

## OPINION NO. 66-144

## Syllabus:

A board of township trustees may not accumulate the proceeds of a voted levy for fire protection (Section 5705.19 (I), Revised Code) during the life of the levy, for expenditure at a later date.

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To: Joseph Murray, Ashland County Pros. Atty., Ashland, Ohio  
By: William B. Saxbe, Attorney General, August 26, 1966

Your request for my opinion reads in part as follows:

"May a board of township trustees in a township where a tax levy in excess of the ten mill limitation has been passed pursuant to Section 5705.19 (I), Revised Code of Ohio, for the purpose of providing and maintaining fire apparatus etc., accumulate the proceeds from said levy during the life of the levy for expenditure at a later date?

"Several townships have expressed the desire to pass a tax levy and accumulate the proceeds therefrom, in order to save interest costs and buy items, particularly fire equipment, at a time when the fund has accumulated enough money that the equipment can be purchased with a lump sum. However, the legal right to do so is not clear. \* \* \*

"If your answer to the above stated question is in the affirmative, then the question arises as to whether or not the township may place these accumulated funds in an interest bearing savings account until enough money is accumulated to make the expenditure which was planned and for which the money was being saved?

"Your answers to these questions will be greatly appreciated."

An examination of the first two paragraphs of your letter of request reveals in effect two questions: first, may a board of township trustees now place before the electorate a levy proposed under subsection (I) of Section 5705.19, Revised Code, the proceeds of which are to be accumulated until some undisclosed time in the future; and, second, may the board of township trustees accumulate the proceeds of a voter-approved, Section 5705.19 (I), supra, levy during the life of the levy, for expenditure at a later date?

Section 5705.19, supra, reads in pertinent part:

"The taxing authority of any subdivision at any time prior to the fifteenth day of September, in any year, by vote of two-thirds of all the members of said body, may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide 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 following purposes:

"\* \* \* \* \* \* \* \* \* \* \* \* \* \* \*"

"(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;

"\* \* \* \* \* \* \* \* \* \* \* \* \* \* \*"  
(Emphasis added)

And Section 5705.26, Revised Code, reads in part as follows:

"Except as otherwise provided in sections 5705.191 and 5705.21 of the Revised Code, if the majority of the electors voting on a levy authorized by sections 5705.19 to 5705.25, inclusive, of the Revised Code vote in favor of such levy at such election, the taxing authority of the subdivision may levy a tax within such subdivision at the additional rate in excess of the ten-mill limitation during the period and for the purpose stated in the resolution, or at any less rate, or for any of said years or purposes; \* \* \*"  
(Emphasis added)

Even if it is first assumed that the board of township trustees has no difficulty in declaring now the necessity to exact monies now via taxation which they do not plan to spend until some undisclosed time in the future, and further assumed that the voters sanction such an action by authorizing the levy at the polls, the fact remains that the county auditor and the county budget commission, created by Section 5705.27, Revised Code, of which you are a statutory member, are empowered to and have a duty to see that no more taxes are exacted for the ensuing fiscal year than are necessary to meet the needs of the township for the ensuing fiscal year.

A township is a "subdivision" and the board of township trustees is the "taxing authority" of the township. Section 5705.01, Revised Code. Section 5705.28, Revised Code, provides in pertinent part that:

"On or before the fifteenth day of July in each year, the taxing authority of each subdivision \* \* \* shall adopt a tax budget for the next succeeding fiscal year. \* \* \*"

Section 5705.29, Revised Code, provides in part:

"The tax budget shall present the following information in such detail as is prescribed by the bureau of supervision and inspection of public offices:

"(A) (1) \* \* \* \* \* \* \* \* \* \* \* \* \* \* \*"

"(4) A statement of expenditures for the ensuing fiscal year necessary for any purpose for which a special levy is authorized, and the fund from which such expenditures are to be made;

\* \* \* \* \*

"(B) (1) An 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;

"(2) The amount each fund requires from the general property tax, which shall be the difference between the contemplated expenditure from the fund and the estimated receipts, as provided in this section. The section of the Revised Code under which the tax is authorized shall be set forth;

\* \* \* \* \*

"(D) An estimate of amounts from taxes authorized to be levied in excess of the ten-mill limitation on the tax rate, and the fund to which such amounts will be credited, together with the sections of the Revised Code under which such tax is exempted from all limitations on the tax rate.

\* \* \* \* \* (Emphasis added)

The taxing authority, in preparing its budget must do everything within its power to make fair and honest estimates of the necessary expenses and expenditures for the ensuing fiscal year. See Opinion No. 1915, Opinions of the Attorney General for 1947, page 260, at 263. The first paragraph of the syllabus in this opinion reads as follows:

"1. The taxing authority of each subdivision in preparing its budget for the ensuing fiscal year under Section 5625-21, General Code, for submission to the county budget commission, should act in good faith in furnishing in detail the information called for by that section, including estimates of receipts, expenditures and unencumbered balances."

Pursuant to Section 5705.30, Revised Code, the tax budget is then filed in the office of the fiscal officer of the subdivision; in the case of a township, with the township clerk (Section 5705.01, supra), for public inspection and at least one public hearing thereon. After adoption, the budget is submitted to the county auditor. The taxing authority loses all control over its tax budget once it has been adopted and submitted to the county auditor, Opinion No. 1226, Opinions of the Attorney General for 1939, Volume II, page 1817, at 1819. The taxing authority, once the budget is submitted to the county auditor, cannot supplement or amend the budget, for such an unauthorized action would defeat the purpose of the public hearing. As was said by the then Attorney General in Opinion No. 4043, Opinions of the Attorney General for 1935, page 285, at 289:

\* \* \* No other or later public hearing or public inspection

of the budget is provided for. It would be an idle and useless ceremony to have such a public hearing if the schedule of contemplated expenditures might later be changed by the taxing authorities which had submitted it, at least if the change involved increases in contemplated expenditures. \* \* \*"

The county auditor, pursuant to Section 5705.31, Revised Code, then presents the annual tax budgets to the county budget commission, a statutory body created by Section 5705.27, Revised Code. In creating the county budget commission and defining its powers and duties, said section provides in pertinent part:

"\* \* \* In adjusting the rates of taxation and fixing the amount of taxes to be levied each year, the commissioners shall be governed by the amount of the taxable property shown on the auditor's tax list for the current year; provided that if the auditor's tax list has not been completed, the auditor shall estimate, as nearly as practicable, the amount of the taxable property for such year, and such officers shall be governed by such estimate."  
(Emphasis added)

Section 5705.32, Revised Code, provides in part:

"The county budget commission shall adjust the estimated amounts required from the general property tax for each fund, as shown by such budgets, so as to bring the tax levies required therefor within the limitations specified in sections 5705.01 to 5705.47, inclusive, of the Revised Code, for such levies, but no levy shall be reduced below a minimum fixed by law. The commission shall have authority to revise and adjust the estimate of balances and receipts from all sources for each fund and shall determine the total appropriations that may be made therefrom."  
\* \* \*

"Before the final determination of the amount to be allotted to each subdivision from any source, the commission shall permit representatives of each subdivision and of each board of public library trustees to appear before it to explain its financial needs."  
(Emphasis added)

In the course of Opinion No. 4043, supra, the following observation was made, beginning on page 289:

"With these schedules of contemplated necessary expenditures and resources of the several taxing subdivisions or other taxing units in a county as set out in their budgets, to be filed with the county auditor as provided by Section 5625-20, General Code, before it, it becomes the duty of the budget commission to examine the same and so adjust the estimated amounts required from the general property tax from each fund as shown by such budgets so as to bring the tax levies required therefor within the limitations of law. The budget commission is not authorized to consider any other contemplated expenditures than those set out in the budget as it was filed with the auditor and, clearly, would have no authority to authorize a levy which would produce more when added

to contemplated receipts from other sources and estimated balances at the end of the year than would be necessary to meet these contemplated expenditures. The intent of the law is clear in this respect if for no other reason than that a public inspection of the budget and a public hearing thereon are provided for, so that the interested taxpayers may know what they are paying for. \* \* \*"  
(Emphasis added)

Section 5705.34, Revised Code, provides in part that:

"When the budget commission has completed its work it shall certify its action to the taxing authority of each subdivision and other taxing unit within the county, together with an estimate by the county auditor of the rate of each tax necessary to be levied by each taxing authority within its subdivision or taxing unit, and what part thereof is in excess of, and what part within, the ten-mill tax limitation. Each taxing authority by ordinance or resolution shall authorize the necessary tax levies and certify them to the county auditor before the first day of October in each year, or at such later date as is approved by the board of tax appeals. \* \* \*"  
(Emphasis added)

In Opinion No. 1915, Opinions of the Attorney General for 1947, page 261, the following observation was made about Section 5625-25, General Code, now Section 5705.34, Revised Code, on page 267:

"The budget law contemplates that the taxing authorities of the respective subdivisions shall not levy taxes for unnecessary purposes, and this policy is particularly disclosed in Section 5625-25, General Code, which provides that when the budget commission has completed its work it shall certify its action to the taxing authority of each subdivision and taxing unit, together with the county auditor's estimate of the rate of tax 'necessary to be levied,' and that each taxing authority by ordinance or resolution shall authorize the 'necessary' tax levies, and certify them to the county auditor, etc. See also Opinions of the Attorney General for 1937 at page 1747, where it says:

"It, of course, is the intent of the budget law that no more and no less taxes be levied than necessary for the financial needs of the county and its subdivisions."

The fourth paragraph of the syllabus of this opinion reads:

"4. The budget law contemplates that the taxing authority of a subdivision shall not levy taxes at a rate greater than is necessary to provide necessary funds for the subdivision during the ensuing fiscal year, and it is the duty of the county auditor and county budget commission to take this lack of authority into consideration when fixing tax rates for the respective subdivisions."

In regard to the budget commission's certification to the taxing authority

of the subdivision, Section 5705.35, Revised Code, provides in pertinent part:

"\* \* \* There shall be set forth on the credit side of each fund the estimated unencumbered balances and receipts, and if a tax is to be levied for such fund, the estimated revenue to be derived therefrom, the rate of the levy, and what portion thereof is within, and what in excess of, the ten-mill tax limitation, and on the debit side, the total appropriations that may be made therefrom. \* \* \* Before the end of the year, the taxing authority of each subdivision and other taxing unit shall revise its tax budget so that the total contemplated expenditures from any fund during the ensuing fiscal year will not exceed the total appropriations that may be made from such fund, as determined by the budget commission in its certification; and such revised budget shall be the basis of the annual appropriational measure."  
(Emphasis added)

In fulfilling its duty of seeing that "no more and no less taxes be levied than necessary for the financial needs of the county and its subdivisions" (Opinion No. 1915, supra, at page 267), the county budget commission is authorized by Section 5705.32, supra, to:

"\* \* \* adjust the estimated amounts required from the general property tax for each fund, as shown by such budgets, so as to bring the tax levies required therefor within the limitations specified in sections 5705.01 to 5705.47, inclusive, of the Revised Code \* \* \* The Commission shall have authority to revise and adjust the estimate of balances and receipts from all sources for each fund and shall determine the total appropriation that may be made therefrom. \* \* \*"

The county budget commission's authority to reduce voted levies outside the ten-mill limitation to a lesser rate than approved by the electorate was challenged and sustained in the case of Coshocton City School District v. Coshocton County Budget Commission, Board of Tax Appeals, Journal Vol. 115, page 404, Case No. 56665, decided December 8, 1964. In that case, the school district was authorized to levy a maximum of 14.40 mills for current expenses for the year 1965. Based upon the budget for fiscal year 1965 submitted by the school district which showed a proposed excess of receipts over expenditures, the Coshocton County Budget Commission revised and adjusted the estimated amount required by the appellant for its 1965 general receipts from the general property tax, from \$830,000 as set out in appellant's tax budget, down to \$769,830. This action by the budget commission authorized the school district to levy only 13.00 mills outside the ten-mill limitation, 1.40 mills less than the maximum authorized by the electorate. When the school district appealed this action to the Board of Tax Appeals under Section 5705.37, Revised Code, the Board of Tax Appeals stated, beginning on page 3 of the entry:

"The question for decision by the Board of Tax Appeals may be stated as follows:

"Does the Coshocton County Budget Commission, in the performance of its budgetary duties prescribed by Revised Code Sections 5705.31 and 5705.32, have any authority to fix the tax rate to be levied for current expenses for the appellant

school district below the maximum rate approved by the electors of the district outside the ten-mill limitation?"

In answering this question in the affirmative, the Board entry stated, on page 9:

"The Board of Tax Appeals agrees that neither it, nor the budget commission, has a right to substitute its judgment as to the amount of money needed for the 1965 operation of appellant's school. The judgment exercised by the Board of Education of Coshocton City School District on that question is, and must be final, and is the amount set out in the expenditures section of the budget presented by the school district. However, we believe that the budget commission has a duty under the provisions of Revised Code Section 5705.32 to revise and adjust the estimate of balances and receipts from all sources noted in the school's budget, and especially to correct the budget to the extent that no more millage is authorized to be levied than [sic] is necessary to provide funds for appellant's total budgeted needs. From the statutes before us, we cannot assume that the legislature intended that the budget commission should rubber stamp maximum voted levies irrespective of need therefor as shown by a budget prepared by the taxing authority and presented for public inspection."

I am not unaware of Section 5705.31, supra, which provides in part:

"\* \* \* The commission shall examine such budget and ascertain the total amount proposed to be raised in the county for the purposes of each subdivision and other taxing units therein.

"The commission shall ascertain that the following levies are properly authorized and if so authorized, shall approve the following levies without modification:

"(A) All levies in excess of the ten-mill limitation;

"\* \* \*

\* \* \*

\* \* \*"

In the case of State, ex rel. Board of Education of East Liverpool City School District, v. Columbiana County Budget Commission, 140 Ohio St. 65, the court was called upon to construe the language in former General Code Section 5625-23 (now Section 5705.31, supra) and concluded, on page 67:

"\* \* \* If these provisions are mandatory the budget commission would be without discretion and its approval would amount to an empty formality. This is inconsistent with the requirement that the 'commission shall ascertain that the \* \* \* levies are properly authorized and if so authorized, shall approve them.' The relator insists that this duty is limited to a mere matter of form and does not extend to the substance of the levy. Were this view correct the commission would be compelled to approve a levy without regard to the actual needs of a subdivision \* \* \*"

Subsequently, the legislature added what is now subsection (F) to Section 5705.31, supra, which reads:

"(F) Divisions (A), (B), (C), (D), and (E) are mandatory and commissions shall be without discretion to reduce such minimum levies except as provided in such divisions."  
(Emphasis added)

Yet, it must be noted that a levy outside the ten-mill limitation pursuant to Section 5705.19 (I), supra, to which your question applies, does not involve a minimum levy and consequently subsection (F) is inapplicable.

I have examined the case of State, ex rel. Board of County Commissioners of Lucas County, v. Austin, Aud., et al., 158 Ohio St. 476, which has, on occasions, been arguably interpreted as rendering the budget commission a mere rubber stamp. However, as is readily apparent from a reading of that case, the budget commission failed to issue any certificate either approving or disapproving the proposed levy. The rates of the proposed levy were not in issue and the Supreme Court quite properly affirmed the issuance of the writ of mandamus to compel the budget commission to issue a certificate.

I have also considered my Opinion 64-1578, Opinions of the Attorney General for 1964, page 2-439, wherein the syllabus reads:

"Where a taxing authority proceeds as authorized by Section 5705.19, et seq., Revised Code, to declare that it is necessary to levy a tax in excess of the ten-mill limitation and that such tax shall be levied upon the duplicate for the current year, the tax shall, after approval by the electors, be levied on the current duplicate as directed by statute, and there is no requirement that the necessity for the additional taxation must have been included in the budget submitted to the county auditor by the taxing authority prior to the adoption of the resolution of necessity."

Although this opinion and syllabus recognized the broad powers of the taxing authority to declare the necessity for additional revenue (page 2-440), this opinion cannot be construed as compelling the county budget commission and the county auditor to pro forma authorize the voted levy at the maximum voted millage irrespective of the subdivision needs. In this regard, the statement on page 2-441 to the effect that:

"\* \* \* if the electors cast a favorable vote, the taxes must be levied as provided by law."

is herewith limited insofar as although the taxes must be levied, the rate of the levy cannot exceed the needs of the subdivision as disclosed by the subdivision's tax budget.

Upon the filing by the budget commission with the taxing authority of the certification, the taxing authority is then required to authorize, by ordinance or resolution, the necessary tax levies as contained in the commission's certification, at rates no greater and no less than as certified. In Opinion No. 1226, supra, beginning on page 1823, it was observed that the budget commission and the county auditor



"\* \* \* are obligated under the law to determine and approve rates for the levying of taxes in accordance with the budget as submitted and to certify those rates to the taxing authority as directed by the terms of Section 5625-25, supra. In accordance with its duty as fixed by the last mentioned statute the taxing authority is bound to authorize the levies by ordinance or resolution at the rates as certified to it, no more and no less, and to certify their action in so doing to the county auditor on or before October 1st in each year or at such later date as may be approved by the Department of Taxation."

The second paragraph of the syllabus of this opinion reads:

"2. It is the duty of the taxing authority of a taxing subdivision or other taxing unit to authorize by ordinance or resolution tax levies for said subdivision or taxing unit at rates estimated by the county auditor and approved by the county budget commission as contained in the certification by the county budget commission of its action in connection with the budget for the taxing subdivision or other taxing unit, to the said taxing authority as directed by the provisions of Section 5625-25, General Code."

Consequently, based upon the above observations, it is manifest that even if the board of township trustees were to now resolve the existence of a necessity as of some undisclosed future time and the voters were to approve a tax levy based upon the "future" necessity, the township trustees could not in good faith budget a nonexistent expenditure into the township budget for the next ensuing fiscal year and hence, the budget commission would be compelled to adjust the township's rate of taxation under that special levy accordingly.

Your letter of request also inquires about the accumulation of tax monies derived from a pre-existent levy, which for some reason or another have not been expended during the fiscal year. In response to this, your attention is again directed to Section 5705.29, supra, which provides that the subdivision's budget for the next succeeding fiscal year shall contain:

"\* \* \* \* \* \* \*"

"(B) (1) An 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;

"(2) The amount each fund requires from the general property tax, which shall be the difference between the contemplated expenditure from the fund and the estimated receipts, as provided in this section. The section of the Revised Code under which the tax is authorized shall be set forth;

"\* \* \* \* \* \* \*"

(Emphasis added)

If the past year's appropriation for fire protection has not been completely expended or encumbered, the monies so appropriated but unspent and unencum-

bered would, at the end of the fiscal year, revert to the fund from which they were appropriated and would, pursuant to Section 5705.29 (B) (1) and (2), supra, be included in the township's estimate of receipts for the next ensuing fiscal year and would be considered accordingly by the county budget commission, as detailed above, in adjusting the rate of taxation necessary for fire protection for the ensuing fiscal year.

To conclude that the appropriation must be completely expended, regardless of whether the expenditure is necessary, encourages fiscal irresponsibility. On the other hand, to conclude that the annual unencumbered appropriation can be accumulated until some future time is contrary to Section 5705.29 (B) (1) and (2), supra.

Inasmuch as the board of township trustees is a creature of statute, it has only the powers expressly provided by law or necessarily implied therefrom. 52 O. Jur. 2d 295, Townships, Section 42. Therefore, based upon the absence of any express power to proceed as outlined in your letter of request and in light of the above observations and conclusions, I herewith conclude that a board of township trustees may not accumulate the proceeds of a voted levy for fire protection during the life of the levy, for expenditure at a later date.

Since I have concluded that a board of township trustees may not accumulate the proceeds of a voted levy during the life of the levy, there is no need to consider your second question pertaining to the investment of the accumulation.