December 30, 1993

OPINION NO. 93-075

The Honorable Gregory A. White
Lorain County Prosecuting Attorney
226 Middle Avenue, 4th Floor
Elyria, Ohio 44035

Dear Prosecutor White:

You have requested an opinion concerning the disposition of revenue derived from a county sales tax. According to information provided in connection with your request, the county wishes to levy a sales tax pursuant to R.C. 5739.026 and deposit the revenue derived from the sales tax into either a special fund for the county's transit authority or a trust fund. Revenue in the special fund or trust fund would be used "to establish a fixed amount of local matching funds to be used each year to secure the necessary federal operating monies to operate" the county's transit authority. As agreed upon in a conversation with a member of your office, your specific questions have been rephrased as follows:

1. May the revenue derived from a county sales tax levied pursuant to R.C. 5739.026 be deposited into a special fund for the transit authority or into a trust fund?

2. If revenue derived from a county sales tax levied pursuant to R.C. 5739.026 is deposited into a special fund for the transit authority or into a trust fund, is there a limit on the amount of revenue that may be carried forward from year to year in the fund? Similarly, must the revenue in the special fund or trust fund be allocated within a certain specified time?

Sales Tax Levied Pursuant to R.C. 5739.026

R.C. 5739.026 authorizes a board of county commissioners to levy a sales tax to provide additional revenue for a transit authority. This section provides, in part, as follows:

> (A) A board of county commissioners may levy a tax of one-fourth or one-half of one per cent on every retail sale in the county, except sales of watercraft and outboard motors required to be titled pursuant to Chapter 1548. of the Revised Code and sales of motor vehicles, and may increase an existing rate of one-fourth of one per cent to one-half of one per cent, to pay the expenses of administering the tax and, except as provided in division (A)(6) of this section, for any one or more of the following purposes:

> ....
> (2) To provide additional revenues for a transit authority operating in the county[.]
> ....
> If the tax is for more than one of the purposes set forth in division (A) of this section or is exclusively for one of the purposes set forth in division (A)(1), (2), (4), (5), (6), or (7) of this section, the resolution shall not go into effect unless it is approved by a majority of the electors voting on the question of the tax.
> ....
> (D)(1) The resolution levying the tax or increasing the rate of tax shall state the rate of the tax or the rate of the increase; the purpose or purposes for which it is to be levied; the number of years for which it is to be levied or that it is for a continuing period of time; the allocation method required by division (C) of this section; and if required to be submitted to the electors of the county under division (A) of this section, the date of the election at which the proposal shall be submitted to the electors of the county, which shall be not less than seventy-five days after the certification of a copy of the resolution to the board of elections.

Revenue derived from a county sales tax levied pursuant to R.C. 5739.026 is deposited into a separate fund, which is allocated and distributed in accordance with the resolution adopted under R.C. 5739.026. R.C. 5739.211(B); *see* 1988 Op. Att'y Gen. No. 88-018 at 2-70 and 2-71.

Special Funds and Trust Funds

Pursuant to R.C. 5705.09, each county is required to establish the following funds for the deposit of its moneys:

> (A) General fund;
> (B) Sinking fund whenever the subdivision has outstanding bonds other than serial bonds;
> (C) Bond retirement fund, for the retirement of serial bonds, notes, or certificates of indebtedness;
> (D) A special fund for each special levy*;*
> (E) A special bond fund for each bond issue;
> (F) *A special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose;*
> (G) A special fund for each public utility operated by a subdivision;
> (H) *A trust fund for any amount received by a subdivision in trust.* (Emphasis added.)

R.C. 5705.09 thus requires a county to establish a special fund for the revenue derived from each special levy and a trust fund for monies received by the county in trust.

Revenue Derived from a County Sales Tax Levied Pursuant to R.C. 5739.026(A)(2)

Must Be Deposited into a Special Fund

As noted above, revenue derived from a county sales tax levied pursuant to R.C. 5739.026 is allocated and distributed in accordance with the resolution adopted under R.C. 5739.026. R.C. 5739.211(B). In the present context, the purpose of the levy, which must be stated in the resolution, is to provide additional revenues for the county's transit authority. Because a county sales tax levied pursuant to R.C. 5739.026(A)(2) for the purpose of providing additional revenues for the county transit authority is required to be used for a particular purpose, as opposed to being used for current expenses in general, the moneys thus raised must be placed in a special fund under R.C. 5705.09(F), which is to be established for the purpose for which the levy was made. Ohio Const. art. XII, §5 (proceeds of a tax levy must be used for the purpose for which the tax was levied); 1992 Op. Att'y Gen. No. 92-027 at 2-101 ("[w]hen voters adopt a tax levy for specified purposes, proceeds of that levy may be used only for the specified purposes"). This is, indeed, the same procedure that is used with the proceeds of a special levy of property tax. 1990 Op. Att'y Gen. No. 90-030 (proceeds of a special tax levy for permanent improvements must be credited to a special fund which may be used for the stated purpose of the levy only). Accordingly, revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) must be deposited into a special fund.[1]

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[1] In your request letter, you question whether, in light of *Lima v. Allen County Budget Comm'n*, 66 Ohio St. 3d 167, 610 N.E.2d 982 (1993), it is proper for a county to deposit into a special fund the revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2). In *Lima v. Allen County Budget Comm'n*, the Ohio Supreme Court determined that Allen County's Miscellaneous Construction Funds account, which was funded through a permissive sales tax and formed to accumulate money to secure matching federal and state funds for capital improvements, did not constitute a special fund. In reaching this conclusion, the court stated:

> Allen County argues that it held money in its Miscellaneous Construction Funds account to obtain federal and state matching money for building a jail facility and that the account constituted a special fund....
>
> ....
>
> The [Board of Tax Appeals ("BTA")] ruled that *the county did not offer proof that the revenues contained in this account were placed there pursuant to statutory procedures as a special fund and that, despite the county's claim that the account was earmarked for a jail, the money was not formally required to be used for a particular purpose.* Consequently, this amount was a part of the general fund balance to be deducted from expenditures.
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> In *Springfield v. Bethel Twp.* (1982), 69 Ohio St.2d 500, 506-507, 23 O.O.3d 428, 432, 432 N.E.2d 830, 835-836, this court held that a fund comprised of money received from federal grants to be used for certain, unspecified capital improvements was not a special fund, but a trust fund. The court determined that the fund in question was not required to be used for any particular purpose and that Springfield could choose the manner in which, and the projects upon which, it spent the money. This discretionary power prevented the fund from being treated as a special fund.
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> Then, in *Cincinnati v. Hamilton Cty. Budget Comm.* (1986), 25 Ohio St.3d 137, 138-

Revenue Derived from a County Sales Tax Levied Pursuant to R.C. 5739.026(A)(2) May Not Be Deposited into a Trust Fund

You have also asked whether revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) may be deposited into a trust fund. Since a trust fund is used to hold moneys received by a county in trust, *see* R.C. 5705.09(H); *see also City Comm'n of City of Springfield v. Bethel Township*, 69 Ohio St. 2d 500, 432 N.E.2d 830 (1982) (monies that are not required to be used for a particular purpose could be considered trust funds), it would not be the proper type of fund for the deposit of revenue derived from a county sales tax levied under R.C. 5739.026(A)(2). Revenue derived from a tax levied by the county for a particular purpose is not money received by the county in trust. S*ee City Comm'n of City of Springfield v. Bethel Township*. Moreover, as determined above, revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) must be deposited into a special fund. Therefore, revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) may not be deposited into a trust fund.

Limitations on the Special Fund

Your second question asks whether there is a limit upon the amount of revenue in a special

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> 140, 25 OBR 184, 185-187, 495 N.E.2d 396, 398-399, this court held that federal revenue sharing funds are not excluded "special funds." Federal law allowed these funds to be used for any purpose permissible under state and local law, except lobbying, and the federal government could not require that the funds be used for any special purpose. Furthermore, the subdivision had discretion to select the manner in which it would spend the funds.
>
> In this case, *the county presented no evidence on how these miscellaneous construction funds had been restricted.* Its attorney stated at the BTA hearing that the county had no evidence to present. Allen County attached to its BTA brief an Allen County Board of County Commissioner's resolution manifesting authorization for the county to sign a memorandum with Lima to build a new jail, but that is insufficient to establish that the funds had a special designated purpose. (Emphasis added.)

Lima v. Allen County Budget Comm'n, 66 Ohio St. 3d at 169-70, 610 N.E.2d at 984-85.

The court in *Lima v. Allen County Budget Comm'n* thus determined that Allen County's Miscellaneous Construction Funds account, which was funded through a permissive sales tax, did not constitute a special fund. The court specifically noted that the county presented no evidence demonstrating that the monies in the Miscellaneous Construction Funds account had been restricted to a special designated purpose. The reasonable inference from the court's analysis and discussion, therefore, is that an account funded through a county sales tax may constitute a special fund if the account is established pursuant to statutory procedures as a special fund, and if the money deposited therein is required to be used for a particular purpose.

fund comprised of revenues derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) that may be carried forward from year to year. You also wish to know whether the revenue in the special fund must be allocated within a certain specified time.[2]

No provision in the Revised Code either limits the amount of revenue in a special fund comprised of revenues derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) that may be carried forward from year to year, or designates a specific period of time when the revenue in the special fund must be allocated. Additionally, no other statute related to the use of moneys by a county transit authority limits the amount of revenue that may be carried forward from year to year by the transit authority or requires the authority to allocate its revenues within a specific time period. Thus, there is no statutory limit upon the amount of revenue in a special fund comprised of revenues derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) that may be carried forward from year to year. There is also no statutorily prescribed time in which the revenue in such fund must be allocated.

As a general matter, however, revenue derived from a special levy of property tax must be applied during the life of the levy to the purpose for which the levy was passed. 1987 Op. Att'y Gen. No. 87-096; 1966 Op. Att'y Gen. No. 66-144; *see* R.C. 5705.10; *see also* Ohio Const. art. XII, §5. The same principle would appear to apply here also. The situation posed in your request letter is one in which revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) would be used "to establish a fixed amount of local matching funds to be used each year to secure the necessary federal operating monies to operate" the county's transit authority. You also indicate that the tax will be levied until the principal of the fund generates sufficient interest to secure the federal operating monies. When the fund produces the required interest, the tax will no longer be levied.[3] Accordingly, the revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) to establish a fixed amount of local matching funds to be used each year to secure the necessary federal operating monies to operate the county's transit authority must be applied during the life of the sales tax levy to the purpose for which the levy was passed.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised that:

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[2] It is assumed, for the purpose of this opinion, that the resolution does not impose any limitations upon the amount of revenue in the special fund that may be carried forward from year to year, or a specified time in which the revenue in such fund must be allocated.

[3] Whether the principal of the fund generates sufficient interest to secure matching federal operating monies is a factual question that will have to be decided by the board of county commissioners. Any exercise of discretion by the board in that regard must be reasonable and within the limitations set by statute and the resolution to levy the tax. 1989 Op. Att'y Gen. No. 89-078 at 2-363.

1. Revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) must be deposited into a special fund.

2. Revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) may not be deposited into a trust fund.

3. There is no statutory limit upon the amount of revenue in a special fund that is comprised of revenues derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) that may be carried forward from year to year. However, revenue derived from such sales tax must be applied during the life of the levy to the purpose for which the levy was passed.

Respectfully,

LEE FISHER
Attorney General

December 30, 1993

The Honorable Gregory A. White
Lorain County Prosecuting Attorney
226 Middle Avenue, 4th Floor
Elyria, Ohio 44035

SYLLABUS: 93-075

1. Revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) must be deposited into a special fund.

2. Revenue derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) may not be deposited into a trust fund.

3. There is no statutory limit upon the amount of revenue in a special fund that is comprised of revenues derived from a county sales tax levied pursuant to R.C. 5739.026(A)(2) that may be carried forward from year to year. However, revenue derived from such sales tax must be applied during the life of the levy to the purpose for which the levy was passed.