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UNIFORM TAX LEVY LAW — SECTION 5625-1 ET SEQ., G. C. — BY ENACTMENT OF SAID LAW AND BY REPEAL OF SECTIONS 3061, 3061-1, G. C., 109 O. L. 284, SECTION 3059 G. C. WAS RENDERED INOPERATIVE.

SYLLABUS:

By the repeal of Sections 3061 and 3061-1, General Code, in 109 O. L., 284, and the enactment of the Uniform Tax Levy Law, Section 5625-1, et seq., G. C., Section 3059, General Code, was rendered inoperative.

Columbus, Ohio, October 10, 1944

Hon. Frank T. Cullitan, Prosecuting Attorney
Cleveland, Ohio

Dear Sir:

This will acknowledge receipt of your letter requesting my opinion with respect to the submission of a tax levy to the electors of the county

under Section 3059, General Code, for the purpose of erecting a memorial building. Your letter reads as follows:

“Recently a petition was filed in the Court of Common Pleas under favor of General Code Section 3059 calling for a submission to the electors of this county of a proposal to make a levy as provided by such act for the purpose of erecting a soldiers’ memorial building.

The petition was filed and the Court of Common Pleas thereupon made a finding of its sufficiency and ordered the election. A copy of such order is enclosed herewith. The Board of Elections now requests the opinion of the Prosecuting Attorney of this county as to its duty in the premises.

In reply to such request we have written the board a letter reciting our doubts as to whether such General Code Section 3059 is now effective in view of the repeal of the former portions of the act providing for various necessary matters in connection therewith, such as the determination of the vote necessary to carry the proposal, the form of the ballot to be used, provision for the making of the levy, for the certification of such tax to the taxing authorities, the creation of the board of trustees which is to have control of the funds, and the purchase of the site and the letting of the contracts for the erection of the building. We also advised the board of elections that in view of the provisions of General Code Sections 5625 and 5625-15, a tax levy for such purpose cannot be regarded as a levy outside limitations, nor in view of the provisions of Section 5625-23 does there seem to be any room for it inside the 10-mill limitation. We enclose herewith a copy of our letter to the Board of Elections.

In view of the fact that this subject is of state-wide importance and similar situations very likely have arisen in other counties, we respectfully request your opinion as to whether the Board of Elections may submit the proposal to the voters at the coming election?

Needless to say, it is necessary that the matter have an early decision in order that the board may have time for printing of the ballots for such election, if you deem it their duty to submit it.”

Section 3059, General Code, in its present form, was enacted in 1921 by the 84th General Assembly as one of the sections of Amended Senate Bill No. 84 (109 O. L. 284), and reads as follows:

“When there is presented to a judge of the court of common pleas, in any county, a petition signed by not less than two per

cent of the electors of the county, as shown at the last preceding general election held therein, requesting the submission to the electors of the county the question of levying a tax in an amount stated in such petition, but not exceeding one mill annually for a period of not more than five years, for the purpose of purchasing a site and erecting and equipping and furnishing a memorial building to commemorate the services of the soldiers, sailors, marines and pioneers of the county, and of maintaining said memorial building, such judge shall forthwith fix a day for the hearing thereof, not more than fifteen days from the presentation thereof; and if, upon such hearing he finds that such petition is signed by the required number of electors, he shall certify the facts to the board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections, as the case may be, of the county, which board shall thereupon submit to the electors of the county, at the next ensuing primary or general election, the question of the levying of such tax for the purpose specified, and take all such steps as may be required by law for the holding of elections upon such question."

There was also enacted as a part of Amended Senate Bill No. 84, two other sections designated as Sections 3061 and 3061-1, which provided the course of procedure to be adopted and followed by the election board in submitting the levy to the electors, and also by the county commissioners in the event the levy was approved by the requisite majority vote. In other words, Section 3061 provided that notice of the election should be given by publication in two or more newspapers of general circulation in the county for three weeks before the election, a special form of ballot to be used at the election was prescribed, and the election board was required to certify the result of the election to a judge of the common pleas court. The section also provided that if sixty per cent of the votes cast was in favor of the levy, a board of trustees consisting of seven members should be appointed by the judge. The duties and powers of this board were provided for in other sections of the Act. The other statute, Section 3061-1, provided that if the levy was approved by the electors, the county commissioners should annually thereafter, for not exceeding five consecutive years, place the levy on the grand duplicate of the county for collection.

Sections 3061 and 3061-1 were repealed in 1927 by House Bill No. 1 (112 O. L. 364), known as the Uniform Bond Act. That Act, which is now in full force and effect, makes no provision for submitting to the electors the tax levy referred to in Section 3059, nor has any legislation been enacted since the repeal of Sections 3061 and 3061-1 to carry out

or make effective any finding that might now be made by any judge of the common pleas court under that section. In other words, Section 3059 now stands alone, unaided by any other statutory provision.

Section 3059, General Code, in terms, requires that a judge of the common pleas court, when a petition as described therein signed by two per cent of the electors of the county, have a hearing and determine the sufficiency of the petition and if it is sufficient to certify such fact to the board of elections. Such section further, in terms, provides that when such facts are certified by the common pleas court to the board of elections, it shall submit the proposition to the electors at the next general or primary election, and "take all such steps as may be provided by law for the holding of elections on such question." What are the steps provided by law for the holding of elections on such question? As I have above pointed out, former Sections 3061 and 3061-1, General Code, which provided machinery for the conduct of such an election and the steps to be taken in the levy and collection of the tax and for the disbursement of the proceeds thereof have been expressly repealed. Since the repeal of such Sections 3061 and 3061-1, General Code, there is no provision of law designating the notice to be given the electors of the election concerning the tax levy mentioned in your request; there is no provision of law prescribing the ballot to be used for such purpose, no provision of law determining the vote necessary to authorize the levy, no provision authorizing any board or officer to make the levy even though all the electors are in favor of the question and no statute authorizing any person or board to control the fund produced by the levy and erect the building even though passed upon favorably by the electors of the county.

It is elemental that public officers, boards and commissions have such powers and duties only as are granted by statute and that any act performed by them in excess of such granted powers is void. It thus appears that it is an absurd situation to require a vote upon a proposition when the proposition cannot be carried out if favorably voted upon. As stated by Owen, J. in *Moore v. Given*, 39 O. S. 661, 663, "that the law does not require absurd or impossible things of men is one of its favorite maxims." What could be more absurd than to require a board of elections to attempt to submit the proposition described in the petition to the electors when the General Assembly has specifically repealed the provisions for authorizing the levy of the tax and accomplishing the intended purpose

and has provided no substitute machinery for such submission and has not authorized the levy of the tax for such purpose even if the approval of the electors could be obtained?

The submission of tax levies to the county electors is now provided for and governed by Section 5625-1, et seq., General Code, particularly Sections 5625-15, 5625-17 and 5625-17a. Under these sections county levies may only be initiated by resolutions adopted by the county commissioners, and, as already indicated, no provision is made therein for submitting a levy initiated and ordered under the special provisions of Section 3059. This is also true with respect to tax levies submitted under Amended Senate Bill No. 69, enacted by the 95th General Assembly, which makes provision for submitting additional levies at special or primary elections.

In Opinions of the Attorney General for 1931, Vol. II, page 974, the statement was made that Section 3059, General Code, "is still in force and effect." The section was not in any way involved in the case presented to the former Attorney General for determination. The questions then under consideration were whether or not a non-profit corporation organized prior to the repeal of another section relating to such corporations (Section 3960), was entitled to receive donations from the county, and to exercise certain corporate powers, after the repeal of the section. As already indicated, the submission of a tax levy to the electors under the provisions of Section 3059 was not involved, and apparently was given no consideration.

Since the repeal of Sections 3061 and 3061-1, General Code, I am unable to find any provision of law authorizing the holding of an election of the type referred to in Section 3059, General Code.

I am, therefore, of the opinion that by the express repeal of Sections 3061 and 3061-1 of the General Code and the enactment of the Uniform Tax Levy Law (Section 5625-1, et seq., G. C.) without making provision for the making of the levy mentioned in Section 3059, General Code, the General Assembly has rendered Section 3059, General Code, inoperative. However, if the board of elections, in view of the action of the judge of the Common Pleas Court in certifying the sufficiency of the petition submitted to him has doubt as to its rights under Section 3059, General Code, it might ask the instruction of the Court of Common Pleas in an appro-

priate action—under Section 12102-2, et seq., General Code, or otherwise.

Specifically answering your inquiry it is my opinion that by the repeal of Sections 3061 and 3061-1, General Code, in 109 O. L. 284, and the enactment of the Uniform Tax Levy Law, Section 5625-1, et seq., G. C., Section 3059, General Code, was rendered inoperative.

Respectfully,

THOMAS J. HERBERT

Attorney General