

OPINION NO. 80-011**Syllabus:**

R.C. 5705.19, R.C. 5705.191 and R.C. 5705.25 do not allow for variable rate tax levies. Levies proposed by counties pursuant to these sections must be fixed rate levies. The only sections in R.C. Chapter 5705 that allow for variable rate levies are R.C. 5705.194, 5705.195, 5705.196 and 5705.197, and these provisions are applicable only to school districts facing emergency requirements.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, March 17, 1980

I have before me your request concerning the lawfulness of a variable rate tax levy. In connection with your question you have provided the following information:

There is currently in effect in Cuyahoga County a Health and Human Services Levy which was placed upon the ballot by the Board of County Commissioners pursuant to the authority granted in O.R.C. 5705.191. The levy which is in the amount of 3.4 mills expires December 31, 1980.

The Board of County Commissioners are interested in the legality of placing a variable rate levy upon the June primary ballot for renewal purposes. It is envisioned that the levy would be for six years and during 1981 the rate would remain 3.4 mills. Each year thereafter, the levy would be increased by .5 of a mill so that in 1986, the last year of the levy, the effective rate would be 5.9 mills.

In light of the statutes cited herein, your opinion is hereby requested as to whether or not the Board of County Commissioners can place a variable rate levy of the nature described upon the ballot or whether the levy must be for a fixed rate throughout the entire period that it is in effect.

R.C. Chapter 5705 governs the imposition of tax levies. Generally, Ohio Const. art. XII, §2¹ and R.C. 5705.02² impose a tax limit of ten mills on all property unless a greater tax is voted for by the electorate. R.C. 5705.19, R.C. 5705.191 and R.C. 5705.25, among other sections in R.C. Chapter 5705, describe the procedures to be followed to establish additional tax levies beyond the ten-mill limitation.

R.C. 5705.191 provides in pertinent part:

The taxing authority of any subdivision, other than the board of education of a school district, by a vote of two-thirds of all its members, 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 an adequate amount for the necessary requirements of the subdivision, and that it is necessary to levy a tax in excess of such limitation for any of the purposes in section 5705.19 of the Revised Code, or to supplement the general fund for the purpose of making appropriations for one or more of the following purposes: public assistance, social services, relief, welfare, hospitalization, health and support of general or tuberculosis hospitals, and that the question of such additional tax levy shall be submitted to the electors of the subdivision at a general, primary, or special election to be held at a time therein specified. . . . Such resolution shall conform to the requirements of section 5705.19 of the Revised Code, except that a levy to supplement the general fund for the purposes of public assistance, social services, relief, welfare, hospitalization, health, or the support of general or tuberculosis hospitals may not be for a longer period than ten years. . . . Said resolution shall go into immediate effect upon its passage and no publication of the same is necessary other than that provided for in the notice of election. A copy of such resolution shall, immediately after its passage, be certified to the board of elections of the proper county or counties in the manner provided by section 5705.25 of the Revised Code, and such section shall govern the arrangements for the submission of such question and other matters with respect to such election, to which said section 5705.25 of the Revised Code refers, excepting that such election shall be held on the date specified in the resolution. . . . (Emphasis added.)

¹Art. XII, §2 provides in pertinent part:

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation.

²R.C. 5705.02 provides:

The aggregate amount of taxes that may be levied on any taxable property in an subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof. The limitation provided by this section shall be known as the "ten-mill limitation," and wherever said term is used in the Revised Code, it refers to and includes both the limitation imposed by this section and the limitation imposed by Section 2 of Article XII, Ohio Constitution.

Hence, it is necessary to review R.C. 5705.19 and R.C. 5705.25 to determine whether variable rate levies may be proposed for the purpose you have described.

R.C. 5705.19 provides in pertinent part:

Such resolution shall be confined to a single purpose, except as hereafter provided, shall specify the amount of the increase in rate which it is necessary to levy, the purpose thereof, and the number of years during which such increase shall be in effect, which may or may not include a levy upon the duplicate of the current year. (Emphasis added.)

The language used indicates that the levy is to be for a fixed rate rather than a variable rate. The statute refers to "the amount of the increase in rate." All the words are in the singular form.

R.C. 5705.25, which governs the form of the ballot for proposed levies, likewise indicates that proposed levies under R.C. 5705.19 are only for one fixed rate:

A copy of any resolution adopted as provided in section 5705.19 or 5705.192 of the Revised Code shall be certified by the taxing authority to the board of elections of the proper county not less than sixty days before the general election in any year, and said board shall submit the proposal to the electors of the subdivision at the succeeding November election. . . . Notice of the election shall be published in a newspaper of general circulation in the subdivision once a week for four consecutive weeks prior to the election, stating the purpose, the proposed increase in rate, expressed in dollars and cents for each one hundred dollars of valuation as well as in mills for each one dollar of valuation, the number of years during which such increase will be in effect, and the time and place of the election.

The form of the ballots cast at such election shall be:

"An additional 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, which amounts to (rate expressed in dollars and cents) for each one hundred dollars of valuation, for (life of indebtedness or number of years the levy is to run)." (Emphasis added.)

Once again the language used indicates that the levies are limited to fixed rate levies and not variable rate levies. The above quoted portion of R.C. 5705.25 directs that notice of the election shall state "the proposed increase in rate" (emphasis added). This indicates just one rate. R.C. 5705.25 then goes on to provide the form of the ballot. That form is mandatory and again indicates that the levy is limited to a fixed rate—"at a rate not exceeding mills. . .for (number of years the levy is to run)." (Emphasis added.)

Where the tax levy is for a renewal and an increase, as is the levy you have inquired about, R.C. 5705.25 provides that the above form be amended as follows:

If the levy submitted is a proposal to renew, increase, or decrease an existing levy, the form of the ballot specified in this section may be changed by substituting for the words "An additional," at the beginning of the form, the words "A renewal of a," in case of proposal to renew an existing levy in the same amount, the words "A renewal of mills and an increase of mills to constitute a," in the case of an increase, or the words "A renewal of part of an existing levy, being a reduction of mills, to constitute a" in the case of a decrease in the proposed levy. (Emphasis added.)

This modification to the form also precludes putting a variable rate levy on the

ballot—"a renewal of mills and an increase of mills to constitute a tax for the benefit of" (emphasis added), as this language assumes just one rate.

By the use of the word "shall" the General Assembly has made it clear that the above described form is mandatory. Without modification the form cannot accommodate a variable rate levy. Hence, the variable rate levy is apparently precluded by R.C. 5705.25.

Further evidence that the General Assembly intended to only allow fixed rate levies pursuant to R.C. 5705.19, 5705.191 and 5705.25 is found in R.C. 5705.194, 5705.195, 5705.196 and 5705.197. These are the only sections in R.C. Chapter 5705 that provide for a mechanism for a taxing district to secure variable amounts of money each year. R.C. 5705.194 provides in pertinent part:

The board of election of any school district may at any time declare by resolution that the revenue which will be raised by all tax levies which the district is authorized to impose, when combined with state and federal revenues, will be insufficient to provide for the emergency requirements of the school district or to prevent temporary or permanent closing of one or more schools within the district, and that it is therefore necessary to levy an additional tax in excess of the ten-mill limitation. Such resolution shall be confined to a single purpose and shall specify the purpose thereof, the amount of money it is necessary to raise for that purpose for each fiscal year the millage is to be imposed. . . . (Emphasis added.)

This section recognizes that certain school districts may need varying amounts of money each year to meet emergency requirements. It allows the boards of education of these school districts to specify such varying amounts in their resolutions. R.C. 5705.194 goes on to provide that R.C. 5705.195 "shall govern the arrangements for submission of such question and other matters concerning such election."

R.C. 5705.195 provides:

Within five days after the resolution is certified to the county auditor as provided by section 5705.194 of the Revised Code, the auditor shall calculate and certify to the taxing authority the annual levy, expressed in dollars and cents for each one hundred dollars of valuation as well as in mills for each one dollar of valuation, throughout the life of the levy which will be required to produce the annual amount set forth in the resolution assuming that the amount of the tax list of such subdivision remains throughout the life of the levy the same as the amount of the tax list for the current year, and if this is not determined, the estimated amount submitted by the auditor to the county budget commission. Thereupon, if the taxing authority desires to proceed with the submission of the question it shall, not less than sixty days before the day of such election, certify its resolution, together with the amount of the average tax levy, expressed in dollars and cents for each one hundred dollars of valuation as well as in mills for each one dollar of valuation, estimated by the auditor, and the number of years the levy is to run to the board of elections of the county which shall prepare the ballots and make other necessary arrangements for the submission of the question to the voters of the subdivision. (Emphasis added.)

R.C. 5705.06 and R.C. 5705.07 then provide that it is this average tax levy that appears on the ballot.

Hence, the General Assembly has provided a mechanism for raising such varying amounts for certain taxing districts for a particular purpose in R.C. 5705.194, 5705.195, 5705.196 and 5705.197. By the terms of those sections that

mechanism is limited, however, to school districts experiencing severe shortages of funds. The fact that the General Assembly expressly provided for variable rate tax levies in R.C. 5705.194, 5705.195, 5705.196, and 5705.197 and did not so provide in R.C. 5705.19, 5705.191, and 5705.25 evidences a clear intent on the part of the General Assembly that variable rate levies not be allowed pursuant to R.C. 5705.19, 5705.191 and 5705.25. The mechanism for securing varying amounts of taxes described in R.C. 5705.194, 5705.195, 5705.196, and 5705.197 is limited to school districts and it is not available for the situation you have described.

Finally, even if there were some ambiguity in R.C. 5705.19, 5705.191 and 5705.25 as to whether variable rate levies were authorized, I would be required to construe such ambiguity against the authority to impose variable rate levies. It is well established that the taxing provisions allowing the imposition of levies beyond the constitutionally mandated limit are for the protection of the taxpayer, are mandatory, and must be strictly construed. Board of Education of Ashville School District v. Briggs, 114 Ohio St. 415, 151 N.E. 327 (1926). In the Ashville School District case the Ohio Supreme Court held that, where the mandatory ballot form for a levy was not complied with, the approval of the levy by the electorate was null. In addition, taxing statutes may not be extended beyond the language used and their operation may not be enlarged so as to embrace subjects not specifically enumerated. Clark Restaurant v. Evatt, 146 Ohio St. 86, 64 N.E. 2d 113 (1945). In the instant case variable rate levies have not been specifically provided for in R.C. 5705.19, R.C. 5705.191, and R.C. 5705.25. Hence, such levies are not authorized by those sections and are, therefore, unavailable for the purpose you have inquired about.

It is certainly conceivable that variable rate levies would make a great deal of economic sense by permitting counties to avoid extracting more tax dollars than they really need at a given point in time. Moreover, I am confident that voters could understand such levies. In short, if I had the power to make law I would authorize variable rate levies under appropriate circumstances and with appropriate safeguards. However, that power rests solely in the General Assembly and if variable rates are to be authorized, they must receive express legislative blessing.

It is, therefore, my opinion, and you are advised, that R.C. 5705.19, R.C. 5705.191 and R.C. 5705.25 do not allow for variable rate tax levies. Levies proposed by counties pursuant to these sections must be fixed rate levies. The only sections in R.C. Chapter 5705 that allow for variable rate levies are R.C. 5705.194, 5705.195, 5705.196 and 5705.197, and these provisions are applicable only to school districts facing emergency requirements.