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WHERE SECTION 727.31 R. C., AUTHORIZING MUNICIPAL LEGISLATURE TO LEVY PROPERTY TAX IN PROPORTION TO COST OF PUBLIC IMPROVEMENT WHICH BENEFITS MUNICIPAL PROPERTY, CONFLICTS WITH CHAPTER 5705 R. C., UNIFORM TAX LEVY LAW, THE FORMER MUST BE DEEMED REPEALED BY IMPLICATION.

SYLLABUS:

Section 727.31, Revised Code, which purports to authorize the legislative authority of a municipal corporation by ordinance, certified to the county auditor, to levy a tax upon all taxable real and personal property in the municipal corporation in the amount of the proper proportion of the cost of public improvements which benefit buildings or real property owned by the municipal corporation, is in direct conflict with Chapter 5705., Revised Code, the uniform tax levy law, to the extent that it conflicts with the procedure therein provided for the levy of taxes, and in this respect must be deemed repealed by implication.

Columbus, Ohio, November 21, 1956

Hon. Harry Friberg, Prosecuting Attorney  
Lucas County, Toledo, Ohio

Dear Sir:

I have before me your request for my opinion regarding a municipal ordinance which has been adopted authorizing the certification to the county auditor of the costs of certain public improvements made benefiting municipal property, to be entered by the county auditor upon the tax lists of all taxable real and personal property in the municipal corporation as provided in Section 727.31, Revised Code. The following questions were specifically presented:

"1. What formula should be used by the County Auditor in apportioning the special assessments upon the tax list?

"2. Revised Code, Section 727.31 provides that the assessments in question be entered upon the tax list 'of all taxable real and personal property in the municipal corporation.' We are in doubt as to the proper application of this statute to 'personal property,' in view of the several classifications of personal property on the tax list."

Section 727.31, Revised Code, reads as follows:

"When any portion of a public improvement authorized by Title VII of the Revised Code passes by or through a public wharf, market space, park, cemetery, structure for the fire department, waterworks, school building, infirmary, market building, workhouse, hospital, house of refuge, gasworks, public prison, or any other public structure or public grounds within and belonging to the municipal corporation, the legislative authority thereof may authorize the proper proportion of the estimated cost of the improvement to be certified by the auditor or clerk of the municipal corporation to the county auditor, entered upon the tax list of all taxable real and personal property in the municipal corporation, and collected as other taxes."

Chapter 727., Revised Code, deals generally with the making and levying of special assessments, provisions for making street improvements and park boulevards, and the collection of special assessments. This chapter provides for certain enumerated public improvements to be ultimately financed by special assessments levied against abutting or adjacent lands in the municipal corporation which have been specially benefited thereby. Section 727.31, *supra*, is a recognition by the General Assembly that the named lands and buildings owned by the municipal corporations are also specially benefited by such public improvements when the improvement passes by or through these lands or buildings and that the municipal corporation should pay a fair share of the cost of this improvement.

Initially it must be pointed out that the procedure designated by Section 727.31, *supra*, requires the levy of a tax upon all real and personal property in the municipal corporation and that it is not in the nature of a special assessment against such property. A special assessment is levied against real property in respect to some benefit accruing to such property resulting from a public improvement and is valid only to the extent that it is equated to such special benefit conferred by the public improvement upon the real property assessed. Article XVIII, Section 11, Ohio Con-

stitution; *Reeves v. Treasurer of Wood County*, 8 Ohio St., 333; *Lima v. Cemetery Association*, 42 Ohio St., 128. Thus, the procedure provided by Section 727.31, *supra*, to make up the proportion of cost to be borne by the municipal corporation by levy against all real and personal property in the municipal corporation, is by its nature a tax, for it cannot be considered that any such special benefit is conferred on all taxable property by a public improvement incidentally made to municipal property. This conclusion is further indicated by the requirement that the levy be against both real and personal property, for a special assessment is to be levied only against the real property benefited. Compare, *Miami County v. Dayton*, 92 Ohio St., 215, 229.

Concluding that Section 727.31, *supra*, purports to authorize a municipal corporation to levy a tax for the purposes stated, the question then becomes one of legality of the manner in which such tax is to be levied. This section was originally enacted by the Seventy-fifth General Assembly, 96 Ohio Laws, 43, in 1902, and is presently in substantially the same form as enacted. It was enacted as a part of an act pertaining generally to the formation and organization of municipal corporations and dealing specifically with restrictions upon the power of a municipal corporation to levy taxes and assessments.

The act placed the authority to levy and collect taxes in the council of the municipal corporation, and the rate levied by the council was certified to the county auditor for placement on the grand duplicate. Section 1536-192, *et seq.*, Revised Statutes. Similarly, the predecessor of Section 727.31, *supra*, Section 1536-223, Revised Statutes, provided for council to determine the amount to be raised by the levy of taxes, and its certification to the county auditor in the same manner.

The fundamental question thus presented by this request is the construction of Section 727.31, *supra*, as it relates to the levy of taxes, and Chapter 5705., Revised Code, the uniform tax levy law, enacted by the Eighty-seventh General Assembly in 112 Ohio Laws, 391. Chapter 5705., Revised Code, provides in detail the procedure required for the levy of taxes, and is made applicable to municipal corporations. Section 5705.01, Revised Code. The authority of the legislative body of the municipal corporation to make an annual levy of taxes is made subject to the limitations of the chapter. Section 5705.03, Revised Code. This limitation upon the authority of a municipal corporation to levy taxes is made pursuant to

Article XVIII, Section 13, of the Ohio Constitution vesting in the General Assembly power to "limit the power of municipalities to levy taxes and incur debts for local purposes \* \* \*." That municipal corporations do not have unlimited authority to levy taxes and are subject to the limitations of Chapter 5705., Revised Code, would appear well settled. *State, ex rel. City of Toledo, v. Cooper*, 97 Ohio St., 86; *State, ex rel. Dayton, v. Bish*, 104 Ohio St., 206.

The uniform tax levy law provides, *inter alia*, that taxes shall be levied only upon the preparation of a tax budget by the municipal corporation and submitted to the budget commission of the county, which has the sole authority to set the rate of taxation throughout the county. Section 5705.27, et seq., Revised Code. In so far as Section 727.31, *supra*, authorizes the municipal corporation to determine by ordinance the amount of tax to be levied and to certify this amount to the county auditor to be imposed upon taxable real and personal property in the municipal corporation, it is in direct conflict with the sections of the uniform tax levy law requiring the preparation of a tax budget and designating the functions of the budget commission in the establishment of the rates of taxes to be levied within the county.

The uniform tax levy law in its original enactment specifically repealed those provisions dealing with the procedure for the levy of taxes by municipal corporations without the repeal of Section 727.31, *supra*, then Section 3837, General Code; and thus there is presented an irreconcilable conflict between this section as it relates to the levy of taxes and the later enactment, the uniform tax levy law. Although the law does not favor such result, where there is an irreconcilable conflict the prior enactment must be deemed repealed by implication to the extent of the conflict. 37 Ohio Jurisprudence, 395. Thus, the instant problem is within the rule stated in *Rabe, et al., v. Board of Education*, 88 Ohio St., 403:

"1. Sections 5649-2 to 5649-5b, General Code, inclusive, limit the rate of taxes that can be levied in any taxing district for any and all purposes. Any statutes existing at the time of the passage of these sections, in direct conflict therewith and not specifically repealed thereby, are repealed by implication."

I am therefore of the opinion that Section 727.31, *supra*, must be deemed to be repealed by Chapter 5705., Revised Code, the uniform tax levy law, to the extent that the legislative authority of the municipal

corporation is granted the authority, independent of the procedures prescribed in that chapter, to certify to the county auditor an ordinance purporting to levy a tax the proceeds of which are to be used to pay the costs of public improvements which specially benefit lands and buildings owned by the municipal corporation. This section may be regarded, however, as still effective so far as it would allow the legislative authority of the municipal corporation to determine a "proper proportion" of the estimated cost of an improvement to be borne by a general tax levy against all taxable real and personal property of the municipality.

In resolving the general question presented by the request in this manner, it is not necessary to consider the specific questions presented supra. It is, however, appropriate to consider the ordinance which was passed by the legislative authority of the municipal corporation. Although there is no authority in such legislative authority to certify the amount noted as the proportion of the cost of the public improvement, to the county auditor to be levied against the taxable property in the municipal corporation, the ordinance is effective as a declaration, pursuant to Section 727.31, supra, of the proper proportion of cost to be borne by the municipal corporation by the levy of taxes in the manner provided in Chapter 5705., Revised Code. Section 727.31, supra, clearly provides for the payment of such costs from the proceeds of a general tax levy. The amount thus determined should be included as an item of expense in the preparation of the next succeeding tax budget as required in the procedure for the levy of taxes against all real and personal property in the municipal corporation. Section 5705.27, et seq., Revised Code.

It is therefore my opinion and you are advised that Section 727.31, Revised Code, which purports to authorize the legislative authority of a municipal corporation by ordinance, certified to the county auditor, to levy a tax upon all taxable real and personal property in the municipal corporation in the amount of the proper proportion of the cost of public improvements which benefit buildings or real property owned by the municipal corporation, is in direct conflict with Chapter 5705., Revised Code, the uniform tax levy law, to the extent that it conflicts with the procedure therein provided for the levy of taxes, and in this respect must be deemed repealed by implication.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General