “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.” 2000 Op. Atty Gen. No. 2000-044, at 2-265. The ambiguity of this language and possible methods of accounting for the revenues were addressed in 1999 Op. Atty Gen. No. 99-022, at 2-148, and in 2000 Op. Atty Gen. No. 2000-004, at 2-266 n.2; *see also* 1981 Op. Atty Gen. No. 81-035; note 7, *infra*.

We are aware that certain opinions of prior Attorneys General have found that some property tax levies must be available for broad uses authorized by statute and may not be restricted by resolution and ballot to more specific uses, but that other property tax levies may be so restricted. *See* 1990 Op. Atty Gen. No. 90-069, at 2-292 (“[a] line of Attorney General opinions has taken the position that a levy under R.C. 5705.19(A) must be available for all current expenses of a subdivision and may not be restricted by ballot language to particular uses. Special levies may, however, be restricted by resolution and ballot language to particular uses” (citations omitted)); R.C. 5705.19 (in levying a property tax pursuant to R.C. 5705.19, “[t]he resolution shall be confined to the purpose or purposes described in one division of [R.C.

5705.19], to which the revenue derived therefrom shall be applied”); 1965 Op. Atty Gen. No. 65-187 (syllabus) (“[w]hen a tax is proposed to be levied under Section 5705.19 (A), Revised Code, the term ‘current expenses’ must appear on the ballot, and additional words suggesting a limitation within the category of current expenses may not be added to the ballot”); *see also, e.g.*, 1992 Op. Atty Gen. No. 92-058, at 2-239 (“[a]lthough the proceeds of a general levy for current expenses must be available for all current expenses of a subdivision, a special levy may be restricted by ballot language to particular uses” (footnote omitted)); 1988 Op. Atty Gen. No. 88-101, at 2-497 n.1. *See generally* 1990 Op. Atty Gen. No. 90-069, at 2-292 (“county commissioners are not prohibited from using language in the resolution and on the ballot that provides more specifically than the statutory language the uses for which moneys generated by a levy under R.C. 5705.24 [county property tax levy for children services] may be expended”); 1976 Op. Atty Gen. No. 76-032 (syllabus, paragraph 2) (“[w]hen a tax levy is submitted to the voters pursuant to R.C. 3354.12 the ballot shall state the statutory purpose of the proposal, but need not state the specific anticipated use of the proceeds of the levy”); *accord* 1987 Op. Atty Gen. No. 87-096, at 2-639. This opinion assumes that the taxes in question were validly adopted and does not address the extent to which the use of taxes levied under R.C. 5739.021 and R.C. 5741.021 may be limited to purposes more narrow than the range of purposes authorized by statute. *See* note 7, *infra*.

[FN7]

. Tax revenues that are restricted to a particular use must be placed in a fund or account that restricts their expenditure to the authorized purpose. *See, e.g.*, Ohio Const. art. XII, § 5 (“every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied”); *In re Petition for Transfer of Funds*, 52 Ohio App. 3d 1, 2, 556 N.E.2d 191 (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”); R.C. 5705.09; R.C. 5705.10; 2006 Op. Atty Gen. No. 2006-009, at 2-79 (“when particular moneys in the county general fund are collected for specified purposes, their expenditure is restricted to those

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purposes”); 1997 Op. Atty Gen. No. 97-030, at 2-176 (“[i]t is... fundamental under Ohio law that money that is derived from a particular tax levy may be expended only for the purpose for which that levy was adopted”); 1988 Op. Atty Gen. No. **88-018** ; 1987 Op. Atty Gen. No. 87-096, at 2-638 to 2-639 (“the purpose of the tax levy, as set forth in the resolution and ballot language, may not be broader than the purpose or purposes authorized by [statute]”).

[FN8]

. The tax levied pursuant to R.C. 5739.026 is “in addition to” the tax levied by R.C. 5739.02 and any tax levied pursuant to R.C. 5739.021 or R.C. 5739.023. R.C. 5739.026(F). The tax levied pursuant to R.C. 5741.023 is “in addition to” the tax levied by R.C. 5741.02 and, with limited exceptions, any tax levied pursuant to R.C. 5741.021 or R.C. 5741.022. R.C. 5741.023(B).

[FN9]

. Division (E) of R.C. 3505.06 states:

The questions and issues ballot need *not contain the full text of the proposal to be voted upon*. A *condensed text* that will properly describe the question, issue, or an amendment proposed by other than the general assembly shall be used *as prepared and certified* by the secretary of state for state-wide questions or issues or *by the board* [of elections] for local questions or issues. If other than a full text is used, *the full text* of the proposed question, issue, or amendment together with the percentage of affirmative votes necessary for passage as required by law *shall be posted in each polling place in some spot that is easily accessible to the voters*. (Emphasis added.)

[FN10]

. We are aware that, in the instant situation, the concern of some taxpayers about the expenditure of the sales and use tax revenues is grounded in their opposition to a particular road improvement. Hence, they are arguing that they voted only for maintenance of existing roads, and not for improvements that might include the controversial road extension. It is a general rule, however, that revenues from a tax levy may be used for any purpose within the language of the resolution and ballot and, if there are excess revenues, they may be expended for projects that were not originally

anticipated, so long as those projects come within the purpose set forth in the resolution and ballot language. For example, 1979 Op. Atty Gen. No. 79-012 involved a situation in which a board of education prepared plans and specifications for certain capital improvements, including a natatorium, and submitted a tax levy and bond issue to the voters, who rejected it. Prior to a subsequent election, the board of education deleted the natatorium from the plans and specifications, and the voters proceeded to approve the tax levy and bond issue. Later, the project architect announced that, after completion of the planned facilities, there would be a surplus in the building fund. The board of education proceeded to have the natatorium constructed with those surplus funds. The propriety of this action was questioned, and the Attorney General concluded: “Absent a showing of bad faith or abuse of discretion, a board of education may expend surplus proceeds of a bond issue for the construction of a building that falls within the purpose of the bond issue, as stated in the board's resolution and on the ballot placed before the electors of the district, but which was specifically excluded from the board's plans and specifications before such bond issue was placed on the ballot.” 1979 Op. Atty Gen. No. 79-012 (syllabus). The Attorney General included a discussion of the ability of a taxing authority to make changes in the manner in which proceeds of a voter-approved issue are used, as follows:

[T]he critical factor in determining whether a particular expenditure of proceeds of a bond issue is proper is whether the expenditure falls within the purpose stated in the resolution adopted by the taxing authority. There is no provision in R.C. Chapter 133 that imports legal significance to collateral or supplemental materials, such as preliminary plans or specifications or informal statements of intent, considered or prepared by the taxing authority contemporaneously with the adoption of its resolution. Recognizing the *controlling significance of the purpose stated in the resolution adopted by the taxing authority*, the courts have upheld the authority of a taxing authority to amend its plans for the construction of buildings or facilities subsequent to the approval of the bond issue, provided that the

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amendment is consistent with the stated purpose. See, e.g., State ex rel. Board of County Commissioners v. Austin, 158 Ohio St. 476 (1953) (board of county commissioners issued notes and levied a tax for the purpose of constructing a county home, which was constructed without exhausting the proceeds of the tax; upon finding that the original building was inadequate, the board had the authority to use the balance of the proceeds to construct an addition to the original building); Hire v. Board of County Commissioners, 16 Ohio Op. 2d 169 (C.P. Allen County 1960) (board of county commissioners could use funds provided by a bond issue for the construction of an airport at a site other than the site originally designated). More specifically, the courts have held that the requirement that a board of education submit the question of a bond issue to the electors of the district does not withdraw from the board its authority and discretion with respect to the control and management of school buildings. For this reason, a board of education may amend its plans for the construction of school facilities subsequent to the approval of a bond issue for this purpose, provided that the added or substituted facility is one the board is empowered to construct and that it falls within the purpose stated in the resolution. See, e.g., State ex rel. Van Harlingen v. Board of Education, 104 Ohio St. 360 (1922) (approval of a bond issue to raise funds for the construction of a schoolhouse did not require the board to proceed with the construction of a particular building); Bartlett v. Board of Education, 71 Ohio Law Abs. 140 (C.P. Montgomery County 1955) (board of education was not limited by a bond levy, the express purpose of which was to acquire a site and construct an elementary school and additions to existing school buildings, to the construction of a single school; the board could use the proceeds to construct two new buildings). 1979 Op. Atty Gen. No. 79-012, at 2-39 to 2-40 (emphasis added). Thus, the language of the resolution and ballot controls the purpose for which revenues may be expended, and, if there are more funds than had been anticipated, the expenditures may be expanded to include

previously unanticipated projects that come within the purposes set forth in the resolution and ballot language. *Accord* 1980 Op. Atty Gen. No. 80-070; 1979 Op. Atty Gen. No. 79-016; 1971 Op. Atty Gen. No. 71-033. Alternatively, the board of county commissioners is authorized to reduce the rate at which the tax is levied, if it determines that less revenue is needed to fulfill the purpose of the levy. See R.C. 5739.021(D); R.C. 5739.026(D)(2)(c).

[FN11]

. When a tax levy is imposed, the resolution adopting the levy must be consistent with the taxing authority granted by statute, though it may, in proper circumstances, adopt more limited purposes than the range of purposes authorized by statute. See note 6, *supra*. When a levy is submitted to the voters, the ballot language may, similarly, limit the expenditure of funds to purposes more narrow than the range of purposes authorized by statute, but only to the extent that the resolution provides for such limitation. As a general rule, the resolution and the ballot language must be consistent in expressing the purpose for which a particular tax is levied. See, e.g., R.C. 5705.25 (the ballot language for a real property tax levy under R.C. 5705.19 includes the “purpose stated in the resolution”); 1992 Op. Atty Gen. No. 92-027, at 2-102 (“[i]n accordance with constitutional and statutory requirements, the proper use of the levy proceeds is expenditure... for any of the purposes stated in the resolution and ballot language”); 1990 Op. Atty Gen. No. 90-069 (syllabus, paragraph 2) (“[m]oneys derived from a levy under R.C. 5705.24 may be used for any purpose within the language of the resolution and ballot adopting the tax”); 1987 Op. Atty Gen. No. 87-096, at 2-639 (“[t]he ballot language thus parrots the language of the resolution and constitutes notice to the public of the purpose for which funds generated by the levy would be used”). Thus, when it is stated that “no levy moneys may be expended for purposes that are not within the ballot language,” and “if the ballot language is more narrow than the statutory language, that narrow language restricts the permissible expenditures of levy moneys,” it is understood that the ballot language is consistent with the language of the resolution and that the resolution and ballot language, working together,

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may restrict the use of levy proceeds to purposes more narrow than the range of purposes authorized by statute. 1990 Op. Atty Gen. No. 90-069, at 2-292; accord 2005 Op. Atty Gen. No. 2005-044, at 2-481; 2005 Op. Atty Gen. No. 2005-011, at 2-115; see also note 6, *supra*.

[FN12]

. See, e.g., R.C. 5535.07 (for purposes of R.C. 5535.07, “maintenance does not include the construction of any new bridges or culverts or the replacement of any bridges or culverts destroyed by the elements or by natural wear, nor any construction work changing the type of construction existing on said roads at the time the same are taken over in accordance with this section”); R.C. 5543.20 (“[m]aintenance’ as used in this division means actual performance of maintenance work”); R.C. 5553.01; R.C. 5705.01(E) (defining “‘permanent improvement’ or ‘improvement’,” for purposes of R.C. Chapter 5705, to mean “any property, asset, or improvement with an estimated life or usefulness of five years or more, including land and interests therein, and reconstructions, enlargements, and extensions thereof having an estimated life or usefulness of five years or more”); *Roddy v. Andrix*, 32 Ohio Op. 2d 349, 350, 201 N.E.2d 816 (C.P. Madison County 1964) (for purposes of R.C. 5705.19, “[c]onstruction or permanent improvement” is one purpose, and “maintenance and operation” is a different purpose); *Savage v. Bd. of Comm’rs*, 29 Ohio App. 1, 163 N.E. 34 (Hardin County 1928) (on particular facts, improvement of road was repair, rather than new construction, and assessment of cost against nearby property was not authorized); 2000 Op. Atty Gen. No. 2000-048, at 2-298 (“[r]evenue from a tax levied for current expenses or current operating expenses may not be used to acquire or construct permanent improvements unless the authorizing statute explicitly permits such use”); 1994 Op. Atty Gen. No. 94-025; 1979 Op. Atty Gen. No. 79-045 (distinguishing between the repair and maintenance of roads and the construction, reconstruction, resurfacing, or improvement of roads).

[FN13]

. It has been stated that provisions governing elections may be construed liberally to protect the rights of electors to select officials of their choice but that, with regard to tax matters, a more strict

construction is necessary to protect the rights of taxpayers. See *Beck v. City of Cincinnati*, 162 Ohio St. 473, 124 N.E.2d 120 (1955); *Mehling v. Moorehead*, 133 Ohio St. 395, 14 N.E.2d 15 (1938) ; see also *Clark Restaurant Co. v. Evatt*, 146 Ohio St. 86, 64 N.E.2d 113 (1945) (syllabus, paragraph 3) (“[i]n the construction and application of taxing statutes, their provisions cannot be extended by implication beyond the clear import of the language used; nor can their operation be so enlarged as to embrace subjects not specifically enumerated. A strict construction is required and any doubt must be resolved in favor of the taxpayer upon whom, or the property upon which, the burden is sought to be imposed”); *Roddy v. Andrix*, 32 Ohio Op. 2d at 350 (“[t]axes cannot be justified on equitable consideration. Their burden can only be sustained when authorized by positive law”); 1973 Op. Atty Gen. No. 73-031, at 2-120 (“laws providing for the levy of a tax must be construed strictly in favor of the taxpayer and against the taxing authority”). This does not mean, however, that the result always supports the fewest taxes or most restrictive use of moneys. Rather, it supports the intention of the voters, as set forth in the resolution and ballot language governing a particular tax levy. See, e.g., *McNamara v. Kinney*, 70 Ohio St. 2d 63, 67, 434 N.E.2d 1098 (1982) (citing the doctrine that election laws are to be construed liberally, so as to preserve the choice of the people as expressed at an election, to support the conclusion that a tax levy was for an additional tax of 5 mills, as stated on the ballot, rather than for the lesser amount of a 3-mill renewal and an additional 2 mills); see also *In re Sugar Creek Local Sch. Dist.*, 21 Ohio Op. 2d 16, 17, 185 N.E.2d 809 (C.P. Putnam County 1962) (ambiguous ballot language came within rule that “irregularities in the form of the ballot which were not caused by fraud and which neither misled voters nor interfered with the full and fair expression of the voters should not effect a disfranchisement of the voters”).

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