

**Note from the Attorney General's Office:**

1962 Op. Att'y Gen. No. 62-3145 was overruled in part by 1963 Op. Att'y Gen. No. 63-166.

1962 Op. Att'y Gen. No. 62-3145 was overruled in part by 1963 Op. Att'y Gen. No. 63-167.

3145

A BOARD OF TOWNSHIP TRUSTEES MAY ISSUE NOTES TO COVER DEFERRED PAYMENTS FOR THE COST OF REMODELING THE TOWNSHIP FIREHOUSE; HOWEVER THE LEGISLATION AUTHORIZING THE NOTES PROVIDE A TAX LEVY SUFFICIENT TO PAY INTEREST AND PRINCIPAL ON SUCH NOTES—TO ISSUE SUCH NOTES A CERTIFICATE OF THE FISCAL OFFICER MUST BE OBTAINED—§§505.37, 505.39, 5705.19, 5705.41, R.C.

## SYLLABUS:

1. Under Section 505.37, Revised Code, a board of township trustees may issue notes to cover deferred payments for the cost of remodeling the township firehouse, but the legislation authorizing the issuance of such notes must provide for a tax levy sufficient to pay the interest on and principal of such notes, and the proceeds of a tax levy previously adopted pursuant to division (I) of Section 5705.19, Revised Code, may not be used for this purpose.

2. Where a board of township trustees elects to issue notes under Section 505.37, Revised Code, a certificate of the fiscal officer as required by division (D) of Section 5705.41, Revised Code, must be obtained.

Columbus, Ohio, July 14, 1962

Hon. Everett Burton, Prosecuting Attorney  
Scioto County, Portsmouth, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“We have received a request from the Porter Township, Scioto County, Ohio Trustees concerning the authority to borrow money for a period of four years, for the remodeling of a fire station in said Township, and to repay the same out of the proceeds of a levy which has already been passed in that Township. The levy referred to was passed last November and was a general operating levy, broadly worded, from which it is anticipated that the annual proceeds will be approximately Twelve Thousand Dollars per year.

“The original authority for such action was contained in Section 505.37 of the Ohio Revised Code. However, effective November 8th, 1961, the Legislature amended this Section to include the following sentence:

“The legislation authorizing the issuance of such notes shall provide for levying and collecting annually by taxation amounts sufficient to pay the interest on and principal of such notes.’

“It would appear from a literal reading of this Section that if the Township wants to borrow money under the authority granted therein, it is necessary to include in the same legislation a provision for levying a tax to pay back the loan. However, as I have indicated, a levy has already been passed in this particular instance and our inquiry then is whether or not they have the authority to borrow money under this Section and use the moneys expected under the levy already passed, or whether in view of this amendment, it is necessary to pass a new levy together with the legislation authorizing the borrowing of money.

“It also should be noted that Section 5705.41 of the Ohio Revised Code prohibits the making of a contract or the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same is on hand or in the process of collection. It may be that this Section does not apply in this instance since some authority is found that this section applies only to expenditures of the general fund of the subdivision and since Section 505.37, as amended, of the Ohio Revised Code specifically authorizes the issuance of notes to pay for such expenditures over a period of four years.”

Section 505.37, Revised Code, reads, in part, as follows:

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“The board of any township or fire district created by such board under sections 505.37 to 505.44, inclusive, of the Revised Code or the legislative authority of any municipal corporation, may purchase the necessary fire-fighting equipment, buildings, and sites for such township, fire district, or municipal corporation and pay for it over a period of four years. Such board or legislative authority may issue the notes of the township, fire district, or municipal corporation, signed by the board or legislative authority and attested by the signature of the township or municipal clerk, covering such deferred payments and payable at the times provided, which notes may bear interest not to exceed six per cent per annum, and shall not be subject to sections 133.01 to 133.65, inclusive, of the Revised Code. *The legislation authorizing the issuance of such notes shall provide for levying and collecting annually by taxation amounts sufficient to pay the interest on and principal of such notes.* One fourth of such purchase price shall be paid at time of purchase, and the remainder of the purchase price shall be covered by notes maturing in two, three,

and four years respectively. Such notes shall be offered for sale on the open market or given to the vendor if no sale is made.

“\* \* \*

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(Emphasis added)

Funds necessary for the remodeling of a fire station might be obtained under a tax levy for fire protection within the ten-mill limitation, such a levy being made under Section 505.39, Revised Code, which reads in part:

“The board of township trustees may, in any year, levy a sufficient tax upon all taxable property in the township or in a fire district, to provide protection against fire, to provide and maintain fire apparatus and appliances, sources of water supply materials for such water supply, lines of fire-alarm telegraph, and to pay permanent, part-time, or volunteer fire-fighting companies to operate such equipment.

“\* \* \*

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Further, such funds might be obtained under a levy outside the ten-mill limitation authorized by vote of the electors pursuant to division (I) of Section 5705.19, Revised Code, which reads:

“(I) For the purpose of providing and maintaining fire apparatus, appliances, buildings or sites therefor, or sources of water supply and materials therefor, or the establishment and maintenance of lines of fire alarm telegraph or the payment of permanent, part-time or volunteer firemen or fire fighting companies to operate the same;”

From the facts as given, I assume that a levy authorized under said division (I) exists in the township in question, and that funds realized therefrom may be used for the maintenance of fire department buildings, which would, in my opinion, include the remodeling of the fire station.

The words of Section 505.37, *supra*, stating that the legislation authorizing the issuance of the notes must provide for levying and collecting annually by taxation amounts sufficient to pay the interest on and principal of the note were added to the section in 1961 (House Bill No. 1122 of the 104th General Assembly, effective November 8, 1961).

The first question here to consider is whether the new language above-noted requires that a special levy be authorized to retire the notes, or whether the proceeds of the existing levy may be used.

Section 505.37, *supra*, does not specifically state that a special levy must be involved as part of the legislation authorizing the issuance of the notes. It does, however, require that such legislation "shall provide for levying and collecting annually." As to this, since an existing levy, and its collection, would have already been provided for at the time it was originally invoked, in enacting the new language the legislature must have intended that a new levy be adopted as part of the legislation providing for the issuance of the notes, and I am of the opinion that such a new levy is necessary.

In reaching this conclusion, I am aware that it could make the issuance of notes a cumbersome procedure in some instances. And here I note that the board of township trustees is authorized to issue notes without the approval of the voters, while the levy of a tax in excess of the ten-mill limitation would require such approval; and in most cases a levy in excess of the ten-mill limitation would undoubtedly be necessary. Thus, in such cases nothing could be done as to the issuance of notes until voter approval of the tax levy was obtained.

In view of the language used, however, I find I have no alternative; and strengthening my opinion in this regard is the general rule of law that any doubt in the expenditure of public moneys must be resolved in favor of the public and against the grant of power. *State, ex rel. Bentley v. Pierce, Auditor*, 96 Ohio St., 44.

Coming to your second question, Section 5705.41, Revised Code, reads, in part, as follows:

"No subdivision or taxing unit shall:

"\* \* \*

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"(D) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same, or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon. If no certificate is furnished as required, upon receipt by the taxing authority of the subdivision or taxing unit of a certificate

of the fiscal officer stating that there was at the time of the making of such contract or order and at the time of execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the issuance of a warrant in payment of amounts due upon such contract, but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate; provided that if the amount involved is less than one hundred dollars, the fiscal officer may authorize it to be paid without such affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid.

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Since the issuance of notes under the deferred payment plan of Section 505.37, *supra*, would clearly entail the making of a contract and the giving of an order involving the expenditure of money, the township may not enter into such a plan unless there is furnished a certificate of the fiscal officer of the township showing that the amount required to meet the money due under the plan is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. While the funds to be used would result from a special levy rather than the general fund, Section 505.37, *supra*, applies to money raised or to be raised by a levy on the general tax list, which would be true in this case. See *Comstock v. Nelsonville*, 61 Ohio St., 288 at 294.

Accordingly, it is my opinion and you are advised:

1. Under Section 505.37, Revised Code, a board of township trustees may issue notes to cover deferred payments for the cost of remodeling the township firehouse, but the legislation authorizing the issuance of such notes must provide for a tax levy sufficient to pay the interest on and principal of such notes, and the proceeds of a tax levy previously adopted pursuant to division (I) of Section 5705.19, Revised Code, may not be used for this purpose.

2. Where a board of township trustees elects to issue notes under Section 505.37, Revised Code, a certificate of the fiscal officer as required by division (D) of Section 5705.41, Revised Code, must be obtained.

Respectfully,  
 MARK MCELROY  
 Attorney General