

*mount Gas Utilities Company vs. Public Utilities Commission*, 125 O. S. 211. The facts in that case as compared with those attending the normal operations of gas companies in the transportation, distribution and sale of gas to consumers, were admittedly *sui generis*. In the case above cited, it appeared that a corporation by cooperation with certain designated persons residing in rural and suburban territory sold to such designated persons, as consumers, petroleum gas from and through a tank and plant which such consumers by financial contributions had helped to install. Even in this case there were circumstances which made it a close question in the mind of the court whether the corporation selling this gas, in the manner above indicated, was not a public utility. However, the court in this case was inclined to the view that the sale of gas in this manner was a merchandising operation, and that the corporation engaged in the sale of the gas was engaged in a private business. Manifestly, if, as conceded by the court, in the case cited, a close question was presented as to whether or not the corporation there involved was engaged in a public utility operation, there can be no question of the status of the Industrial Gas Company as a public utility after it has openly operated as a public utility ever since its incorporation and organization, and after it has invoked the powers of the Public Utilities Commission in securing increased rates for the sale of its gas.

Respectfully,  
JOHN W. BRICKER,  
*Attorney General.*

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1972.

BOARD OF EDUCATION—BUDGET SUBMITTED TO BUDGET COMMISSION MUST CONTAIN ALL ESTIMATED RECEIPTS INCLUDING LIQUID FUEL TAX—UNAUTHORIZED TO LEVY AT GREATER RATE THAN NECESSARY TO PROVIDE FOR NEXT ENSUING YEAR—BUDGET COMMISSION MAY APPROVE TAX LEVY AT RATE LESS THAN 4.85 MILLS WHEN.

**SYLLABUS:**

1. *When a board of education submits its budget to the budget commission pursuant to the requirements of Sections 5625-20 et seq. General Code, Section 5625-21, General Code, requires that there be set forth therein all estimated receipts from sources other than general property tax, and including the amount estimated to be received during the ensuing year from the proceeds of the liquid fuel tax by virtue of the provisions of Section 5542-18, General Code.*

2. *When the budget of a board of education prepared in compliance with the provisions of Section 5625-1, General Code, shows that in order to provide revenue for the purposes of the subdivision it is unnecessary to levy taxes on the general property at a rate equal to, or greater than 4.85 mills and at a rate outside of constitutional limitations equal to the maximum rate authorized by the vote of the people, there is no provision of law which requires or authorizes the tax levying authority of the subdivision to levy such taxes at a greater rate than necessary to provide the necessary funds for the estimated needs of the subdivision during the next ensuing year.*

3. *When the budget of a board of education prepared in compliance with the provisions of Section 5625-1, General Code, shows that, in addition to a levy of taxes theretofore authorized by a vote of the people outside of constitutional limi-*

tations, it is unnecessary to levy taxes within the limitations at the rate of 4.85 mills in order to produce the revenue requested by such board, the budget commission, by reason of the provisions of Section 6525-23, General Code, may approve the levy of taxes within such limitations at a rate less than 4.85 mills.

COLUMBUS, OHIO, December 8, 1933.

HON. RAY B. WATTERS, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion, which reads as follows:

“I would appreciate your opinion on the following proposition:

The Akron City School Board in July, 1933, and prior to the passage of the Liquid Fuel Tax, submitted its budget to the Budget Commission of Summit County, requesting a total amount of \$2,905,000.00, for operation.

The estimated receipts as figured by the Budget Commission are as follows:

Irreducible debt .....	\$1,700.00	
Rental school lands .....	6,000.00	
Depository interest .....	2,600.00	
Special classes.....	26,000.00	
Miscellaneous .....	19,600.00	
Classified personal tax.....	245,295.00	estimated \$5.00 per pupil S. B. No. 30
Fuel Tax (1c) .....	358,557.00	estimated \$7.30 per pupil
General Property Tax.....	2,243,248.00	
This totals.....	<u>\$2,905,000.00</u>	

The first question is, can the fuel tax be used as revenue receipts in making up the amount requested, to wit, \$2,905,000.00?

The school board claims that the amount of the Fuel Tax should be treated separate and apart as an additional amount to the use of the schools over and above the amount requested of \$2,905,000.00 for operation.

If the full tax of \$9.85 was levied, the amount from general property tax would have been \$2,707,842.00. If the intangible personal tax of \$245,295.00 and the revenue totalling \$57,900.00 were allowed, the amount allowed would total \$3,011,037.00, not counting, of course, the one cent fuel tax.

In other words, if I make myself clear, the school board requested \$106,034.00 less than the amount it should have been entitled to as above shown.

The second question is, does the Budget Commission have the authority to reduce the 4.85 levy or the voted five mill levies outside by reason of the additional revenue ensuing from the fuel tax where the total amount requested by the Board of Education as above shown is less than the amount of revenue derived from taxation and other sources?”

The question of law raised by your first inquiry, involves an interpretation of Section 5625-21, General Code. Such section prescribes the nature and form

of the budget presented by the taxing subdivision to the budget commission for the purpose of determining the feasibility of desired tax levies. Such section prescribes that the subdivision must set forth, in its budget, the amount of moneys needed for the operation of the subdivision. It further states that there must be set forth therein the amounts of money which the subdivision anticipates receiving from all sources other than general taxation. Such section in so far as is pertinent to your first inquiry, reads:

"Such budget shall present the following information which shall be presented in such detail as may be prescribed by the bureau:

\* \* \* \*

2. (a) Estimate of receipts from other sources than the general property tax during the ensuing fiscal year, which shall include an estimate of unencumbered balances at the end of the current year, and the funds to which such estimated receipts are credited.

(b) Estimated amount required from the general property tax in each fund, which shall be the difference between the contemplated expenditures therefrom and the estimated receipts, as herein provided. The section of the General Code under which the tax is authorized shall be set forth.

(c) Comparative statements so far as possible, in parallel columns, of taxes and other revenues for the current year and the two preceding years.

3. (a) Amount required for debt charges.

(b) Estimated receipts from other sources than the tax levy for payment of such debt charges.

(c) Net amount for which a tax levy shall be made. This shall be classified as to bonds authorized and issued prior to January 1st, 1922, and authorized and issued subsequent to such date, and as to what portion of the levy will be within and without the fifteen mill limitation.

4. Estimate of amounts from taxes authorized to be levied outside of the fifteen mill limitation on the tax rate, and the fund to which such amounts will be credited, together with the provisions of the General Code under which such tax is exempted from all limitations on the tax rate. \* \*\*

Paragraph 2 (a), quoted above, requires that the budget shall set forth "an estimate of receipts from other sources than the general property tax" etc. From an examination of the act (Am. S. B. No. 354) levying a tax on the use, distribution or sale of liquid fuel, it is evident that such tax is not a general property tax, but is rather in the nature of a privilege or excise tax.

Section 5542-18 G. C. (Section 18 of S. B. No. 354, enacted by the 90th General Assembly, as amended in S. B. No. 54, in the First Special Session) requires the apportionment or allocation of a portion of the funds received by the state by virtue of a tax on the sale, distribution or use of liquid fuel, to the school districts on the basis of "the average daily attendance" in such districts. Such section in so far as material, reads:

"The balance collected under the provisions of this act, after the credits to said rotary fund, and after the amounts herein appropriated to the tax commission to pay the actual and necessary expenses of administering the provisions of this act during the remainder of the year

1933, and the year 1934, shall be placed in 'the state public school fund', which fund is hereby created, and which shall be apportioned to each school district of the state on the basis of the average daily attendance in the schools thereof during the next school year preceding such apportionment as determined by the director of education.

On or before the fifteenth day of December each year the director of education shall certify to the auditor of state the average daily attendance in each school district for the next preceding school year. On the basis of these data the auditor of state shall apportion the said fund quarterly each year and as of the last day of March, June, September and December, to the several school districts of the state and shall issue his warrant on the treasurer of state in favor of each district for the amount due and the treasurer of state shall forthwith pay the same to the designated districts."

It is evident from the language of such section, above quoted, that unless the proceeds of the liquid fuel tax levied by virtue of Sections 5542-1 to 5542-18, General Code, are not in excess of the amount set aside to the liquid fuel tax rotary fund and the \$35,000.00 appropriated annually to the Tax Commission during the years 1933 and 1934, each school district should receive some amount of money from this source, however, small.

It would appear that Section 5625-21, General Code, would require the school district to set forth in its budget estimate the amount of estimated receipts from the state liquid fuel tax. I must, therefore, answer your first inquiry in the affirmative.

Your second inquiry I am restating as follows:

Where by reason of the estimated receipts from the "liquid fuel tax" (§5542-1 to 5542-18 G. C.) the budget of a school district prepared pursuant to the provisions of Section 5625-21 G. C. shows it to be unnecessary to levy both the minimum levy of 4.85 mills mentioned in Section 5625-23 Par. (d) and an aggregate of five mills theretofore authorized by a vote of the people, in order to produce from general taxation the amount of revenue necessary for the estimated needs of the district, may either of such items be reduced?

That part of Section 5625-23, General Code, applicable to your inquiry, reads:

"(c) The levy prescribed by section 7575 of the General Code, or any other school equalization levy which may be authorized.

(d) A minimum board of education levy for current expense in case the levy referred to in paragraph 'c' hereof is less than four and eighty-five hundredths mills. Such minimum board of education tax levy shall be at such rate in each school district that the sum of the levy referred to in paragraph 'c' hereof, and such minimum board of education tax levy shall be four and eighty-five hundredths mills in such district, unless the board of education requests an amount requiring a lower rate."

From the language of such section it is apparent that the minimum of 4.85 mills is not definitely fixed. That is, if the amount of funds requested by the board of education requires a lesser rate that amount only should be included in the levy which will produce, if taxes are collected, the sum requested by the

board of education. It is only when the board of education requests a sum of money which would require a levy equal to or in excess of 4.85 mills that such rate becomes the irreducible minimum levy for school purposes.

That part of Section 5625-23, General Code, quoted above, specifically requires the budget filed thereunder to contain a statement of the amounts estimated to be received from levies outside of constitutional limitations, it would appear that the legislative intent was to require the budget filed to contain the full facts from which it could be ascertained what sum of taxes it would be necessary to levy within the constitutional limitation for educational purposes. It is therefore my opinion that if the budget request shows the needs of the board of education as so requested to be less than would be produced by a rate of 4.85 mills, the budget commission may reduce the rate of such amount.

With reference to that part of your inquiry as to whether the levy authorized by the people to be voted outside of constitutional limitations may be reduced, I call your attention to that part of Section 5625-23, General Code, which reads:

“The budget commission shall ascertain that the following levies are properly authorized and if so authorized, shall approve them without modification.

(a) All levies outside of the fifteen mill limitation. \* \*”

It is evident that the budget commission has no authority to adjust or alter any proposed levy of a subdivision when it has been authorized by a legal vote of the people outside of constitutional limitations. The mere fact that the budget commission may not disturb the estimated levy does not tend to indicate that it is mandatory upon the taxing authority of the subdivision to make the levy in the maximum amount authorized by the vote of the electors. The taxing authority alone is authorized to levy the tax (§5625-3 G. C.) The taxing authority of the school district is the board of education (§5625-1 (c)). An examination of the provisions of statute with reference to a levy beyond or outside of constitutional limitations (§§5625-15 and 5625-17 G. C.) would indicate that there is authority to submit the question as to whether a levy may be made outside of constitutional limitations “at a rate of not exceeding ..... mills.” I am unable to find any provision of statute which would purport to authorize the submission of the question to the voters as to whether such levy at a definite rate of tax might be levied each year. It appears that such vote of the electors grants authority to the board of education to levy a tax outside of constitutional limitations *for the purposes set forth in the notice* and places a limit on the extent of such authority. That is, the subdivision, by reason of such vote, is authorized to levy a tax outside of constitutional limitations to the extent necessary to accomplish the purpose or aim set forth in the proposition submitted to the electors, so long as the amount is not in excess of the amount stipulated in the proposition so voted upon.

Specifically answering your inquiries, it is my opinion that:

1. When a board of education submits its budget to the budget commission pursuant to the requirements of Sections 5625-20 et seq. General Code, Section 5625-21, General Code, requires that there be set forth therein all estimated receipts from sources other than general property tax, and including the amount estimated to be received during the ensuing year from the proceeds of the liquid fuel tax by virtue of the provisions of Section 5542-18, General Code.
2. When the budget of a board of education prepared in compliance with the provisions of Section 5625-1, General Code, shows that in order to provide

revenue for the purposes of the subdivision it is unnecessary to levy taxes on the general property at a rate equal to or greater than 4.85 mills and at a rate outside of constitutional limitations equal to the maximum rate authorized by the vote of the people there is no provision of law which requires or authorizes the tax levying authority of the subdivision to levy such taxes at a greater rate than necessary to provide the necessary funds for the estimated needs of the subdivision during the next ensuing year.

3. When the budget of a board of education prepared in compliance with the provisions of Section 5625-1, General Code, shows that, in addition to a levy of taxes theretofore authorized by a vote of the people outside of constitutional limitations it is unnecessary to levy taxes within the limitation at the rate of 4.85 mills in order to produce the revenue requested by such board, the budget commission, by reason of the provisions of Section 5625-23, General Code, may approve the levy of taxes within such limitations at a rate less than 4.85 mills.

Respectfully,

JOHN W. BRICKER,

*Attorney General.*

1973.

BONDS—TAX LEVY FOR RETIREMENT OF BONDS MAY BE OMITTED  
FROM BUDGET AND TAX LEVY WHEN—REFUND THEREOF  
UNDER H. B. NO. 217 UPON AGREEMENT OF BONDHOLDERS.

*SYLLABUS:*

*When the holders of bonds of a county maturing in one year have consented in writing to have their bonds refunded under House Bill No. 217, passed by the 90th General Assembly, and also have agreed, in consideration of the issuance of refunding bonds by the county commissioners in the year previous to such maturity, to accept said refunding bonds in exchange for their original bonds in the manner provided by section 2293-29, General Code, in the event the refunding bonds after advertisement remain unsold at private sale for a period of ten days, and when the refunding bond resolution has been actually adopted making provision for the levy and collection of a tax annually sufficient to pay the interest on the refunding bonds and to provide for their final redemption at maturity, the tax levy which would have otherwise been necessary for the retirement of the bonds refunded may be omitted from the budget and tax levy for the year in which such refunded bonds mature.*

COLUMBUS, OHIO, December 8, 1933.

HON. FRANK T. CULLITAN, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication, which reads as follows:

“The Board of County Commissioners of Cuyahoga County have asked me to request your opinion in the following connection:

An Act of the General Assembly of Ohio designated as House Bill No. 217 passed March 30, 1933, otherwise known as the Douglas Bill,