

**OPINION NO. 79-016****Syllabus:**

When a special tax levy produces more revenue than originally anticipated by the taxing authority which presented the levy for voter approval, and the taxing authority in good faith determines that a need for further expenditure exists, the taxing authority may spend such excess revenue for the needed project, provided that the project is wholly consistent with the special levy as originally passed by the voters. In such an instance, the county budget commission is required by R.C. 5705.31(A) to approve the levy.

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**To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio**  
**By: William J. Brown, Attorney General, May 24, 1979**

I have before me your request for my opinion which reads, in part, as follows:

A tax levy was placed on the ballot in 1974 for constructing workshops and classrooms for the Seneca County Mental Health and Retardation Center. The levy read as follows:

An additional tax for the benefit of Seneca County for the purpose of paying for the cost of construction of a

workshop and classrooms for the mentally retarded, at a rate not exceeding seven-tenths (.7) of one mill for each dollar of valuation, which amounts to seven (7) cents for each one hundred dollars of valuation, for a period of five (5) years beginning with the current year 1974.

The tax levy was approved, funds were borrowed and the building constructed. The seven-tenths mill is generating considerably more money than is required to pay for the building loans. The Budget Commission wishes to reduce the levy. However, the Mental Health and Retardation Board wishes to add a building approximately 40' x 60', to the original building for equipment storage and expanded workshop area.

Our question, therefore, is: Can the County Mental Health and Retardation Board use the excess funds generated by the seven-tenths mill to construct an additional building for equipment storage and added workshop space?

The question of the board's authority to construct an additional building requires an analysis of the issue of whether a county mental health and retardation board may spend the excess levy funds to construct an additional facility, assuming that such a facility is consistent with the purpose of the levy as approved by the electorate. Necessary to the resolution of your question, however, is an analysis of the issue of whether the county budget commission may overrule the board's wishes, even if the authority to expend funds does exist. For this reason, I believe that an overview of the budgetary process is necessary in order to place in perspective the powers and duties of a county budget commission in relation to the taxing units they serve.

Under the provisions of R.C. 5705.02 and Ohio Const. art. XII, §2, the aggregate amount of taxes that may be levied on any taxable property within a unit shall not in any one year exceed ten mills on each dollar of tax valuation, except for taxes specifically authorized to be levied in excess thereof.

R.C. 5705.07 permits the taxing authority of any subdivision to levy a tax authorized by law to be in excess of the ten-mill limitation where an affirmative vote of the people has occurred. There are a number of specific statutory provisions authorizing such a taxing authority to seek a levy in excess of the ten-mill limitation where a particular purpose exists. See, e.g., 5705.19 et seq.

With respect to your particular question, R.C. 5705.221 authorizes a board of county commissioners to levy a tax outside the ten-mill limitation to provide for the needs of the county mental health and retardation service district. That section provides, in part:

At any time the board of county commissioners of any county . . . may declare by resolution . . . that it is necessary to levy a tax in excess of such limitation for mental health and retardation purposes.

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

If a majority of electors . . . vote in favor of the levy, the board may levy a tax . . . for the purpose stated in the resolution.

It is my understanding that the levy in question was submitted to the electorate under the provisions of this section.

Under the terms of R.C. 5705.221, a board of county commissioners has been vested with the discretion to determine the needs of the mental health and retardation service district and to declare the necessity for additional revenue by taxation outside the ten-mill limitation. When the electors cast a favorable vote, the board is authorized to levy a tax as provided by law.

R.C. Chapter 5705 makes a number of provisions applicable to all levies authorized by R.C. 5705.19 to 5705.221. Under the provisions of R.C. 5705.28, on or before the fifteenth day of July of each year, the taxing authority has the duty to adopt a tax budget for the next succeeding fiscal year. R.C. 5705.29 specifies the information which must be presented in the tax budget adopted; such information must include an estimate of amounts of receipts from taxes authorized to be levied in excess of the ten-mill limitation.

Pursuant to the requirements of R.C. 5705.30, a proposed tax budget must be filed in the office of the fiscal officer of the subdivision for public inspection not less than ten days before its adoption by the taxing authority. After adoption, the budget must be submitted to the county auditor by the twentieth day of July, or at such later date as is prescribed by the Commissioner of Tax Equalization.

Under the provisions of R.C. 5705.31, the county auditor shall present to the county budget commission the annual tax budgets submitted to him, together with estimates prepared by the auditor. R.C. 5705.31 grants to the budget commission certain specified powers to reduce tax levies, but specifies that "[t]he commission shall ascertain that the following levies have been properly authorized and if so authorized, shall approve them without modification: (A) All levies in excess of the ten-mill limitation; . . ."

This provision must be read in conjunction with the budget commission's general duties to adjust the estimated amounts required. As provided by R.C. 5705.341, the county budget commission operates within the requirement that any tax levied for a particular year, whether within the ten-mill limitation or approved by the voters in excess of the ten-mill limitation, must be clearly required by the budget of the taxing district. R.C. 5705.341 provides, in pertinent part:

Nothing in this or any section of the Revised Code shall permit or require the levying of any rate of taxation, whether within the ten-mill limitation or whether the levy has been approved by the electors of the taxing district, the political subdivision or the charter of a municipal corporation in excess of such ten-mill limitation, unless such rate of taxation for the ensuing fiscal year is clearly required by a budget of the taxing district or political subdivision properly and lawfully advertised, adopted, and filed pursuant to the provisions of section 5705.01 to 5705.47 of the Revised Code.

As discussed in 1966 Op. Att'y Gen. No. 66-144, the budget commission and the county auditor do not pro forma authorize a voted levy at the maximum voted millage, irrespective of a subdivision need. When, as was the case in the situation therein under consideration, there is no need, but merely a wish to accumulate tax monies in anticipation of a future use, the levy may be disapproved. But when a taxing authority has made the decision that such a need exists, the budget commission has no power to overrule that decision. The commission's duty is to see that any tax levied will not generate more revenue than is necessary to meet the needs. The taxing authority, however, is authorized to determine what the needs are.

In applying this principle to the situation you describe, it must be observed that the board of county commissioners is, under the terms of R.C. 5705.01 and 5705.221, the taxing authority for a county mental health and retardation service district. As such, it is the entity responsible for determining the tax needs of the district. For this reason, I am assuming that the board of county commissioners concurs in the determination of the mental health and mental retardation board to expand upon what the board of county commissioners originally determined to be the necessities of the district. Since it was within the power of the commissioners as the taxing authority to declare the original need, if, in their present opinion, that need has increased, it follows that it is, likewise, within the power of the board of county commissioners to declare that there is an increased need.

A similar situation arose in State ex rel. Board of County Commissioners v. Austin, 158 Ohio St. 476 (1953). In that case, a board of county commissioners wished to construct an addition to a county home that was built and paid for out of tax revenue generated by a special five year levy placed on the tax duplicate after a resolution of necessity and presentation to the voters. The original building was paid for after only four years of levies had been used, and the county budget commission refused to certify a levy in the fifth year for additional construction since, in their opinion, the original levy had been fulfilled and the board of commissioners lacked authority to levy a tax voted for a specific purpose after such purpose had been accomplished.

The Supreme Court upheld the right of the board of commissioners to levy the tax, stating at 481:

Therefore, since the relator [board of commissioners] found and concluded that the county-home building was inadequate before such authorized tax levy was exhausted and further determined that it was within the purpose and contemplation of the levy to permit the expansion of such building, the relator had the authority to levy the tax for such expansion and should prevail in this action.

The court also stated that it was not within the province of the budget commission to determine whether the use to be made of funds comes within the purpose of the enactment of the tax. This determination is properly made by the taxing authority. In exercising its discretion with respect to such matters, a taxing authority has, however, a duty to act in good faith and to use its best judgment with due regard to the circumstances and interest of the district at the time of its action. See, e.g., Brannon v. Board of Education, 99 Ohio St. 369 (1919); Hire v. Board of County Commissioners, 16 Ohio Op. 2d 169 (C. P. Allen County 1960).

In specific answer to your question, it is my opinion, and you are advised, that:

When a special tax levy produces more revenue than originally anticipated by the taxing authority which presented the levy for voter approval, and the taxing authority in good faith determines that a need for further expenditure exists, the taxing authority may spend such excess revenue for the needed project, provided that the project is wholly consistent with the special levy as originally passed by the voters. In such an instance, the county budget commission is required by R.C. 5705.31(A) to approve the levy.