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SYLLABUS:

A tax levy approved in accordance with Section 5705.21, Revised Code, at a special election held on December 10 or December 12, 1963, may not be extended upon the tax list and duplicate for the current year (1963). Opinion No. 2145, Opinions of the Attorney General for 1961, approved and followed. Opinion No. 2657, Opinions of the Attorney General for 1961 modified.

Columbus, Ohio, December 9, 1963

Hon. John S. Ballard
Prosecuting Attorney
Summit County
Akron, Ohio

Dear Sir:

Your request of November 12, 1963, states that pursuant to the provisions of Section 5705.21, Revised Code, several local school districts propose to submit tax levies to their electorate at special elections to be held on December 10th and December 12th. Assuming the proposed levies will be approved at said special elections you ask my opinion on the following questions:

1. May such levies be extended upon the tax duplicate for 1963 to be collected in 1964?
2. If such levies are to be extended, shall they be extended in the first half of 1963 collection, or shall the entire first year's levy be extended on the second half of 1963 collections, in view of the requirement for extension after the February settlement next succeeding the special election?
3. Does the fact that these elections will be held between December 10th and December 15th cause any conflict with the 20th day of December recited in Section 5719.19?

Your inquiry makes it apparent that all of the resolutions of necessity involved were adopted by the local boards of education after the day of the general election in November. From the copies of the resolutions submitted, it appears that three boards of education which qualify as taxing authorities are involved and one of these is proposing to submit two separate special levies to the electorate by two separate resolutions each of which read in part "at

a SPECIAL ELECTION to be held in accordance to R. C. Sec. 5705.21, on December 10, 1963." All of the resolutions of all of the school districts propose that the respective ballots shall include the words "for a period of five years and shall be included upon the tax duplicates for the years 1963 to 1967 both inclusive."

You also direct my attention to two opinions issued by my predecessor in relation to this subject. The second branch of the syllabus of opinion No. 2145, Opinions of the Attorney General for 1961, reads:

"2. Where a tax levy is approved by the voters of a taxing district at a special election held in December pursuant to Section 5705.191, Revised Code, the county auditor is not required to extend such tax levy on the tax list and duplicate for the current year."

The syllabus of Opinion No. 2657 of the same year reads:

"If a board of education of a school district pursuant to Section 5705.21, Revised Code, resolves to submit the question of an additional tax levy for school district purposes to a vote of the electors of such school district, and the resolution of the board in accordance with Section 5705.19, Revised Code, specifies that such additional tax levy is to be placed upon the tax duplicate for the current year, then the levy, if it receives a favorable vote, must be extended on the current tax duplicate for collection pursuant to Section 5705.25, Revised Code, and after the first year, the tax levy shall be included in the annual tax budget that is certified to the county budget commission."

Section 5705.21, Revised Code, authorizes local boards of education to declare by resolution that it is necessary to levy a tax outside the ten-mill limitation and provides that the question of such additional tax levy may be submitted to the electors at a special election on the first Tuesday after the first Monday in May or on another day to be specified in the resolution. In addition to the specific requirement of Section 5705.21, Revised Code, concerning the resolution said section provides that the resolution shall conform with Section 5705.19, Revised Code. Finally, Section 5705.21 Revised Code, provides that Section 5705.25, Revised Code, "shall govern the arrangements for the submission of such question and other matters concerning such election."

Upon careful analysis of the statutes involved I find I am not

in accord with the reasoning in Opinion No. 2657, *supra*, particularly that portion which states:

“* * * Under the provisions of Section 5705.25, *supra*, to which Section 5705.21, *supra*, refers, if the resolution specifies that the tax levy is to be placed upon the tax duplicate for the current year, then it must be extended on the current tax duplicate for collection. * * *”

Such logic may well apply in the case of a levy resulting from action pursuant to Sections 5705.19 and 5705.192, Revised Code, because Section 5705.25, Revised Code, is applicable in all respects as to these. However, as to levies resulting from actions pursuant to Section 5705.21, Revised Code, Section 5705.25, Revised Code, is significant only in that it governs the arrangements for the submission of the question to the electors and other matters concerning such election which are not specifically provided for by Section 5705.21, Revised Code. It does not control as to events after such special election. Opinion No. 2145, *supra*, which dealt with a proposed levy under Section 5705.191, Revised Code, points out that a special election held in December could not have been held pursuant to Section 5705.25, Revised Code. That opinion then states:

“* * * Such a special election could be held in December, however, pursuant to Section 5705.191, Revised Code, but the result of such election is not required by this section to be certified immediately and the taxes extended on the duplicate for the current year as provided for in Section 5705.25, *supra*. On the contrary, Section 5705.191, *supra*, specifically provides that, ‘Such tax levy shall be included in the next annual tax budget that is certified to the county budget commission.’ * * *”

What was said with respect to Section 5705.191, Revised Code, must also be applicable to Section 5705.21, Revised Code, because the pertinent provisions of these sections, as to events after approval by the electors, are very similar.

Sections 5705.19, 5705.191, 5705.192, 5705.193, 5705.20, and 5705.21, Revised Code, contain considerable repetition of language and all are interrelated to Section 5705.25, Revised Code. This fact, coupled with the circumstances presented in the request for Opinion No. 2657, *supra*, may have led to the conclusion therein, with which I am now unable to concur.

As previously stated, Section 5705.25, Revised Code, is of significance in relation to Section 5705.21, Revised Code, only to the extent that it governs arrangements for submission of the question and other matters concerning the election. Section 5705.21, Revised Code, contains specific provisions as to events which shall follow a favorable vote. These are as follows:

“* * * the board of education of the school district may forthwith make the necessary levy within such school district at the additional rate, or at any lesser rate in excess of the ten-mill limitation on the tax list, for the purpose stated in the resolution. Such tax levy shall be included in the next annual budget that is certified to the county budget commission. After the approval of such levy vote and prior to the time when the first tax collection from such levy can be made, the board of education of the school district may anticipate a fraction of the proceeds of such levy and issue anticipation notes in an amount not exceeding fifty per cent of the total estimated proceeds of the levy throughout its life.”

By this language the legislature clearly anticipated and made provision for any situation in which need for the revenue was of such urgency that it was necessary to avoid the delay of waiting for the first collection. This language is applicable to all situations, without limitations, in which the levy is approved pursuant to Section 5705.21, Revised Code.

This brings us to a consideration of the provisions of Section 5705.19, Revised Code, with which the resolutions authorized by Section 5705.21, Revised Code, must conform. It is appropriate to note that the conformity required can only be that which is not inconsistent with the independent requirements of Section 5705.21, Revised Code. To conform with Section 5705.19, Revised Code, the resolution must:

1. be confined to a single purpose,
2. specify the amount of increase in rate which it is necessary to levy,
3. state the purpose thereof, and
4. state the number of years during which such increase shall be in effect, which according to Section 5705.21, Revised Code, may not exceed five years.

Section 5705.19, Revised Code, also provides that the number of years during which the increase is to be in effect "may or may not include a levy upon the duplicate of the current year." Does that language mean that resolutions adopted pursuant to Section 5705.21, Revised Code, may specify that the proposed levy shall be applied to the duplicate for the current year without limitation? In my opinion it does not. First, because Section 5705.19, Revised Code, is directed initially to resolutions of necessity referred to therein which are required to be adopted prior to the fifteenth day of September. Second, because under Section 5705.21, Revised Code, a resolution of necessity may be adopted at any time, which obviously includes the last four weeks of the year. In view of the time required for publication this would result in the special election being held in the following year. Further, a resolution of necessity so providing could well result in a levy being made after December 20, which would constitute an attempt to increase the levy upon the tax list and duplicate of the current year after the taxes for that year had been determined and the first half thereof paid as required by Section 5719.17, Revised Code. Obviously this is an anomalous, undesirable, and impossible result.

In Opinion No. 4559, Opinions of the Attorney General for 1935, it was ruled that when a taxing authority failed to make a levy, which had been authorized by vote, until too late for the auditor to extend the levy on the tax duplicate for that year for collection with the first half year's collection of taxes on that duplicate, said taxing authority was without power to effectively make the levy at a later date. If a taxing authority cannot effectively make a late levy pursuant to an authorization by vote timely made, it must follow that a taxing authority cannot effectively make a levy on a current year's duplicate when both the authorizing vote and the action of the taxing authority are late.

It is my opinion that the language of Section 5705.19, Revised Code, which provides that the increase "may or may not include a levy upon the duplicate of the current year" must be considered as permissive only in that it permits the increased levy to be placed upon the duplicate of the current year when, pursuant to Section 5705.21, Revised Code, such action is possible. This statement requires an understanding of the sequence of events involved in

making a levy such as is being discussed. In Opinion No. 1452, Opinions of the Attorney General for 1957, I summarized these as follows:

“The procedure by which the rate of the tax to be levied in any year against real estate is to be determined, as well as the process of making the levy, is set forth in Chapter 5705., Revised Code, and briefly stated, begins with the preparation by each taxing subdivision of a budget showing an estimate of its contemplated revenue and expenditures for the ensuing fiscal year. This budget is to be presented to the county auditor on or before July 20, and by the auditor sent to the budget commission. Following review by the budget commission its action is certified to the subdivision concerned, together with an estimate by the auditor of the rate of each tax necessary to be levied by each taxing subdivision. The subdivisions are then required by ordinance or resolution to levy the tax and certify to the county auditor the levy so made on or before October 1, or at such later date as may be approved by the Board of Tax Appeals. Section 5705.34, Revised Code. It is this levy that is extended upon the general tax list and duplicate by the county auditor, and by him certified to the county treasurer for collection. Sections 319.28 and 319.30, Revised Code.”

For our present purpose I must now add to this explanation a further reference from Section 5705.34, Revised Code, which provides in part:

“* * * If the levying of a tax to be placed on the duplicate of the current year is approved by the electors of the subdivision under sections 5705.01 to 5705.47, inclusive, of the Revised Code, * * * the commission shall reconsider and revise its action on the budget of the subdivision for whose benefit the tax is to be levied after the returns of such election are fully canvassed, * * *”

This means that the county budget commission must, if the levy is to be extended upon the current year's duplicate, revise its certification of the subdivision's budget to include the new or additional levy in the anticipated revenue. But Section 5705.21, Revised Code, specifically states that a tax levy approved and made thereunder “shall be included in the next annual tax budget that is certified to the county budget commission.” Thus it clearly appears that the legislature did not anticipate the reconsideration and revision mentioned in Section 5705.34, Revised Code, in con-

nection with a levy made under Section 5705.21, Revised Code. In lieu thereof, it provided for issuance of anticipatory notes.

I conclude that with respect to a levy voted pursuant to Section 5705.21, Revised Code, it was the intention of the legislature to permit the taxing authority to determine whether the levy should be made and extended upon the current year's tax list and duplicate in those cases in which the results of the special election will be known prior to the time for submission of the annual tax budget for that year. It follows that a statement in a resolution of necessity adopted pursuant to Section 5705.21, Revised Code, specifying that the proposed tax is to be extended on the tax list and duplicate of the current year, if approved at the special election held thereon, is effective when said resolution further specifies that said special election shall be held in time for the results thereof to be known prior to the time for submission of the annual tax budget for that year. Conversely, it also follows that such a statement in a resolution of necessity adopted pursuant to Section 5705.21, Revised Code, after the day of a general election in November, calling for a special election in December, must be considered as ineffective. The reasoning applied in Opinion No. 2145, *supra*, is consistent with this conclusion.

It should be noted that the conclusion stated goes only to the effectiveness of the attempt to make the levy upon the current year's tax list and duplicate. In my opinion the ineffectiveness of that attempt would not invalidate an election held pursuant to such a resolution as there is no requirement that a levy be made in each of the years specified on the ballot by which the question is submitted to the electorate. Neither would it extend the levy beyond the year 1967 as stated on the ballot. The effect of omitting to make a levy in one of the years for which the same has been authorized by the electorate is discussed in Opinion No. 4863, Opinions of the Attorney General for 1935.

In so concluding I am not unmindful of the irreconcilable conflict in the law, as to that date for extension of a levy upon the tax list and duplicate, which was discussed in Opinion No. 2145, *supra*. That conflict was resolved as requiring the auditor to stand ready to extend upon the current tax list and duplicate a levy

voted and made pursuant to Section 5705.25, Revised Code, notwithstanding the fact that the election thereon would occur on the day of the general election in November, which is after the October 1 date specified in Section 5705.34, Revised Code, for certification to the auditor of the levy to be extended. But the conflict there cited exists when the special levy is approved at an election held pursuant to Section 5705.25, Revised Code. I do not find the same irreconcilable conflict with respect to special levies approved at special elections held in December pursuant to Section 5705.21, Revised Code. Since all of the resolutions involved in your inquiry were adopted after the day of the general election in November and call for a special election in December, I do not find it necessary to consider what the effect might have been had the date specified for the special elections been the day of the general election in November.

The fact that one of the school districts is proposing to submit two separate levies, one a renewal of 13.3 mills and the other an addition of 5.92 mills, requires further comment.

Section 5705.21, Revised Code, provides that "No more than one such special election shall be held in any one year." I recognize that the board of education may be of the view that it is calling for only a single special election to be held on December 10, 1963 and that the submission of two questions on two separate ballots does not alter the fact that this is a single special election. Perhaps it was led to this conclusion by that portion of Section 5705.25, Revised Code, which states "More than one such question may be submitted at the same election." If so, I feel it has been misled.

The tenor of Section 5705.21, Revised Code, indicates it is directed to the approval of a single tax levy. The form of the ballot specified by Section 5705.25, Revised Code, specifically provides for a single ballot the heading of which shall, in the case of a combination of a renewal and increase, start with the words:

A renewal of . . . mills and and increase of . . . mills
to constitute a tax for the benefit of (name of subdivision)
. . . for the purpose of (purpose stated in the resolution)
. . . at a rate not exceeding . . . mills for each one dollar
of valuation, * * *

It therefore appears the submission of two levies, one an increase and one a renewal by separate ballots on the same special election day, is not consistent with Sections 5705.21 and 5705.25, Revised Code. The inconsistency of so doing is further illustrated by the second paragraph of the two resolutions which recites:

“WHEREAS, no other election has been called during the calendar year of 1963 under the authority of Section 5705.21 of the Revised Code of the State of Ohio,”

Obviously, if these two resolutions are to be viewed as entirely separate and independent one must contradict the other.

The provision of Section 5705.25, Revised Code, to the effect that more than one such question may be submitted at the same election refers to questions presented by different taxing authorities or to questions presented by the same taxing authority under different statutory authorizations. I can not conclude that it means that a taxing authority may split a single question authorized under a single statutory provision into several parts, for under such a construction there would be no end to the extent to which a proposed levy could be divided into separate ballots.

An analysis of the portion of the statute above quoted reveals that the legislature has not provided for the appointment of members of local school district boards of education to a joint vocational school district board of education such as is contemplated by your inquiry. Where a joint vocational school district is to be composed of local school districts and a city school district, all located in the same county, the joint vocational school district is to be administered by the county board of education provided all of the boards of education of the participating school districts so choose. If all of the boards of education of the participating school districts do not so choose then the joint vocational school district is to be administered by a joint vocational school district board of education which “shall be composed of one or more persons who are members of the boards of education from each of the city, exempted village, or county school districts affected to be appointed by the boards of education of such school districts.” Significantly, boards of education of local school districts are not mentioned as a source of appointees to a joint vocational school district board of education. I conclude therefrom that the legislature did not intend that mem-

bers of local school district boards of education should be appointed to joint vocational school district boards of education. This conclusion is strengthened by the fact that even where the joint vocational school district is composed solely of local school districts no provision is made for appointing members of local school district boards of education to joint vocational school district boards of education. In such an instance if all of the participating school districts are local school districts and are located in one county the statute provides that the county board of education shall serve as the joint vocational school district board of education. It is also strengthened by the following quote from Section 3311.213, Revised Code, which deals with enlargement of an existing joint vocational school district:

“* * * On the addition of a local school district to the joint vocational school district, pursuant to this section, the board of education of such joint vocational school district may submit to the state board of education a proposal to enlarge the membership of such board by the addition of one or more persons who are members of the county board of education of such additional local school district. * * *”

It is apparent that any plan for a joint vocational school district which proposes the appointment of persons not specified by Section 3311.19, Revised Code, to a joint vocational school district board of education must be considered as failing to meet the requirements of the statute. Both of the forms of proportional representation suggested in your first question fail to meet the statutory requirements. The form suggested by subparagraph A fails to satisfy the statute because it proposes the appointment of members of local school district boards of education and also residents of the city school district who are not members of the city school district board of education. Neither of these groups are specified in Section 3311.19, Revised Code, as a source from which members of a joint vocational school district board of education may be appointed. The form suggested by subparagraph B fails to satisfy the statute in that it proposes the appointment of two members to the joint vocational school district board of education “from the county school district of which the local school districts are a part” and three members “from the city school district.” The defect in this suggested form is that it does not specify that the appointees are to be

members of the board of education of the school districts named therein.

The plan suggested by subparagraph B would satisfy the statutory requirement if modified to provide for the appointment to the joint vocational school district board of education of a given number from the members of the board of education of the county school district of which the local school districts are a part and of a given number from the members of the board of education of the city school district. Section 3311.19, Revised Code, makes no requirement as to the total membership of a joint vocational school district board of education except that there must be at least one member from each of the boards of education from which the appointments are to be made and the total must be an odd number. However, it is pertinent to note that inasmuch as the allocation, i.e., proportional representation, is to be determined in the plan required by Section 3311.16, Revised Code, that allocation is subject to the approval of all of the boards of education of all of the participating school districts since each one has the privilege under Section 3311.17, Revised Code, of determining whether it will, or will not, participate in the proposed joint vocational school district.

Your second, third and fourth questions are most conveniently answered in the inverse order of presentation. Your fourth question requires an examination of the basic nature of a board of education, the capacity in which it holds school property, and an interpretation of Section 3311.212, Revised Code, in the light thereof.

A board of education is a creation of the general assembly, a creature of statute, the paramount purpose of which is to fulfill the mandate of Article VI, Section 2, Constitution of Ohio; namely, to secure a thorough and efficient system of common schools throughout the state. To this end it is declared by Section 3313.17, Revised Code, to be a body politic and corporate and to have power to acquire, hold and dispose of real and personal property. However, as a creature of statute it has no inherent power or authority. It has only such power as is expressly granted by statute and such power as may be fairly and necessarily implied from the powers expressly granted which are essential to the accomplishment of its objectives.

As stated in branch one of the syllabus of *Schwing v. McClure et al., Trustees*, 120 Ohio St., 335 (1929) :

In view of the fact that the two resolutions were adopted simultaneously, I suggest that unless one is withdrawn the board of elections must view them as a single two part resolution and make up the ballot accordingly.

In conclusion, it is my opinion and you are advised that a tax levy approved in accordance with Section 5705.21, Revised Code, at a special election held on December 10 or December 12, 1963, may not be extended upon the tax list and duplicate for the current year (1963). Having so answered your first question it becomes unnecessary to answer your second and third questions.

Respectfully,
WILLIAM B. SAXBE
Attorney General