

Governor Kasich Signs Operating Budget Into Law

After vetoing certain provisions, Governor John Kasich signed Amended Substitute House Bill Number 64 into law on June 30. The following is a brief summary of certain items in the Operating Budget.

- **Abandoned Gas Station Cleanup Grant Program** – establishes a grant program through the Development Services Agency for local governments and certain applicants working with local governments to pay for property assessments (up to \$100,000) and remediation (up to \$500,000) related to abandoned gas stations.
- **County Land Reutilization Corporation (CLRC)** – removes the population threshold necessary for a county to establish a CLRC (currently requires a population of at least 60,000).
- **Enterprise Zone Program** – extends the Enterprise Zone tax abatement program two years to October 15, 2017.
- **Township Tax Increment Financing (TIF)** – permits a township with a population of at least 15,000 to extend an exemption that had been established by a TIF resolution adopted before December 31, 1994 for an additional 15 years.
- **Job Creation and Retention Tax Credits** – amends the State Job Creation and Retention Tax Credit programs, including by restricting the eligible payroll to Ohio employee payroll (with certain exceptions), provides for amendments of agreements due to increases or decreases in state income tax rates, and authorizes agreements to include provisions for refunds of the credits received if the taxpayer fails to meet agreement requirements.
- **Local Government Safety Capital Grant Program** – establishes a grant program as part of the Local Government Innovation Council program for purchases of vehicles, equipment, facilities or systems needed to enhance public safety.
- **Shoreline Improvements** – authorizes certain counties along the Lake Erie shore to levy a lodging tax of up to 2% to fund improvements located near the Lake Erie shoreline to be undertaken by a port authority under agreement with the county and authorizes a port authority to issue bonds secured by that lodging tax.
- **Tourism Development Districts** – authorizes the establishment of a tourism development district in a township (currently applicable only in Stark County) and to impose up to a 2% tax on gross receipts from sales made in the district and certain other fees to fund tourism promotion and development in the district.
- **Lodging Tax for Sports Park** – permits a county (currently only Erie County) to impose an additional lodging tax of up to 1% and to use existing lodging taxes to fund costs related to a sports park.
- **Refunding Securities** – amends provisions related to refunding certain local government securities including with respect to the refunding of special obligations.

- **Fiscal Emergency** – amends provisions relating to fiscal emergency, including requiring the State Auditor (under certain circumstances) to declare a fiscal emergency for a political subdivision in fiscal watch that has not made a reasonable effort to correct the fiscal practices that lead to the fiscal watch, reducing from 120 to 90 the days a political subdivision in fiscal watch has to submit its financial recovery plan, and authorizing the State Auditor to conduct a performance audit of a political subdivision in fiscal caution, fiscal watch or fiscal emergency.
- **Special Election** – eliminates the ability to conduct special elections in February.
- **Tax Levy for Cemeteries** – lengthens the maximum term for a tax levy for the purpose of operating a cemetery, including for a continuing period of time.
- **Sale Leaseback Agreements** – authorizes political subdivisions to enter into a sale and leaseback agreement obligating the lessor to make public improvements to the building subject to the lease.

Recent State Tax Decisions

Property Tax Exemption – Management Contracts. In *City of Cincinnati v. Testa*, (2015-Ohio-1775), the Ohio Supreme Court unanimously sustained the Board of Tax Appeals by holding that golf courses owned by the City of Cincinnati are exempt from property tax under ORC 5709.08 as public property used exclusively for a public purpose, notwithstanding the management of the golf courses by a for-profit manager pursuant to a management contract between the City and the for-profit manager. As the Court noted in its opinion, three elements must be satisfied for exemption under ORC 5709.08:

1. the property must be public property;
2. the use of the property must be for a public purpose; and
3. the property must be used exclusively for a public purpose.

The Court had no difficulty concluding that the City's golf courses are public property and are used for a public purpose because the courses were available to the general public, and a public purpose of a municipal corporation is to provide parks and other recreational facilities.

The Court also found that the management contract in question did not prevent the courses from being used exclusively for public purposes because the courses remained under the direction and control of the city and the manager did not have the opportunity to profit from the courses. Specifically, the City retained the authority to set greens fees and operating hours and to approve marketing campaigns, and the City's golf-audit team inspected the courses each week and the City's supervisor of golf inspected the courses each day. The manager's compensation consisted of: (1) a fixed fee; (2) an incentive fee if certain revenue targets are met (to date, none of these targets have been satisfied); and (3) a percentage of the revenue from merchandise, food and beverage sales.

The Court found that the fixed fee was not the receipt of profits from the golf courses because it had to be paid to the manager regardless of whether the courses were profitable. The Court also found that the merchandise, food and beverage sales were incidental to the public purposes of the golf courses, with the manager's share of these revenues never exceeding more than 5% of the revenues in the City's municipal golf fund.

The Court had previously held in *Parma Heights v. Wilkins* (2005), 105 Ohio St.3d 463, that a for-profit lessee's operation of a municipal ice rink pursuant to a lease between the city and the operator prevented the extension of the ORC 5709.08 property tax exemption to the city-owned ice rink. The Tax Commissioner in the *Cincinnati* case argued that a management contract should be treated no differently than a lease for this purpose, and he also argued that even if management contracts are accorded different treatment than leases, the arrangement between Cincinnati and the golf course manager was, in substance, a lease. The Court rejected the contention that management contracts are indistinguishable from leases for purposes of determining whether the ORC 5709.08 exemption applies because a lease, unlike a true management contract, results in the transfer of an element of ownership of the property to the lessee, which causes the property to lose its identity as public property used exclusively for a public purpose. The Court also dismissed the assertion that the management contract here was, in substance, a lease because: (1) the management contract did not give the manager the right of possession of the golf courses and the associated right to exclude others from the courses; (2) unlike a lease, the management contract did not limit the City's access to, and supervision of, the golf courses; and (3) the management contract contained no provision for the payment of rent by the manager to the City.

Property Tax Exemption – CIC. In *Union Township Community Improvement Corp., Inc. v. Testa*, BTA No. 2014-2658, the Board of Tax Appeals (BTA) held that property owned by the Union Township Community Improvement Corporation (CIC) prior to the disposition or lease of that property to for-profit entities was entitled to exemption from property tax under ORC 5709.08 because the CIC held the property as the Township's agent for the public purpose of economic development benefitting the Township.

Property Tax Exemption – VAP Program. In *Kinnear Road Development, LLC v. Testa*, BTA No. 2013-1407, the BTA held that where the Tax Commissioner issued an order pursuant to ORC 5709.87 (the environmental remediation property tax exemption) on March 25, 2013, the exemption applied to the increase in value of the property, including any new improvements, buildings, fixtures and structures, as of March 25, 2013 as compared to the value of the property as of January 1, 2012. In his ORC 5709.87 order, the Tax Commissioner said the exemption did not apply to any new improvements, buildings, fixtures and structures added after January 1, 2012.

Municipal Income Taxes – Deferred Compensation. In *Nationwide Mutual Insurance Company and Nationwide Life Insurance Company v. City of Columbus*, BTA No. 2010-1590, the BTA held that the City of Columbus could tax nonqualified deferred compensation/supplemental executive retirement plan income because, to the extent the SERP constitutes a pension, the City did not exclude pension income from its municipal income tax base. The BTA further held, however, that although ORC Chapter 718 treats nonqualified deferred compensation as municipal taxable income when it is subject to Medicare tax and reported in Box 5 of the employee's IRS Form W-2 (this usually occurs upon separation from employment), the employer here did not have to withhold Columbus income tax on the SERP amounts until they were actually paid because the City had not amended its codified income tax ordinances to require withholding when the SERP amounts were subject to Medicare withholding rather than when these were paid to the employees.

Municipal Income Taxes – Income Tax Credit. In *Lange v. City of Newton Falls* [(2015-Ohio-1873)], the 11th District Court of Appeals affirmed the Trumbull County Court of Common Pleas' grant of Newton Falls' motion for summary judgment on two claims brought in connection with legislation passed by Newton Falls to reduce its income tax credit for income taxes paid by residents to other municipalities. The first claim involved whether a proposed referendum on this legislation was properly excluded from the ballot in the November 2012 election. This claim was dismissed as moot, because no relief was sought on this claim until after the November 2012 election had occurred.

The second claim was that the reduction in the income tax credit would cause the Newton Falls income tax rate to exceed 1%, and this required the approval of the City's electorate under ORC Chapter 718. The Court of Common Pleas granted summary judgment to Newton Falls, holding that Newton Falls could tax the income of its residents wherever earned, and that the tax rate set forth in the City's codified ordinances did not exceed 1% after the reduction in the credit. Stated another way, although the effective municipal income tax rate of a Newton Falls resident affected by the reduction in the tax credit would rise above 1%, the requirement for voter approval in ORC Chapter 718 extends only to the nominal, stated tax rate of the municipality that imposes the tax. The 11th District Court of Appeals affirmed.

Local Income Taxes – State of Maryland US Supreme Court Case

The US Supreme Court, in *Comptroller of Maryland v. Wynne*, 135 S. Ct. 1787 (2015), ruled 5–4 that the county income tax component of the Maryland income tax is unconstitutional because it is “internally inconsistent” and, thus, violates the dormant Commerce Clause. A state tax structure is “internally inconsistent” for purposes of the Commerce Clause if it is assumed that every state has the same tax structure as the one in question and interstate income would be subject to double taxation under that structure. Like all other states that levy an income tax, Maryland imposes the tax on all the taxable income of its residents, wherever earned, and on the taxable income of nonresidents that is derived from Maryland sources. For purposes of the Maryland state income tax, Maryland residents are granted a credit for income taxes paid to other states; this credit is not, however, available for the county component of the Maryland income tax.

The Court maintained that if every state had a tax structure like the county component of the Maryland income tax, interstate income would be subject to double taxation, because it would be taxed both by the state in which the taxpayer earned the income and by the state (or political subdivision, as applicable) in which the taxpayer resides. Thus, to be internally consistent for purposes of the Commerce Clause, a state or local income tax either must be limited to the income of residents, wherever earned, or, if it extends to the income of nonresidents, must afford a credit to residents for income taxes paid to other states or political subdivisions.

Recent Decisions of Interest

Public Records. A report detailing an investigation into the activities of a fire department and its fire chief is a public record under Section 149.43 of the Ohio Revised Code, despite a clause in a contract between the fire chief and the township providing for the terms of the fire chief's resignation that purports to keep the report confidential between the county prosecutor and the investigator. *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309 (Ohio App. 9th Dist.).

Qualification for Office. Where petitioner for a writ of mandamus was elected to village council despite not having met the village's residency requirement of having been a resident of the village for at least one year prior to the election, the village council did not have the authority to refuse to recognize the certification of her election and refuse to seat her in the absence of a valid election contest. State ex rel. *Grady v. Chesterhill*, 2015-Ohio-2216 (Ohio App. 5th Dist.).

Public Records. Handwritten notes prepared by township's fiscal officer during township trustee meetings were not public records under section 149.43 of the Ohio Revised Code because they were "personal in nature," "were taken for [the fiscal officer's] own convenience to serve as a reminder when compiling the official record and were not created to document organization, functions, policies, decisions, procedures, operations and other council activities." State ex rel. *Santefort v. Wayne Twp. Bd. of Trustees*, 2015-Ohio-2009 (Ohio App. 12th Dist.).

Stormwater Utility Change. A stormwater utility charge imposed by a municipality will be classified as a fee if the charge is "reasonable, just, and equitable," and the revenue generated by the fee "is used exclusively for the conduct and operation of the stormwater utility." 2015 Op. Att'y General No. 2015-020.

Financing Recycling Equipment. A board of county commissioners may not borrow from a private, for-profit company to purchase recycling carts and automated recycling trucks for a county solid waste management district, but, under Section 343.01(C) of the Ohio Revised Code, a board of county commissioners may lease recycling carts and automated recycling trucks for a county solid waste management district from a private, for-profit company. Also, under the authority granted by Section 307.01-02 of the Ohio Revised Code to a board of county commissioners to equip county offices, a board of county commissioners of a county solid waste management district may acquire recycling carts or automated recycling trucks by installment-purchase, lease-purchase or by lease with a purchase-option. 2015 Op. Att'y General No. 2015-019.

Park District Tax Levy. The approval of a board of township trustees is not required for a board of park commissioners' proposed tax levy under Section 511.27 of the Ohio Revised Code before it may be submitted to the board of elections for placement on the ballot when the township park district includes incorporated territory outside of the township. 2015 Op. Att'y General No. 2015-014.

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