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SYLLABUS:

1. The first paragraph of the syllabus of Opinion No. 3145, Opinions of the Attorney General for 1962, is overruled. (Opinion No. 166, Opinions of the Attorney General for 1963 approved).

2. A township clerk may execute the certificate required by Section 5705.41 (D), Revised Code, if sufficient unencumbered funds will be available to pay notes and interest thereon, issued pursuant to a continuing contract without regard to the source of said unencumbered funds.

Columbus, Ohio, April 23, 1963

Hon. George Cleveland Smythe
Prosecuting Attorney
Delaware County
Delaware, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Village of Ashley in Delaware County, the Township of Oxford in Delaware County, the Township of Peru in Morrow County and the Township of Westfield in Morrow County jointly own and operate a fire department. The fire house and equipment is situated in the Village of Ashley.

“Recently the Village and Townships decided to purchase another fire truck and the Township of Oxford has enough money in its treasury to pay its pro rata share of the down payment of the purchase price and desires to pay the balance of its share of the purchase price by issuing notes maturing in two, three and four years pursuant to Sec. 505.37.

“The general fund has provided enough revenue to meet all fire department expenses incurred by Oxford Township and would also provide enough revenue to retire the notes as they come due in two, three and four years.

“Our question involves Attorney General’s Opinion No. 3145 issued on July 14, 1962, (and an Article by Attorney General Mark McElroy on page 5 of Vol. 28, Number 4, August, 1962 of Ohio Township News), to the effect that ‘the legislation authorizing the issuance of such notes shall provide for levying and collecting annually by taxa-

tion amounts sufficient to pay the interest on and the principal of such notes.'

"No such special levy providing for levying and collecting by taxation amounts sufficient to pay interest and retire the principal on such notes has been passed.

"Neither does said township have a special levy for fire protection under section 5705.19, division (I).

"As stated before, the only source of revenue available to pay the principal and interest on these notes would be from the general fund of the township. There is no question but that the yearly revenue from the general fund would be sufficient to retire the notes.

"The Trustees of Oxford Township do not understand why they must pass a special levy to pay off notes they desire to issue, when their yearly general fund revenue would be sufficient to retire said notes and our question is, does Sec. 505.37, as amended, and interpreted by Opinion No. 3145 prohibit the trustees from paying off notes issued pursuant to Sec. 505.37 and maturing in two, three and four years, from the yearly General Fund Revenue. Also, would the clerk of the township violate Sec. 5705.41 if she placed her certificate on the contract and notes, she knowing that no special levy had ever been passed to retire the notes, but basing her certificate solely upon her knowledge that the yearly General Fund Revenue would be sufficient to retire said notes? Also; would Sec. 5705.191 be the proper Section under which to levy the special tax which is spoken of in Sec. 505.37 as being necessary to pay off the notes?"

At the outset I would point out to you that any consideration of Sections 5705.19 and 5705.191, Revised Code, is unnecessary for those sections have no efficacy unless the required taxes are to be levied in excess of the ten mill limitation. Which, according to your request, is not the case in this particular political subdivision.

The question whether Section 505.37, Revised Code, requires the levying and collecting of a tax sufficient to pay off the interest and principal of notes issued under this section without regard to funds from other sources available for this purpose, and whether Opinion No. 3145, Opinions of the Attorney General for 1962, which so concludes, is in error have been considered by me in a companion (for this purpose) opinion, Opinion No. 166, Opinions of the Attorney General for 1963. I concluded in Opinion No. 166, contrary

to the 1962 opinion, that the amount necessary to be levied is to be determined by the taxing officials at the time the levy is made, annually, after taking into consideration other funds lawfully available to retire notes issued pursuant to Section 505.37, Revised Code, and specifically overruled Opinion No. 3145, Opinions of the Attorney General for 1962, in this regard.

By way of further explanation let me say that Sections 505.37, 5705.29, 5705.31, 5705.41 and 5705.411, Revised Code, are in *para materia* and must be read and applied to each appropriation for the various funds required by the township to exercise its functions. This, of course, includes the funds necessary to service and retire any debt evidenced by interest bearing notes. The use of the so-called continuing contract was made possible by the enactment of Section 5705.41, Revised Code, in 1927 (112 Ohio Laws, 391 (406)). This was done to avoid any possibility of conflict with Section II, Article XII of the Constitution of Ohio. Section 505.37, *supra*, expressly permitting the use of the continuing contract for the purchase of fire equipment was enacted in 1945 (121 Ohio Laws, 123 [124]). Obviously the legislative intention was to broaden rather than restrict the ability of townships to render services to and protection for the residents thereof. The Attorney General, in Opinion No. 1087, Opinions of the Attorney General for 1939, discussed the entire problem of the continuing contract and reviewed the judicial decisions affecting the question up to that date. This opinion is applicable here by analogy. The cases cited therein have not been overruled. These additional citations also support the conclusion that the political subdivision may look to any funds lawfully available in the issuance of notes under Section 505.37, Revised Code. *State ex rel., The City of Cleveland v. Zangerle*, 95 Ohio St., 58; *State ex rel., Bruml v. Village of Brooklyn*, 126 Ohio St., 459; and *State ex rel., Speeth v. Carney*, 163 Ohio St., 159.

It is to be borne in mind that appropriations are made annually by township trustees. This is done in the budget which the trustees submit to the county budget commission. The same is true of the levying of taxes. This is also done annually even though it may be the collection of a tax, voted by the electors for a definite number of years. The levy is accomplished at the time the township budget is approved by the county budget commission. The tax is then

levied and the rate determined.

The recent amendment of Section 505.37, *supra*, (129 Ohio Laws, 1817 [1818]), was effected November 8, 1961. The following language was added:

“* * * The legislation authorizing the issuance of such notes shall provide for levying and collecting annually by taxation amounts sufficient to pay the interest on and principal of such notes. * * *”

It was never intended by this proviso to require additional taxes either by resolution or voted levy. It only put into Section 505.37, *supra*, the existing requirement of Section 5705.41 (D), Revised Code, as to continuing contracts in the interest of clarity. To hold otherwise would thwart the legislative intent, impose taxes that are not necessary and emasculate established fiscal procedure. See Opinion No. 1604, Opinions of the Attorney General for 1958, page 22; Opinion No. 1304, Opinions of the Attorney General for 1960, page 305, and Opinion No. 2595, Opinions of the Attorney General for 1961, and the citations therein.

To further support my conclusion as to the import of the recent amendment of Section 505.37, *supra*, you are referred to Section 5705.411, Revised Code. This section is new. It was passed by the 104th General Assembly which amended Section 505.37, *supra*. It became effective on September 26, 1961 (129 Ohio Laws, 437) and reads as follows:

“Upon the approval of a tax levy by the electors of a county under section 5705.191 (5705.19.1) of the Revised Code for the purpose of providing funds for the acquisition for construction of a specific permanent improvement or class of permanent improvements for the county, the total anticipated proceeds from such levy are deemed appropriated for such purpose by the taxing authority of the county and are deemed in process of collection within the meaning of section 5705.41 of the Revised Code.”

The effect of this statute is obvious. It defines the meaning of the words “appropriated” and “or in the process of collection” contained in Section 5705.41 (D), Revised Code, which is the section wherein the fiscal officers certificate necessary to validate a continuing contract is set forth.

Therefore, it is my opinion and you are advised:

1. The first paragraph of the syllabus of Opinion No. 3145, Opinions of the Attorney General for 1962, is overruled. (Opinion No. 166, Opinions of the Attorney General for 1963 approved).

2. A township clerk may execute the certificate required by Section 5705.41 (D), Revised Code, if sufficient unencumbered funds will be available to pay notes and interest thereon, issued pursuant to a continuing contract without regard to the source of said unencumbered funds.

Respectfully,

WILLIAM B. SAXBE

Attorney General