

OPINION NO. 74-061

Syllabus:

A board of county commissioners may certify to the board of elections a ten-year levy for a community mental health and retardation program, even though the amendment to R.C. 5705.221, permitting such ten-year levy, becomes effective after the date of certification but before the November election.

To: Ted W. Brown, Secretary of State, Columbus, Ohio
By: William J. Brown, Attorney General, July 29, 1974

Your request for my opinion recites the facts and poses the question in the following language:

"I have received an inquiry from the Montgomery County Board of Elections relative to Amended House Bill No. 1112 and its effect on a possible tax levy to be submitted to the voters at the November 5 general election.

"Section 5705.221 of the Revised Code allows the county commissioners to submit a tax levy for mental health and retardation purposes. The present statute limits such a levy to five years. Amended House Bill No. 1112 amends this section to permit such a levy to be in effect for a maximum of ten years. This new legislation will not be effective until September 13, 1974.

"A resolution providing for a levy under Section 5705.221 supra must be certified to the board of elections no later than September 6, 1974, in order for it to be submitted to the voters at the general election.

"The question, therefore, is whether the county commissioners have the authority to pass

a resolution for a mental health and retardation levy for a ten-year period prior to the effective date of Amended House Bill No. 1112 so that it may be timely certified to the board of elections for the November general election."

There are, of course, two distinct mental health and retardation programs which are supported by county tax levies, the community program and the county program. In Opinion No. 71-070, Opinions of the Attorney General for 1971, I said:

"A community mental health and retardation board should be carefully distinguished from a county board of mental retardation, which is provided for in Section 5126.01 through 5126.04, Revised Code. The county board's function is limited to supervision of facilities, programs and services in the county for the special training of the mentally retarded, the establishment of which is provided for in Section 5127.01, Revised Code. The community board, on the other hand, has a general planning and coordinating function with respect to all mental health and retardation facilities, programs and services in the community (which may extend over three counties), with the exception of those specifically committed to the jurisdiction of the county board."

See also Opinion No. 71-067, Opinions of the Attorney General for 1971.

Although R.C. 5705.19, which prescribes the manner in which a levy in excess of the ten-mill limitation may be initiated, generally limits the life of such levy to five years, it contains an exception permitting a levy in support of a county mental retardation program to continue in existence for ten years. In pertinent part the Section provides as follows:

* * * * *

"* * *The number of years may be any number not exceeding five, except that * * * when for the maintenance and operation of schools, training centers, workshops, and residential facilities for mentally retarded persons, the increased rate may be for any number of years not exceeding ten. * * *

* * * * *

On the other hand, the authority to submit to the voters a tax levy for a community mental health and retardation program appears in R.C. 5705.221. That Section incorporates the general five year limitation of R.C. 5705.19 but makes no mention of the ten year exception. As it presently stands, R.C. 5705.221 reads as follows:

"At any time the board of county commissioners of any county by a majority vote of the full membership may declare by resolution that the amount of taxes which may be raised

within the ten-mill limitation by levies on the current tax duplicate will be insufficient to provide the necessary requirements of the community mental health and retardation program established pursuant to Chapter 340. of the Revised Code and that it is necessary to levy a tax in excess of such limitation for mental health and retardation purposes.

"Such resolution shall conform to section 5705.19 of the Revised Code and be certified and submitted in the manner provided in section 5705.25 of the Revised Code.

"If the majority of electors voting on a levy to supplement general fund appropriations for the support of the comprehensive mental health and mental retardation program vote in favor of the levy, the board may levy a tax within the county at the additional rate outside the ten-mill limitation during the period, for the purpose stated in the resolution."

In order to put the two programs on the same basis, the General Assembly has now, by enactment of Amended House Bill No. 1112, amended R.C. 5705.221 so as to make the ten year exception applicable to the community program as well as the county program. The effective date of the act is September 13, 1974, and thereafter the Section will read as follows:

"At any time the board of county commissioners of any county by a majority vote of the full membership may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation by levies on the current tax duplicate will be insufficient to provide the necessary requirements of the county's community mental health and retardation service district established pursuant to Chapter 340. of the Revised Code, or the county's contribution to a joint-county district of which the county is a part and that it is necessary to levy a tax in excess of such limitation for mental health and retardation purposes.

"Such resolution shall conform to section 5705.19 of the Revised Code, except that the increased rate may be in effect for any number of years not exceeding ten. The resolution shall be certified and submitted in the manner provided in section 5705.25 of the Revised Code.

"If the majority of electors voting on a levy to supplement general fund appropriations for the support of the comprehensive mental health and mental retardation program vote in favor of the levy, the board may levy a tax within the county at the additional rate outside the ten-mill limitation during the period, for the purpose stated in the resolution."

(Emphasis added.)

Under R.C. 5705.25, any resolution of a board of county commissioners, submitting a tax levy to the voters pursuant to R.C. 5705.221 (which incorporates R.C. 5705.19 by reference), must be certified to the board of elections at least sixty days prior to the general election. You point out that the certification here must be made no later than September 6, 1974, and you ask whether the board of county commissioners may pass a resolution for a ten-year community mental health and retardation levy, prior to the effective date of the new act on September 13, so that it may be timely certified to the board of elections.

It is clear that the authority of the board of county commissioners to certify a resolution to the board of elections still continues under R.C. 5705.221. It is also obvious that the new ten-year levy, if approved by the voters, will not become effective until after the effective date of the amendment to R.C. 5705.221, and after the November election. See the last paragraph of R.C. 5705.25. In an analogous opinion previously rendered at your request, involving a transitional period from one form of municipal government to another, I said (Opinion No. 72-001, Opinions of the Attorney General for 1972):

"The Supreme Court has frequently said that the election laws should be construed, whenever possible, so as to make them operable."

In support of that statement I quoted from State, ex rel. Grace v. Board of Elections, 149 Ohio St. 173, 177 (1948); State, ex rel. Harsha v. Troxel, 125 Ohio St. 235, 237 (1932); Jones v. Cleveland, 124 Ohio St. 544, 547, 548 (1932); and State, ex rel. Eavey v. Smith, 107 Ohio St. 1, 6 (1923). In the light of these authorities I conclude that the board of county commissioners may now adopt a resolution for a ten-year community mental health levy, to be voted on in the November election, even though the amended R.C. 5705.221 will not become effective until September 13, 1974. Any other interpretation would render the amendment inoperable for at least the first year of its existence.

It may be objected that approval of the proposed resolution would give retroactive effect to Amended House Bill No. 1112, contrary to Article II, Section 28, of the Constitution of the State of Ohio. Such an argument prevailed in Kurtz v. City of Columbus, 137 Ohio St. 184 (1940), and the holding of that case was approved and followed in State, ex rel. Cribbet v. Ziegler, 172 Ohio St. 32 (1961). In each of those cases, however, the statute in question was amended by the General Assembly after an election so as to cure the invalidity of the election. In Kurtz the Court said that a statute which grants authority to borrow money and levy taxes "is a grant of authority by the people under the laws in effect at the time of the election." 137 Ohio St. at 193; emphasis added. Here, the amendment to R.C. 5705.221 will become effective before the November election, and the rule of the Kurtz case does not apply. Furthermore, it is generally held that a taxing statute may have a retroactive effect, so long as it does not affect vested rights or the obligations of contracts. 2 Sutherland, Statutory Construction, Sec. 41.17 (Revised 3rd Edition, 1973; and see also, City of Sidney v. Cummins, 93 Ohio St. 328 (1916); Opinion No. 72-009, Opinions of the Attorney General for 1972; and Opinion No. 73-063, Opinions of the Attorney General for 1973. I fail to see how the adoption of a resolution for a ten year levy at the present time can have

any effect on vested rights. The electorate will be accurately informed of the issue, and they will vote on a resolution which, at the time of the election, will fully comply with the law then in effect.

In specific answer to your question it is my opinion, and you are so advised, that a board of county commissioners may certify to the board of elections a ten-year levy for a community mental health and retardation program, even though the amendment to R.C. 5705.221, permitting such ten-year levy, becomes effective after the date of certification but before the November election.