OPINION NO. 80-031

Syllabus:

1. The tax reduction provided by R.C. 3769.08 for permit holders who make capital improvements to a race track facility may be approved for permit holders at that facility even though the permit holders are not directly involved in the construction or financing of the capital improvements. Hence, a tax reduction may be approved for a capital improvement made by a non-permit holder at the request of a permit holder.

2. The tax reduction for capital improvements provided for in R.C. 3769.08 is limited to additions, replacements, or remodelings of structural units and whether an item is a capital improvement is a question of fact. However, the tax reduction may not be approved for items that are moveable or are not made part of a structural unit. Hence, a totalizator, the bulk of which is moveable and not part of a structural unit, does not qualify for the tax reduction provided by R.C. 3769.08.

3. Similarly, for purposes of the tax reduction provided by R.C. 3769.08, the cost of a new race track does not include the cost of moveable items such as totalizators.

To: Henry Gurvis, Chairman, Ohio State Racing Commission, Columbus, Ohio
By: William J. Brown, Attorney General, May 16, 1980

I have before me your request for my opinion regarding the application of the tax abatement provision of R.C. 3769.08. You raise the following specific questions:

> 1. May a tax abatement be approved for capital improvements to a race track facility, made by a non-permit holder at the request of the permit holder?
>
> 2. Does a totalizator system and consequent rehabilitation of mutuel windows at a race track facility qualify for capital improvement tax reductions under the following types of ownership arrangements:
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> a) The totalizator will be owned jointly by one or more permit holders;
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> b) The totalizator will be owned by the track landlord and rented to the permit holders along with the rest of the premises and equipment, and the rental payments will constitute 70% of the landlord's purchase price;
>
> c) The totalizator will be owned by the track landlord and rented to the permit holders along with the rest of the

track premises and equipment, and the rental payments will totally pay for the system without any investments by the landlord;

d) The totalizator will be owned by another entity, which is neither the landlord nor the permit holder nor the totalizator company, and rented to the permit holders, and the rental payments over a five year period will totally pay for the system with no investment by the owner?

3. In the event that an entire race track facility and its totalizator are destroyed by fire, can the cost of a new totalizator be included in the cost of rebuilding the entire race track facility?

R.C. Chapter 3769 governs horse racing and pari-mutuel wagering. Persons who wish to conduct such activities must secure a permit from the Ohio Racing Commission. Pursuant to R.C. 3769.08 permit holders are required to pay a tax upon the amounts wagered in accordance with the formula provided therein. R.C. 3769.08 goes on to provide for a partial reduction of that tax for those permit holders who make capital improvements.

Your first question asks if the tax reduction provided by R.C. 3769.08 may be approved for capital improvements made by a non-permit holder at the request of the permit holder.

R.C. 3769.08 provides in pertinent part:

> To encourage the improvement of racing facilities for the benefit of the public, . . .and to increase the revenue to the state from the increase in pari-mutuel wagering resulting from such improvements, the taxes paid by a permit holder to the state as provided for in this section, shall be reduced by one-half of one per cent of the total amount wagered for those permit holders who make capital improvements to existing race tracks or construct new race tracks. (Emphasis added.)

Hence, it would appear that the tax reduction is limited to those permit holders who "make" qualifying capital improvements. However, what "make" means is not defined or readily apparent. At one extreme "permit holders who make capital improvements" could be read literally to mean permit holders who personally construct capital improvements. I do not believe that construction was intended, nor do I believe that your question that asks whether capital improvements made by a non-permit holder are eligible for tax abatement was intended to be taken that literally.

"Make" has many definitions, but generally it means "to bring into being; . . .to cause; bring about; produce. . . ." Webster's New World Dictionary 855 (2d college ed. 1976). The common meaning of "make" confirms my initial reaction to your question that it is not necessary for a permit holder to personally construct the improvement in order to be a permit holder "who makes capital improvements"; rather, the permit holder need only "bring about" the improvement. Yet even with the aid of the common meaning of "make," it is still not clear what the General Assembly intended by the use of the phrase "permit holders who make capital improvements."

The General Assembly's intent is further confused because R.C. 3769.08 is internally inconsistent. Some parts of the statute indicate that "make" should be broadly construed, while other portions of the statute indicate that "make" should be narrowly construed. For example, the language that follows that part of R.C. 3769.08 quoted above states:

> If more than one permit holder is authorized to conduct racing at the facility which is being built or improved, the cost of the capital

> improvement shall be allocated between or among all the permit holders in the ratio that the permit holders' number of racing days bears to the total number of racing days conducted at the facility. Such reduction . . . shall continue . . . until the total tax reduction reaches seventy per cent of the cost of the new race track or capital improvement, as allocated to each permit holder. . . . The total tax reduction because of capital improvements shall not during any one year exceed for all permit holders using any one track one-half of one per cent of the total amount wagered. . . . (Emphasis added.)

These sentences require that the cost of the capital improvement, and hence, the tax reduction, be allocated among all the permit holders at a particular racing facility, regardless of the involvement of any particular permit holder in bringing about the improvement.[1] Pursuant to these sentences, "make" would have to be broadly construed to allow any permit holder at a facility that is being improved to share in the tax reduction, provided that he applies for the tax reduction.

However, latter portions of R.C. 3769.08 indicate that "make" must be construed more narrowly. R.C. 3769.08 states in pertinent part:

> The cost and expenses to which a tax reduction applies shall be determined by generally accepted accounting principals and verified by an audit of the permit holder's records upon completion of the project by the commission, or by an independent certified public accountant, selected by the permit holder and approved by the commission.

This sentence indicates that to "make" improvements must mean to be directly financially responsible for the capital improvements; otherwise, there would be no reason to assume that the permit holder's records would contain any data, let alone sufficient data, for the Commission to verify the cost of the capital improvements. This construction of "make" is very restrictive and conflicts with that construction just discussed. Hence, R.C. 3769.08 is ambiguous.

In such a situation, R.C. 1.49 provides that it is appropriate to consider several factors in order to ascertain the legislative intent, among which is the administrative construction of the statute. It is this factor that appears most helpful in determining the legislative intent in the instant case. Generally, courts defer to an administrative agency's interpretation of a statute that the administrative agency has responsibility to implement, see, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Jones Metal Products v. Walker, 29 Ohio St. 2d, 173, 181, 281 N.E. 2d 1, 3 (1972), so long as there is a reasonable legal basis for the agency's construction of the statute. Ft. Pierce Utilities v. United States, 606 F.2d 986 (D.C. Cir. 1979), cert. den. __ U.S. __, 100 S. Ct. 83 (1979).

You have advised me that the Racing Commission, which is responsible for implementing R.C. Chapter 3769, has been interpreting the tax reduction provision

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[1]The apparent clarity of the General Assembly's intent as evidenced by these sentences is diminished somewhat because the first sentence does not make sense if read literally. The sentence states that the cost of the improvement is to be allocated among the permit holders in the "ratio that the permit holders' number of racing days bears to the total number of racing days conducted at the facility." Since the possessive plural of "permit holder" is used, the ratio would be one to one. The "permit holders' number of racing days" is all the racing days of all the permit holders. This equals the total number of racing days conducted at the facility. Hence, I assume that the ratio intended was the ratio that the permit holder's number of racing days bears to the total number of racing days conducted at the facility, since a literal construction reaches an unworkable result and since the two succeeding sentences indicate that the interpretation suggested herein reflects the intent of the General Assembly.

in a manner that allows the tax reduction to any permit holder at a track where capital improvements have been made, regardless of the permit holder's imvolvement in bringing about the capital improvement or the manner in which the capital improvement was financed, so long as the permit holder applies for the tax reduction on the proposed capital improvement. This leaves the construction methods and financing details up to the permit holder or holders and race track landlords. I cannot say that such an interpretation of "permit holders who make capital improvements" is not within the ordinary meaning of those words.

Moreover, in light of the rather unique way that race track facilities are owned and operated, this construction of that language is the one that would seem to be best suited to accomplish the legislatively stated purpose of offering the tax reduction—improvement of race track facilities. Giving effect to the legislative intent is, of course, the polestar of all statutory construction. Cohrel v. Robinson, 118 Ohio St. 526, 149 N.E. 871 (1925).

"Capital improvement" is defined in R.C. 3769.08 to be an "addition, replacement or remodeling of a structural unit." By definition then, "capital improvements" become part of the realty of the race track. You have advised me that most permit holders are not also the owners of the tracks at which they conduct race meetings. This means that, absent an agreement to the contrary, improvements will become the property of the owner of the track. This fact will tend to discourage permit holders from "making" capital improvements if the tax reduction of R.C. 3769.08 is restrictively interpreted to be limited to those permit holders who directly pay for capital improvements.

This problem is avoided, however, if the phrase "permit holders who make capital improvements" is interpreted to mean permit holders who bring about capital improvements without regard to how they bring about the capital improvements. This interpretation will further the General Assembly's intent in that it will maximize the number of improvements made at race track facilities by allowing race track owners to make capital improvements on behalf of the permit holders.

Finally, an interpretation of "make" that avoids requiring the Racing Commission to become involved with the construction or financing details of an improvement makes practical sense. Such areas are outside the scope of the Commission's horse racing expertise. Moreover, that part of R.C. 3769.08 that states that the cost of the improvement is to be allocated among the permit holders "in the ratio that the permit holders' number of racing days bears to the total number of racing days conducted at the facility" without regard to any one permit holder's involvement or financial commitment in the capital improvement indicates that such considerations are not relevant to whether the permit holder should be granted the tax reduction. This provision of R.C. 3769.08 is strong support for the conclusion that the Commission need not limit tax reductions to those permit holders who directly bring about or directly finance capital improvements. Hence, because there is a reasonable legal basis for the Commission's interpretation of the statute, it is appropriate for me to defer to the Racing Commission's interpretation of the statute.

Your second question asks whether a totalizator may qualify for the tax reduction under certain described ownership arrangements. In asking that question, you assume that a totalizator is a capital improvement. For the reasons discussed below, that assumption does not appear to be correct.

R.C. 3769.08 defines capital improvement:

> As used in this section, "capital improvement" means an addition, replacement, or remodeling of a structural unit of a race track facility costing at least one hundred thousand dollars including the construction of barns used exclusively for such race track facility. "Capital improvements" does not include the cost of ordinary repairs and maintenance required to keep a race track facility in ordinary operating condition. (Emphasis added.)

Therefore, to qualify as a "capital improvement," the improvement must be an addition to a structure, a replacement of a structure or a remodeling of a structure. Whether an improvement is one of these things is a question of fact.

You have described a totalizator as a system that keeps track of all bets and consists of cash register or typewriter-like machines, computers and associated wires and cabinets. You indicate that the bulk of a totalizator is moveable. Hence, a totalizator, or at least the moveable parts, cannot be considered an "addition, replacement, or remodeling of a structural unit of a race track facility." The wires and certain cabinets associated with the totalizator may qualify as a capital improvement if they are installed in or affixed to walls or floors or some other structural part in such a way that they become part of the structural unit and if they cost more than one hundred thousand dollars. After installation, however, most of the totalizator would simply not be part of the structural unit of the race track.

An interpretation of "capital improvement" which excludes items that are not a part of a structural unit is consistent with the stated purpose of the tax reduction, which is to improve race track facilities so that more money will be wagered and tax revenues will be increased. If tax reductions were not limited to structural additions or modifications and were available to moveable items, there would be no assurance that the "capital improvement" would not be removed as soon as some part or most of it was paid for by the tax reductions. If that occurred, the public would no longer benefit from the "capital improvement" and the increase in revenues from the increase in wagering attributable to the "capital improvement" would be eliminated. Hence, in order to further the legislative purpose of the statute, capital improvements should not be construed to include moveable items such as totalizators.

Since a totalizator does not qualify as a capital improvement, no tax reduction is available under any ownership arrangement. However, in answering your first question, it is clear that ownership arrangement of the capital improvement is not determinative as to whether the tax reduction becomes available to a permit holder. The key is whether the permit holder applies for a tax reduction for a qualifying capital improvement.

Your last question asks if a totalizator may be included in the cost of rebuilding an entire race track where the race track and its totalizator have been destroyed by fire. R.C. 3769.08 allows a tax reduction for capital improvements to existing race tracks or for construction of "new race tracks."

R.C. 3769.08 defines "new race track" or "new racing track" to include "the reconstruction of a race track damaged by fire or other cause which has been declared by the racing commission, as a result of the damage, to be an inadequate facility for the safe operation of horse racing." The definition of "new race track" is not as definitive as that of a capital improvement. Hence, it is not clear whether the General Assembly intended to allow items such as totalizators to be included in the cost of reconstruction. However, such a result is precluded for the following reasons.

First of all, and as noted above, if moveable items could be included in the cost of reconstruction, such items could be removed after the tax reduction has been used up. This would thwart the stated purpose of allowing the tax reduction, for if such items were removed, the public would no longer benefit from the improvements and the state would no longer receive additional taxes from an increase in wagering stimulated by such improvements. Hence, inclusion of moveable items in the cost of reconstructing a new race track could frustrate the express purpose of the General Assembly in offering the tax reductions.

Second, tax reductions are to be construed strictly against the reduction. See, e.g., American Handling Equipment Co. v. Kosydar, 42 Ohio St. 2d 150, 326 N.E. 2d 660 (1975); Dayton Sash & Door Co. v. Kosydar, 36 Ohio St. 2d 120, 304 N.E. 2d 388 (1973); Wallover Oil Co. v. Ohio Water Pollution Control Board, 32 Ohio St.

2d 233, 291 N.E. 2d 469 (1972). This principle of construction precludes construing the tax reduction broadly and, hence, militates against construing "new race track facility" to include moveable items such as totalizators. Moreover, absent some affirmative indication to the contrary, I am reluctant to construe "new race track" in a manner that would allow tax reductions for items that clearly do not qualify for tax reductions as part of a race track improvement. Hence, I believe that "new race track facility" may not be construed to include moveable items such as totalizators.

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

1. The tax reduction provided by R.C. 3769.08 for permit holders who make capital improvements to a race track facility may be approved for permit holders at that facility even though the permit holders are not directly involved in the construction or financing of the capital improvements. Hence, a tax reduction may be approved for a capital improvement made by a non-permit holder at the request of a permit holder.

2. The tax reduction for capital improvements provided for in R.C. 3769.08 is limited to additions, replacements, or remodelings of structural units and whether an item is a capital improvement is a question of fact. However, the tax reduction may not be approved for items that are moveable or are not made part of a structural unit. Hence, a totalizator, the bulk of which is moveable and not part of a structural unit, does not qualify for the tax reduction provided by R.C. 3769.08.

3. Similarly, for purposes of the tax reduction provided by R.C. 3769.08, the cost of a new race track does not include the cost of moveable items such as totalizators.