

OPINION NO. 94-057**Syllabus:**

A tax levied pursuant to R.C. 6115.46 for preliminary expenses of a sanitary district is a tax within the ten-mill limitation. It is not a mandatory levy under R.C. 5705.31 but is, instead, subject to review and reduction by the county budget commission. The county auditor is not required to levy a preliminary tax requested by the board of directors of a sanitary district pursuant to R.C. 6115.46 when there is no free millage within the ten-mill limitation within the district.

To: Keith A. Shearer, Wayne County Prosecuting Attorney, Wooster, Ohio
By: Lee Fisher, Attorney General, August 30, 1994

You have requested an opinion considering whether the county auditor has a duty to levy a real property tax to pay preliminary expenses of a sanitary district. The sanitary district in question encompasses four townships within Wayne County.¹ It was created pursuant to R.C. 6115.04(F) for the purpose of eradicating mosquitoes within the district. See R.C. 6115.01(G).

Taxing Authority of a Sanitary District

A sanitary district organized in accordance with R.C. Chapter 6115 is a political subdivision of the state with the power to exercise various rights, including the right of taxation and assessment as provided in R.C. Chapter 6115. R.C. 6115.08. A sanitary district organized after October 9, 1981, wholly for the purpose of eradicating mosquitoes and other biting arthropods, is governed by a board of directors appointed as prescribed by statute. R.C. 6115.101. The board is authorized to levy a tax to pay for preliminary expenses ("preliminary tax") as follows:

As soon as any district has been organized, and a board of directors of the sanitary district has been appointed and qualified, such board may levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This tax shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. If such items of expense have already been paid in whole or in part from other sources, they may be repaid although the work proposed may have been found impracticable or for other reasons is abandoned. The collection of such tax levy and the procedure relating to the nonpayment of taxes shall conform in all matters to the collection of taxes and assessments for the district.

R.C. 6115.46 (emphasis added); see R.C. 6115.01(E) (defining "property" to mean "real property").

Your questions relate to the three-tenths of a mill tax levy authorized by R.C. 6115.46. You have asked:

1. Is the Auditor required to levy this millage when there is no free millage within the ten mill limitation within the district?
2. If the answer to the first question is yes, from which taxing district or districts is the corresponding millage to be deducted in order to stay within the ten mill limitation?

¹ Because your request relates to a sanitary district that is located wholly within a single county, this opinion discusses only sanitary districts of that type. It is possible, however, for a sanitary district to be located in more than one county. See, e.g., R.C. 6115.04, .08.

3. Assuming the answer to question one is yes, must the tax be levied for collection in 1994 when the sanitary district has not submitted a budget for 1994, and all other budgets from taxing districts have been approved and certified by the Budget Commission prior to receiving this request?

Ten-Mill Limitation

The ten-mill limitation prohibits the imposition of a property tax in excess of one percent of the value of the property, except as provided by vote of the people or by charter of a municipal corporation. See Ohio Const. art. XII, §2; R.C. 5705.02. Various taxing units may seek to levy taxes on the same property, but the total amount of unvoted taxes actually levied may not exceed ten mills. See, e.g., 1993 Op. Att'y Gen. No. 93-019 at 2-105 ("because of the financial needs of various taxing units, the amount of inside millage sought may exceed the amount of inside millage available"). The levy about which you have inquired has not been submitted to the voters and is, therefore, an unvoted levy.

The county budget commission is responsible for considering tax budgets submitted by the various taxing units and determining the amounts of taxes each taxing unit may levy. See R.C. 5705.28-.34; Op. No. 93-019. The budget commission is required by statute to approve certain levies without modification, if the levies have been properly authorized. The levies that the budget commission must approve are: (1) levies in excess of the ten-mill limitation [including levies approved by the voters, see R.C. 5705.07]; (2) levies for debt charges; (3) levies prescribed by R.C. 742.33(B) and 742.34(B) relative to police and firemen's relief and pension funds; (4) minimum levies for current expense and debt service of each subdivision or taxing unit, based on the amounts allotted to those subdivisions or taxing units during a certain historical period; and (5) levies prescribed by R.C. 3709.29 for general health districts. R.C. 5705.31(A)-(E). Any levy that is not listed in R.C. 5705.31 is not a mandatory levy and is subject to being adjusted or reduced by the county budget commission so as to satisfy the ten-mill limitation. See R.C. 5705.31, .32, .34; 1979 Op. Att'y Gen. No. 79-063.

Tax Levied Under R.C. 6115.46

A sanitary district is a "[t]axing unit" as that term is defined for purposes of R.C. Chapter 5705. See R.C. 5705.01(H). R.C. 6115.46, quoted in relevant part above, authorizes the board of directors of a sanitary district to levy up to three-tenths of a mill on the assessed valuation of the district for preliminary expenses. A levy to pay preliminary expenses is a tax subject to the ten-mill limitation. See R.C. 6115.45(A); 1970 Op. Att'y Gen. No. 70-106 at 2-197 (stating that the levy of an assessment pursuant to R.C. 6115.46 is "subject, of course, to the ten mill limitation imposed by Section 2, Article XII, Ohio Constitution"); cf. *State ex rel. Lewis v. Scioto-Sandusky Conservancy District*, 160 Ohio St. 155, 160, 113 N.E.2d 633, 636 (1953) (construing analogous language governing conservancy districts and concluding that a preliminary tax "is a tax as contemplated by Section 2, Article II of the Constitution" and is subject to the ten-mill limitation).² The statute states that "[t]his tax shall be certified to the

² *State ex rel. Lewis v. Scioto-Sandusky Conservancy District*, 160 Ohio St. 155, 113 N.E.2d 633 (1953), found support for the conclusion that the ten-mill limitation was applicable to a preliminary tax levied by a conservancy district organized and established after January 1.

auditors of the various counties and by them to the respective treasurers of their counties." R.C. 6115.46. Use of the word "shall" may suggest that the tax must be levied as requested by the board of directors of the sanitary district. *See generally Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E. 2d 834 (1971) (in statutory construction, the word "shall" is generally construed as mandatory). A levy under R.C. 6115.46 is not listed in R.C. 5705.31 as a mandatory levy, however. Therefore, it is a levy that is subject to review and adjustment by the county budget commission. *See R.C. 5705.31, .32, .34.*³

The taxing authority of each taxing unit is required to adopt a tax budget and submit it to the county auditor. R.C. 5705.28-.31. The budget includes estimated revenue from various tax levies. R.C. 5705.29. The county budget commission must approve mandatory levies and has discretion to adjust other levies. *See R.C. 5705.31, .32.* The county budget commission may reduce the amount of a levy or decline to certify the levy in accordance with its statutory authority. *See, e.g., Op. No. 79-063* (budget commission may decline to certify a park district levy if certifying the levy would necessitate a reduction in other levies). When the budget commission has completed its work with respect to a tax budget, it certifies its action to the taxing authority, together with a statement of the taxes that may be levied by the taxing authority within the ten-mill limitation. At that time, the taxing authority authorizes the necessary tax levies and certifies them to the county auditor. R.C. 5705.34. The provisions of R.C. 6115.46 do not permit the board of directors of a sanitary district to bypass the general procedure established under R.C. Chapter 5705 and certify a tax levy to the county auditor without going through the county budget commission. *Cf. State ex rel. Lewis v. Scioto-Sandusky Conservancy District*, 160 Ohio St. at 157-60, 113 N.E.2d at 635-36 ("no immediate duty rests on the county auditors" to place on the tax list a conservancy district preliminary tax that was not submitted to the budget commissions of the counties as a levy within the ten-mill limitation or to a vote of the people as a tax beyond the ten-mill limitation).

The direct answer to your first question is, therefore, that the county auditor is not required to levy a preliminary tax requested by the board of directors of a sanitary district pursuant to R.C. 6115.46 when there is no free millage within the ten-mill limitation within the district. In light of this answer, it is unnecessary to address your remaining questions.

Conclusion

For the reasons discussed above, it is my opinion, and you are advised, that a tax levied pursuant to R.C. 6115.46 for preliminary expenses of a sanitary district is a tax within the ten-mill limitation. It is not a mandatory levy under R.C. 5705.31 but is, instead, subject to review and reduction by the county budget commission. The county auditor is not required to levy a

1934, in the fact that Ohio Const. art. XII, §2, as then in effect, expressly excluded from the ten-mill limitation all tax levies provided for by the Conservancy Act of Ohio or the Sanitary District Act of Ohio, as those laws were in force on January 1, 1934, for the purpose of conservancy districts and sanitary districts organized prior to that date. *Id.* at 158-60, 113 N.E.2d at 635-36. Ohio Const. art. XII, §2 has since been amended to delete this exclusion.

³ A sanitary district that is located in more than one county is a taxing unit, *see R.C. 5705.01(H)*, whose levies are subject to review and adjustment by a joint budget commission. *See R.C. 5705.48.*

preliminary tax requested by the board of directors of a sanitary district pursuant to R.C. 6115.46 when there is no free millage within the ten-mill limitation within the district.