Supreme Court of Ohio Clerk of Court - Filed July 06, 2016 - Case No. 2015-0484

In the Supreme Court of Ohio

DEFIANCE COUNTY, OHIO,	:	
Appellant,	:	Case No. 2015-0484
v.	:	
	:	Appeal from the Board of Tax Appeals
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO,	:	BTA Case No. 2014-2059
Appellee.	:	

NOTICE OF SUPPLEMENTAL AUTHORITY OF APPELLEE JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

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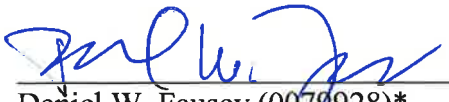
NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Rule 17.08 of the Supreme Court of Ohio Rules of Practice, Appellee Joseph W. Testa, Tax Commissioner of Ohio, hereby gives notice of the following additional authorities upon which he will rely in presenting oral argument before the Court:

- OH Const. Art. XII, § 5;
- RC 5705.12
- *In re Perry Tp.*, 52 Ohio App.3d 1 (1988);
- *Mountain View Ltd. Partnership v. City of Clifton Forge*, 256 Va. 304 (1998);
- 1963 Ohio Op. Atty. Gen. 154;
- 1992 Ohio Op. Atty. Gen. 2-101 (Ohio A.G.), 1992 Ohio Op. Atty. Gen. No. 92-027, 1992 WL 526415;
- 2016 Ohio Op. Atty. Gen. No. 2016-002 (Ohio A.G.), 2016 WL 463430;

Respectfully Submitted,

Michael DeWine
Ohio Attorney General



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Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article XII. Finance and Taxation (Refs & Annos)

OH Const. Art. XII, § 5

O Const XII Sec. 5 Levy of taxes; object to be stated; revenue to be applied to stated object

Currentness

No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

Notes of Decisions (32)

Const. Art. XII, § 5, OH CONST Art. XII, § 5
Current through Files 85 to 89, 91 to 99, and 101 to 106 of the 131st General Assembly (2015-2016).

End of Document

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5705.12 Approval to establish special funds.

In addition to the funds provided for by sections 5705.09, 5705.1215705.13, and 5705.131 of the Revised Code, the taxing authority of a subdivision may establish, with the approval of and in the manner prescribed by the auditor of state, such other funds as are desirable, and may provide by ordinance or resolution that money derived from specified sources other than the general property tax shall be paid directly into such funds. The auditor of state shall consult with the tax commissioner before approving such funds.

Effective Date: 07-22-1998

52 Ohio App.3d 1
Court of Appeals of Ohio, Second District, Montgomery County.

In re Petition for Transfer of Funds by PERRY TOWNSHIP.

No. 10770.
|
June 24, 1988.

Township trustees filed petition to transfer excess funds from special fire district fund to township general fund. The Court of Common Pleas, Montgomery County, denied petition, and petitioners appealed. The Court of Appeals, Brogan, J., held that: (1) unexpended balance of special fire district fund could not be transferred to general fund where undertaking for which special fund existed had not terminated, and (2) provision allowing transfer from one fund to another public fund was unconstitutional as applied to the transfer of funds from special levies enacted for particular purpose to funds which could be used for a different purpose.

Affirmed.

West Headnotes (3)

[1] **Municipal Corporations**
Special Funds

Statute allowing special levy funds to be distributed to other places of need when original purpose of levy could not possibly be carried out did not authorize transfer of fire district funds to township general fund; funds were raised by specific tax levy for specific purpose of providing fire protection, a need which would continue indefinitely. R.C. §§ 5705.01 et seq., 5705.09, 5705.09(D), 5705.14, 5705.14(D), 5705.15, 5705.16; Const. Art. 12, § 5.

1 Cases that cite this headnote

[2] **Municipal Corporations**
Special Funds

Taxes levied for specific purpose which the voters approved cannot be used for purpose the voters did not approve.

1 Cases that cite this headnote

[3] **Municipal Corporations**
Constitutional and Statutory Provisions

Provision authorizing transfer of political subdivision funds to other public funds under government subdivision's supervision was unconstitutional as applied to transfer of funds raised by a levy for a specific purpose to general fund. R.C. §§ 5705.14(D), 5705.15; Const. Art. 12, § 5.

Cases that cite this headnote

****191** *Syllabus by the Court*

***1** 1. R.C. 5705.14(D) prohibits the transfer of the unexpended balance of a special fund to a general fund where the undertaking for which the special fund exists has not terminated. Where the special fund was created to pay for fire protection, the need for that service is not terminated by paying the expenses for the current year. Therefore, no transfer of funds can occur under R.C. 5705.14(D).

2. As applied to the transfer of funds from special levies, enacted for a particular purpose, to funds which may be used for a different purpose, R.C. 5705.15 is unconstitutional under Section 5, Article XII of the Ohio Constitution.

Attorneys and Law Firms

Lee C. Falke, Pros. Atty., and Michael Russell, Dayton, for appellants Perry Township Trustees.

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Gary E. Zuhl, Brookville, for appellee village of Brookville.

John R. Wykoff, Cincinnati, for village of New Lebanon.

Opinion

BROGAN, Judge.

This case comes to us from a petition to transfer excess funds from a special Fire District Fund to a township general fund brought by the petitioners, the Trustees of Perry Township, in the Court of Common Pleas of Montgomery County. The common pleas court held a hearing at which the villages of New Lebanon and Brookville ("the villages") opposed the petition. This appeal arises out of the common pleas court's decision to deny the petition.

The pertinent facts are simple. A vote by the citizens of Perry Township, which includes the citizens of New Lebanon and Brookville, approved a special tax levy for the purpose of providing fire protection. Township fire protection is provided by contracts with the villages providing for the payment of $42,000 to each village. The contracts and the levy each run through ****192** 1989. The villages provide their own police protection and have their own central government facilities.

The Perry Township Trustees predict a surplus at the end of 1987 of ***2** approximately $40,000 in the Fire District Fund, which is where the money from the fire prevention levy is held. The trustees want to transfer $30,000 of the surplus from the Fire District Fund to the township's General Fund to help pay for renovations to an old building so that it may become a new central government building housing the township clerk, the township zoning inspectors, township meetings and the township police department.

A petition to transfer funds was sent to the state Tax Commissioner. The commissioner ruled that the transfer was in compliance with R.C. 5705.15 and 5705.16, and therefore he approved the request to file the petition with the common pleas court. The common pleas court held a hearing and then denied the petition to transfer funds based on that court's reading of R.C. 5705.14 and 5705.15. It is from that decision that this appeal was taken.

The appellant petitioners assert three assignments of error:

"1. The trial court erred in finding that the 'unexpended balance in the fire fund as of the date of the hearing and all the estimated fire levy tax revenues not yet collected may be insufficient to pay for and satisfy all the fire protection needs of Perry Township's residents.'

"2. The trial court erred in finding that section 5705.14(D) was applicable to the transfer of fire funds to the General Fund of Perry Township, Ohio.

"3. The trial court erred in finding that injury would result from the transfer of $30,000.00 from the fire fund to the General Fund of Perry Township by citing 'a potential injury to those residents.' "

We will address the second assignment of error first since our conclusion under that assignment will render assignments of error numbers one and three moot.

[1] The first assignment of error alleges that R.C. 5705.14(D) does not apply to the requested transfer of funds. We disagree.

The nature of the funds being transferred in this case is of paramount importance. What we have before us are funds raised by a specific tax levy for the specific purpose of providing fire protection to Perry Township. Both the intention of the legislators in drafting the provisions of R.C. 5705.01 *et seq.* applying to tax levies and the ruling of this court are bound by Section 5, Article XII of the Ohio Constitution, which states:

"No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of same, to which only, it shall be applied."

[2] This prevents taxes levied for a specific purpose which the voters approve being used for a purpose the voters did not approve. With this in mind we can address the applicable statutes pertaining to transfers of tax monies between funds.

R.C. 5705.09 establishes the various funds in which tax dollars can be kept. R.C. 5705.09(D) provides that a special fund be set up for each special levy. In the case before us, the Fire District Fund was set up to hold the proceeds from the special fire protection levy. Therefore, the Fire District Fund is such a special fund.

Transfers of money from one fund to another are limited by R.C. 5705.14 and 5705.15, and the procedures for transfer are laid out in R.C. 5705.16. Transfers of the unexpended balance of a special fund to a general fund are limited by R.C. 5705.14(D), which allows such a transfer only " * * * after the termination of the activity,

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service, or other undertaking for which the special fund existed * * *." In the case *3 at bar, the undertaking for which the Fire District Fund existed is the provision of fire prevention to the residents of Perry Township. The common pleas court concluded, and we agree, that the need for fire protection will continue indefinitely. This need is not terminated by paying for this year's fire protection. Additional need may arise above and beyond that provided for in the contracts with the two villages. **193 The need does not terminate. Therefore, no transfer of funds can occur under R.C. 5705.14(D).

R.C. 5705.14(D) does not conflict with Section 5, Article XII of the Ohio Constitution. It acts much like the doctrine of *cy pres* which is used to determine the distribution of a testamentary trust in perpetuity when the original purpose of the devise cannot possibly be carried out. Likewise, R.C. 5705.14(D) allows special levy funds to be distributed to other places of need when the original purpose of the levy cannot possibly be carried out.

Another provision providing for transfers of public funds is R.C. 5705.15, which contains the following general language:

"In addition to the transfers authorized in section 5705.14 of the Revised Code, the taxing authority of any political subdivision may, in the manner provided in this section and section 5705.16 of the Revised Code, transfer from one fund to another any public funds under its supervision, except the proceeds or balances of loans, bond issues, special levies for the payment of loans or bond issues, the proceeds or balances of funds derived from any excise tax levied by law for a specified purpose, and the proceeds or balances of any license fees imposed by law for a specified purpose."

[3] While it seems that this provision would allow the transfer of funds from any special levy to a general fund in addition to the method provided in R.C. 5705.14(D), allowing this type of transfer would be unconstitutional according to Section 5, Article XII of the Ohio Constitution, prohibiting the use of funds raised by a levy for a specific purpose for any other purpose than that specified. This is exactly the type of transfer the Constitution intended to prohibit. See *State, ex rel. Walton v. Edmondson* (1913), 89 Ohio St. 351, 364, 106 N.E. 41, 45. Therefore, as applied to funds from special levies enacted for a particular purpose being moved to funds which may be expended for a different purpose, R.C. 5705.15 is unconstitutional and we refuse to apply it to allow the requested transfer in this case. Transfer of the funds requested by the petition was properly denied below.

The residents of the villages who vote for and receive benefit from the payment of taxes imposed by the special fire protection levy would receive no benefit from the construction of a township building which duplicates services provided to them by the villages. We suggest that if the people of Perry Township want to pay for a central government building, they should vote for a levy to do so. Otherwise, surplus to pay for this building may be obtained from one of the township's general funds from general taxes. We also suggest that if the surplus in the Fire District Fund cannot be used on current fire prevention needs, in the future this special tax should be levied at a rate less than approved. While lowering the tax rate is not a novel idea, it would surely make for a pleasant surprise to the township taxpayers.

The second assignment of error is not well-taken.

The first and third assignments of error can have no impact on the outcome of this appeal. The sufficiency of the fire fund to meet the obligation is irrelevant, as is whether or not this *4 transfer would create injury. The only factual inquiry of any relevance was whether or not the activity, service or undertaking for which the special fund existed had terminated according to R.C. 5705.14(D). Mr. Hough, a township trustee, testified at the hearing that Perry Township had a continuing need for fire protection. The common pleas court found likewise. The findings below were therefore proper and these two assignments of error are moot.

The first and third assignments of error are not well-taken.

The judgment below is affirmed.

Judgment affirmed.

WILSON and FAIN, JJ., concur.

All Citations

52 Ohio App.3d 1, 556 N.E.2d 191

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132 Ohio St.3d 186
Supreme Court of Ohio.

DREES COMPANY et al., Appellants,
v.
HAMILTON TOWNSHIP et al., Appellees.

No. 2010–1548.
|
Submitted June 8, 2011.
|
Decided May 31, 2012.

Synopsis
Background: Builders brought action against township, seeking injunctive relief, declaratory judgment, and damages, challenging validity of "impact fee" imposed by township upon applicants for zoning certificates for new construction or redevelopment within township's unincorporated areas. The Court of Common Pleas, Warren County, No. 07CV70181, 2009 WL 6024008, entered summary judgment in favor of township. Builders appealed. The Court of Appeals, 2010 WL 2891746, affirmed.

[Holding:] After accepting builders' discretionary appeal, the Supreme Court, Pfeifer, J., held that impact **fee** was a **tax**, imposed in violation limited home rule statute.

Reversed and remanded.

West Headnotes (3)

[1] **Towns**
⚖Governmental powers in general

Townships are creatures of the law and have only such authority as is conferred upon them by law. R.C. § 504.04 et seq.

1 Cases that cite this headnote

[2] **Taxation**
⚖Distinguishing "**tax**" and "license" or "**fee**"

In order to determine whether certain government assessments are **taxes** or **fees**, for purposes of determining the validity of the assessments, a court must analyze the substance of the assessments and not merely their form.

2 Cases that cite this headnote

[3] **Taxation**
⚖Distinguishing "**tax**" and "license" or "**fee**"
Zoning and Planning
⚖Fees, bonds and in lieu payments

"Impact **fee**," an assessment imposed by limited home rule township upon applicants for zoning certificates for new construction or redevelopment within township's unincorporated areas, was a **tax**, not a **fee**, and thus assessment violated limited home rule statute; although revenue generated by assessment was placed in segregated fund, stated purpose of assessment was to guarantee consistent level of services to all members of community, revenue generated by assessment was spent on typical township expenses inuring to the benefit of the entire community, such as roads, fire, police, and parks, revenue was not earmarked to ensure that it was spent to improve area around particular property upon which assessments had been imposed, assessed parties got no particular service above that provided to any other taxpayer for the **fee** that they paid, and any refund of assessment was dependent on whether township had spent revenue from assessment. R.C. § 504.04(A)(1).

4 Cases that cite this headnote

Attorneys and Law Firms

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Rendigs, Fry, Kiely & Dennis, L.L.P., Wilson G. Weisenfelder Jr., James J. Englert, and Lynne M. Longtin, Cincinnati; and Keating Ritchie & McGary, L.P.A., and Warren J. Ritchie, Cincinnati, for appellees.

Keating Ritchie & McGary, L.P.A., and Thomas T. Keating, Cincinnati, urging affirmance for amicus curiae Ohio Township Association.

****917** Maurice A. Thompson, urging reversal for amici curiae 1851 Center for Constitutional Law and the Tax Foundation.

Christopher M. Whitcomb, urging reversal for amicus curiae National Association of Home Builders.

Robert N. Eshenbaugh Jr., urging reversal for amicus curiae Ohio Home Builders Association.

Opinion

PFEIFER, J.

***186** { ¶ 1} In this case we consider whether Hamilton Township, a limited-home-rule township, was authorized under Ohio law to impose its system of impact fees upon applicants for zoning certificates for new construction or redevelopment within its unincorporated areas. We hold that the impact **fees** operated as **taxes**; thus, Hamilton Township was not authorized to impose them pursuant to R.C. 504.04(A)(1).

Factual and Procedural Background

{ ¶ 2} Appellee Hamilton Township is a township that has adopted a limited-home-rule government, as defined by R.C. Chapter 504, and is located in Warren County. It has seen significant growth in recent years; the population grew from 5,900 in 1990, to 9,630 in 2000, to 23,556 in 2010. http://www. census. gov/prod/cen1990/cp1/cp–1–37.pdf (page 583, accessed May 3, 2012); http://fact finder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml? pid=DEC_10_ DP_DPDP1&prodType=table (accessed May 3, 2012) and http://fact finder2.census. gov/faces/tableservices/jsf/pages/productview.xhtml?pid= DEC_00_ SF1_DP1&prod Type=table (accessed May 3, 2012). Appellee Hamilton Township Board of Trustees is the legislative and administrative body responsible for governing Hamilton Township under R.C. Title 5.

{ ¶ 3} On May 2, 2007, the board of trustees passed Amended Resolution No. 2007–0418, descriptively titled "Amended Resolution Implementing Impact Fees Within the Unincorporated Areas of Hamilton Township, Ohio for Roads, Fire ***187** and Police, and Parks." The resolution adopted a schedule of fees to be charged to applicants for zoning certificates for new construction or redevelopment. The resolution included four categories of fees: a road-impact fee, a fire-protection-impact fee, a police-protection-impact fee, and a park-impact fee. The parties in this case made the following stipulation regarding the purpose of the resolution:

> The purpose of the impact fee is to benefit the property by providing the Township with adequate funds to provide the same level of service to that property that the Township currently affords previously developed properties.
>
> The Resolution assesses an impact fee to previously undeveloped property, and property undergoing redevelopment, to offset increased services and improvements needed because of the development.

{ ¶ 4} The amount of the fees varies based upon the land use. Owners of property to be used for single-family detached dwellings, multifamily units, and hotel/motel rooms are assessed fees on a per-unit basis. Owners of property to be used for retail/commercial, office/institutional, industrial, warehouse, church, school, nursing-home, and hospital purposes are assessed fees on a per–1,000–square–feet basis. Only owners of property to be used for single-family detached and multifamily units are assessed the park component of the impact fees.

{ ¶ 5} For example, the fees for the owner of property to be used as a single-family detached dwelling, broken down by category, ****918** are $3,964 for roads, $335 for fire, $206 for police, and $1,648 for parks, for a total assessment of $6,153. The fees, per 1,000 square feet, for the owner of property to be used for retail/commercial purposes are $7,265 for roads, $432 for fire, and $265 for police, for a total assessment of $7,962. The township phased in the impact fees over time, charging only one-third of the total fee the first year after passage and two-thirds the second year. As of August 31, 2009, the township has charged the full impact fees.

{ ¶ 6} All impact fees collected by the township are

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deposited into impact-fee accounts, not into a general fund. The resolution created accounts for each of the four types of impact fees. Money in each discrete account may be used only for the purpose of the account. The accounts do not contain geographic subaccounts. The money in each account is to be spent on a "first-in/first-out" basis, meaning that the money that has been in each account the longest will be spent first. Funds must be spent on projects initiated within three years of the fees' collection; any money not spent within seven years of its collection is refunded to the current owner of the property.

***188** { ¶ 7} The resolution permits the township to give credits to offset against the impact fees for certain improvements. A land owner or developer can receive partial or full credit for contributions toward the cost of major roadway-system improvements, provided the roadway is on the township's thoroughfare plan. However, no credit will be given for dedication of right-of-ways or for improvements to the major roadway system that primarily serve traffic generated by the improved property, such as acceleration/deceleration lanes into and out of the property.

{ ¶ 8} The township allocates a maximum of 75 percent of the impact fees collected each year to reimburse developers for eligible improvement credits. If the amount allocated for reimbursements is not sufficient to make all payments due to developers for that year, each developer will receive a pro rata share of the amount owed, and the unpaid amount will be carried forward to the following year. If less than 75 percent of the impact fees collected is required for reimbursements in any given year, the remainder may be used for public-project expenditures.

{ ¶ 9} The township will not issue a zoning certificate until the applicant has paid the applicable impact fee. Within the first year of the passage of the resolution, appellants the Drees Company, Fischer Single Family Homes II, L.L.C., John Henry Homes, Inc., and Charleston Signature Homes, L.L.C., all sought zoning certificates to construct single-family homes; all paid a $200 zoning-application fee and, under protest, paid impact fees of $2,030.16 per application.

{ ¶ 10} Appellants named above and appellant Home Builders Association of Greater Cincinnati then brought this action against appellees, the township and its trustees, seeking a declaratory judgment, injunctive relief, and damages, alleging that the impact fees are contrary to Ohio law and are unconstitutional. The parties submitted stipulated facts and exhibits, and each side filed a motion for summary judgment. The trial court granted the township's motion, holding as follows:

> Hamilton Township, pursuant to its statutory limited police powers, may make and fund improvements to benefit new development by use of its system of impact fees, because the resolution is not in conflict with any other Ohio statute, and because it is sufficiently narrowly tailored to ****919** provide services to the class of fee payers in exchange for the fees.

{ ¶ 11} The Twelfth District Court of Appeals affirmed. The court held that, contrary to appellants' arguments, the impact fees were not a prohibited form of ***189** taxation, did not conflict with general laws of the state, and did not alter the structure of township government.

{ ¶ 12} The cause is before this court upon the acceptance of a discretionary appeal. 127 Ohio St.3d 1460, 2010-Ohio-6008, 938 N.E.2d 362.

Law and Analysis

[1] { ¶ 13} In Ohio, "townships are creatures of the law and have only such authority as is conferred on them by law." *State ex rel. Schramm v. Ayres,* 158 Ohio St. 30, 33, 106 N.E.2d 630 (1952). Hamilton Township is a limited-home-rule township created under R.C. Chapter 504. R.C. 504.04(A)(1) states that limited-home-rule townships may, by resolution,

> [e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws, except that the township shall comply with the requirements and prohibitions of this chapter, and *shall enact no taxes other than those authorized by general law* * * *.

(Emphasis added.)

{ ¶ 14} This opinion focuses on whether the impact **fees** imposed by the township are **taxes** "other than those authorized by general law." Ohio law already empowers townships to employ specified methods of taxation to raise money to pay for police and fire service (R.C. 505.51 and 505.39), parks (R.C. 511.27 and 511.33), and roads (R.C. 5571.15, 5573.07, 5573.10, 5573.11, and 5573.211). There is no dispute in this case that the impact

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fees at issue do not meet the requirements of those methods of taxation, so if the impact **fees** are actually **taxes**, they violate R.C. 504.04.

Distinguishing a **Fee** from a **Tax**

[2] { ¶ 15} The fact that the township's resolution calls the assessments "**fees**" is certainly not sufficient to establish that the assessments are not **taxes**. In order to determine whether certain assessments are taxes, we must analyze "the substance of the assessments and not merely their form." *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow,* 62 Ohio St.3d 111, 116, 579 N.E.2d 705 (1991), fn. 5. Although this court has stated that "[i]t is not possible to come up with a single test that will correctly distinguish a **tax** from a **fee** in all situations where the words '**tax**' and '**fee**' arise," *id.* at 117, 579 N.E.2d 705, we can look to our own case law and that of other jurisdictions for guidance in making our determination in this case.

***190** *Withrow* Factors

{ ¶ 16} In *Withrow,* this court considered whether assessments imposed upon owners and operators of underground storage tanks ("USTs") by the Petroleum Underground Storage Tank Release Compensation Board were taxes. The assessments helped fund the Petroleum Underground Storage Tank Financial Assurance Fund. That fund was created "to reimburse owners and operators of USTs for the costs of corrective actions in the event of a release of petroleum into the environment and to compensate third parties for bodily injury and/or property damage resulting from such occurrences." *Withrow* at 111, 579 N.E.2d 705. The proceeds from the assessment were kept separate from the ****920** general fund of the state treasury. *Id.* at 116, 579 N.E.2d 705.

{ ¶ 17} This court cited a number of factors in concluding that the assessment in *Withrow* was not a **tax**, but a **fee**. First, this court found it significant that the fees were imposed in furtherance of regulatory measures designed to address the environmental problems caused by leaking USTs; by statute, the owners and operators of USTs were strictly liable to take corrective actions and to pay damages for leaking USTs. *Id.* The fund into which the fees were paid ensured that UST owners could meet those statutory obligations.

{ ¶ 18} Second, the assessments were never placed in the general fund and were to be used only "for narrow and specific purposes, all directly related to UST problems." *Withrow,* 62 Ohio St.3d at 116–117, 579 N.E.2d 705.

{ ¶ 19} Third, the court noted that "[a] fee is a charge imposed by a government in return for a service it provides." *Id.* at 113, 579 N.E.2d 705. And it held that in exchange for the fee, the UST owners and operators received protection that resembled insurance. *Id.* at 117, 579 N.E.2d 705.

{ ¶ 20} Fourth, this court was also persuaded by the fact that when the unobligated balance in the fund exceeded a certain amount, there would be no assessment for that year. Further, if the fund dipped below a certain amount, the assessing authority was permitted to charge a supplemental assessment. The court concluded, "Thus, the assessment appears to function more as a **fee** than as a **tax**, because a specific charge in return for a service is involved." *Id.*

Applying *Withrow* Factors to this Case

[3] { ¶ 21} The assessment in this case differs in several important respects from the assessment this court deemed a fee in *Withrow.* First, the township's assessment lacks the regulatory aspect of the fee charged in *Withrow.* Unlike the fee in *Withrow,* the assessment at issue is not imposed in furtherance of statutes designed to protect the public from harms associated with a specific industry. Rather, it is a revenue generator with the stated purpose of guaranteeing a consistent level of services to all members of the community. It does not ***191** encourage the assessed parties' compliance with certain statutory obligations or protect the public from specific threats.

{ ¶ 22} Second, unlike the fee collected in *Withrow,* the revenue generated by the assessment in this case is spent on typical township expenses inuring to the benefit of the entire community. It is true that the Hamilton Township assessments are not placed into the general fund; rather, the revenue goes into separate funds for roads, fire, police, and parks. However, as the court pointed out in *Withrow,* "if these assessments [are] actually **taxes**, the simple act by the legislature of placing them in a segregated fund [does] not transform them into **fees**. We must examine the substance of the assessments and not merely their form." *Withrow,* 62 Ohio St.3d at 116, 579 N.E.2d 705, fn. 5. Here, although the funds are segregated, the *use* of the money from the funds is general in nature. The money is not earmarked so that it is spent to improve the area around the particular property upon which the assessments are imposed; in other words, there are no geographic subaccounts among the accounts. For

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instance, there is no requirement that money placed into the police fund goes to create a police substation near a new neighborhood. Instead, the funds can be spent on any police expenditure throughout the community. Within the specific fund, money is spent in a general way, all toward the normal expenditures of government.

****921** { ¶ 23} Third, this court found that the assessment in *Withrow* was a fee for a service that the government provided; that is, the fund into which the fees were deposited operated, essentially, as insurance coverage for catastrophic damage caused by leaking tanks. Here, assessed parties get no particular service above that provided to any other taxpayer for the fee that they pay. As taxpayers and residents of Hamilton Township, they are entitled to police and fire protection and to use township parks and roadways. They already pay taxes for those services; in fact, when they improve their property, they pay higher taxes than they did when the property was undeveloped. But targets of the assessment receive no greater benefit than any other taxpayer despite the payment of the additional assessment.

{ ¶ 24} Finally, the fee that was charged in *Withrow* was tied to events, not the spending whims of government. In *Withrow,* UST owners were liable for a supplemental fee if the situation warranted it, that is, if the fund dwindled as tank leaks increased. Further, if the fund were at sufficient levels, the board could suspend the fees. In regard to the township assessment in this case, there is a refund of the fees only if the township decides not to spend the money. Whether the money is spent is up to the local government. Since the money is not tied to any particular type of expenditure within any of the four funds, the only way the money would not be spent is by governmental frugality. And unlike the system in place in *Withrow,* there is no mechanism to require a further assessment ***192** should the situation demand it. Thus, unlike the fee in *Withrow,* this assessment is not responsive to need. Thus, it bears less resemblance to a fee for a service than the assessment in *Withrow* did.

{ ¶ 25} Overall, an application of the *Withrow* factors in this case points to the assessments as constituting taxes.

Am. Landfill Analysis

{ ¶ 26} In *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgt. Dist.,* 166 F.3d 835 (6th Cir.1999), the Sixth Circuit Court of Appeals employed an analysis similar to that used in *Withrow* in considering whether assessments imposed by solid-waste-management districts on persons disposing of material at solid-waste-disposal facilities located within their districts constituted **fees** or **taxes** for purposes of the **Tax** Injunction Act, 28 U.S.C. 1341. The funds, collected by owners or operators of disposal facilities, were to be used for various purposes, including "preparing and implementing the district's solid waste management plan," "develop[ing] and implement[ing] * * * solid waste recycling or reduction programs," "providing financial assistance to local boards of health for water analysis and other enforcement activities," "providing financial assistance to counties for maintenance of roads, public facilities, and emergency services which result from the location of a solid waste facility in the counties," and "assist[ing] * * * local law enforcement and boards of health [in] enforc[ing] littering and open dumping laws." *Am. Landfill* at 836.

{ ¶ 27} The court in *Am. Landfill* applied a three-factor analysis that had been employed by the courts in *Bidart Bros. v. California Apple Comm.,* 73 F.3d 925, 931 (9th Cir.1996) and *San Juan Cellular Tel. Co. v. Pub. Serv. Comm. of Puerto Rico,* 967 F.2d 683, 685 (1st Cir.1992) to determine whether the assessment was a **fee** or **tax**. As set forth in *Bidart,* a court should consider "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether ****922** the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed." *Bidart* at 931.

{ ¶ 28} The court in *San Juan* described the classic versions of a **tax** and a **fee**:

> The classic "**tax**" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. * * * The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. * * * It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. * * * Or, it may serve ***193** such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

San Juan at 685.

{ ¶ 29} In regard to the first two factors—the entity that imposes the assessment and the entity that must pay the assessment—"[a]n assessment imposed directly by the

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legislature is more likely to be a tax than an assessment imposed by an administrative agency" and "[a]n assessment imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class." *Bidart,* 73 F.3d at 931, citing *San Juan,* 967 F.2d at 685.

{ ¶ 30} Most assessments fall somewhere near the middle of the spectrum between a **fee** and a **tax**; in such cases, the use of the funds becomes the predominant factor in making the ultimate determination:

> Both *San Juan* and *Bidart* indicate that for cases where the assessment falls near the middle of the spectrum between a regulatory **fee** and a classic **tax**, the predominant factor is the revenue's ultimate use. *See San Juan,* 967 F.2d at 685; *Bidart,* 73 F.3d at 932. When the ultimate use is to provide a general public benefit, the assessment is likely a **tax**, while an assessment that provides a more narrow benefit to the regulated companies is likely a **fee**. *See id.*

Am. Landfill, 166 F.3d at 837–838.

{ ¶ 31} In applying the *San Juan* and *Bidart* approach, the court in *Am. Landfill* determined that the assessment was a tax. The court found that the entity imposing the assessment—the local solid-waste-management district—and the parties upon whom the assessment was imposed—users of solid-waste-management facilities—were factors that weighed in favor of the assessment's being a fee. But that was balanced by the fact that the General Assembly had been involved in authorizing the districts to impose the assessment, keeping the case "near the middle of the spectrum between a pure regulatory **fee** and a classic **tax**." *Am. Landfill* at 839. The court concluded that the third factor pushed the assessment into the realm of a tax: "The revenue's ultimate use as a benefit shared by the public and not just the waste disposal facilities indicates that the assessment here is a tax." *Id.* at 839–840. The court made that finding despite the fact that the revenues were placed in a fund separate from the general fund. The court pointed to the public purposes to which the revenue collected was to be put, including the development of recycling programs, road and public-facility maintenance, and emergency services: "These ****923** purposes 'relate directly to the general welfare of the citizens of [Ohio],' and dedication to a ***194** particular aspect of state welfare makes them 'no less general revenue raising levies.' " *Id.* at 839, quoting *Wright v. McClain,* 835 F.2d 143, 145 (6th Cir.1987).

Application of *Am. Landfill* Analysis

{ ¶ 32} Applying the three-factor test that the court employed in *Am. Landfill* in this case yields the conclusion that the assessment at issue is a tax. As for the first factor, the entity imposing the assessment in this case is a legislative body, not a regulatory body, which favors characterizing the assessment as a tax. In regard to the second factor, the entities paying the assessment are not part of a single industry or group. The assessment applies to a fairly large swath of people—anyone who wants to engage in any type of development in the township. However, it also is not imposed on every township resident. That pushes the needle further from a classic **tax**, but not into the realm of a classic **fee**. The third factor, the ultimate use of the revenue, places the assessment solidly in the realm of taxation. The fact that the funds from the assessments are segregated into separate accounts is irrelevant; the fact that the revenue is earmarked for police protection, fire protection, road improvement, and parks that benefit the entire community is the key factor. The assessments raise revenue for the public's benefit. All members of the community will benefit from improved roadways and parks, as well as from consistent levels of police and fire protection.

Other State Supreme Courts

{ ¶ 33} Although *Withrow* and *Am. Landfill* are instructive as to the **fee**-versus-**tax** issue, neither involved the type of assessment at issue in this case. However, other state supreme courts facing very similar matters have found that impact **fees** constituted **taxes**. A key factor in those cases was the extent of the public benefit that resulted from the assessment. In *Home Builders Assn. of Greater Des Moines v. W. Des Moines,* 644 N.W.2d 339 (Iowa 2002), the court considered an impact fee paid by land developers and builders that was used by the city to create or improve parks. The court pointed to the lack of a special benefit inuring to the targets of the **fee** in determining that the **fee** was a **tax**:

> [T]he **fee** is based on the cost of building the neighborhood parks, an expense representing the general benefit to the community at large. Therefore, the parks **fee** is not based on special benefits conferred on the property owners so as to

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> fall outside the definition of a **tax**. *See E. Diversified Props., Inc.* [*v. Montgomery Cty.*, 319 Md. 45] 570 A.2d [850] at 855 [Md.App.1990] (holding that impact **fee** was not a regulatory **fee** where it was not based on the "service provided to the property owner"); *Haugen v. Gleason*, 226 Or. 99, 359 P.2d 108, 111 (1961) (holding **fee** charged as condition of plat approval was an illegal **tax** because the **fees *195** were not required to be used for "the direct benefit of the regulated subdivision"). To conclude otherwise would in essence permit the City to assess property for a public improvement without regard to the limitations on its taxing authority* * *.

Id. at 349.

{ ¶ 34} In *Mayor of Ocean Springs v. Homebuilders Assn. of Mississippi, Inc.*, 932 So.2d 44 (Miss.2006), the court addressed a city's ordinances that authorized it to collect impact fees from developers ****924** for funding various public improvements and services. In holding that the impact **fees** were a revenue-raising mechanism that constituted **taxes**, the court concluded:

> "Courts cannot fault the logic or the foresight that induces the municipality to consider the long term impact of permitted development on municipal resources and public facilities. However, in the absence of legislative intent, municipalities cannot depart from traditionally authorized methods of financing public facilities so as to allocate the costs of substantial public projects among new developments on the basis of their anticipated impact." 8 McQuillin, Municipal Corp.3rd Ed., Rev.2000, § 25.118.50 at 384.

Id. at 60.

Public Benefit Versus Private Benefit

{ ¶ 35} In the present case, the potential public benefit appears to be the main reason for the assessment. But in addressing the **tax**-versus-**fee** question, the court of appeals put great stock in one of the stipulations that the parties agreed to in this case, using it as proof that the assessments were made for the benefit of the targeted property:

> [Appellants'] claim flies in the face of the parties stipulated facts, which state, in pertinent part:
>
> "The purpose of the impact **fee** is to benefit *the property* by providing the Township with adequate funds to provide the same level of service to *that property* that the Township currently affords previously developed properties." (Emphasis added.)
>
> To quote [appellants], "[i]n order to be classified as a fee, a charge must specially benefit the property that pays the fee." Based on the parties stipulated facts, that is exactly what occurs here; namely, a payment to the Township to obtain a zoning certificate in order to build on property ***196** within its unincorporated areas so that "*that property* " can receive the same level of service provided to previously developed properties. By stipulating to these facts, [appellants] are now bound by their agreement.

(Emphasis sic.) *Drees Co. v. Hamilton Twp.*, 12th Dist. No. 2009–11–150, 2010-Ohio-3473, 2010 WL 2891746, ¶ 17–19.

{ ¶ 36} It is unlikely that appellants would stipulate to a fact that dooms their claim. More importantly, the stipulation implicitly recognizes that the goal is for the township to have the necessary funds to allow *all* properties in the township to maintain their same level of service despite recent, rapid growth. The parties also stipulated that the impact fees were imposed "to offset increased services and improvements needed because of the development." The impact fees are intended to prevent any diminishment of services to *anyone* in the township.

{ ¶ 37} Lest there be any doubt as to whether the impact-fee resolution was designed to affect the whole community, the factual findings in the resolution itself contain statements indicating that maintaining the general welfare of the community is the aim of the resolution. The resolution states that the impact-fee system "assures the continuation of capital services *to benefit one of the fastest growing townships in the State of Ohio and the United States of America*, utilizing a system which is widely accepted as a valid exercise of the police ****925** power to protect health, safety and the wellbeing of the community." (Emphasis added.) The board states in the resolution that "*the protection of the health, safety, and general welfare of the citizens and property owners of the*

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Township " requires that the major roadway facilities, fire-protection and police-protection facilities, and the park facilities of the township "be improved to maintain them at their current levels of service in order to meet the demands of new development." (Emphasis added.)

{ ¶ 38} In *Home Builders Assn. of Mississippi, Inc. v. Madison,* 143 F.3d 1006, 1012 (5th Cir.1998), the court dealt with a similar impact-fee plan and an ordinance with language similar to the resolution in this case. The ordinance stated:

> "This Ordinance shall be used for the purposes of implementing and funding the [public-improvement plan] and to otherwise further the protection and promotion of the public health, safety and welfare of the City of Madison and its citizens and to regulate the adverse effects of rapid residential development by insuring adequate public facilities and services to present and future residents of the City."

***197** *Id.* at 1012.

{ ¶ 39} *Home Builders* stated, "[I]t is difficult to imagine that an ordinance designed to protect and promote the public health, safety and welfare of an entire community could be characterized as anything but a tax." *Id.*

{ ¶ 40} We reach the same conclusion. Here, the assessment results in no direct service to the landowner, other than the issuance of a zoning certificate, for which there is already a separate $200 fee. When the amount of the **fee** exceeds the cost and expense of the service, the **fee** constitutes a **tax**. *Granzow v. Montgomery Cty. Bur. of Support,* 54 Ohio St.3d 35, 38, 560 N.E.2d 1307 (1990). The impact fees are a revenue-generating measure designed to support infrastructure improvements benefiting the entire township. "Taxation refers to those general burdens imposed for the purpose of supporting the government, and more especially the method of providing the revenues which are expended for the equal benefit of all the people." *Cincinnati v. Roettinger,* 105 Ohio St. 145, 153–154, 137 N.E. 6 (1922).

Conclusion

{ ¶ 41} Having analyzed the substance of the assessments, and not merely their form, we conclude that the impact **fees** charged by Hamilton Township in this case constitute **taxes**. Since those taxes were not authorized by general law, Hamilton Township was not authorized to impose them pursuant to R.C. 504.04(A)(1). Accordingly, we reverse the judgment of the court of appeals and remand the matter to the trial court.

Judgment reversed and cause remanded.

O'CONNOR, C.J., and LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and CELEBREZZE, JJ., concur.

FRANK D. CELEBREZZE JR., J., of the Eighth Appellate District, sitting for McGEE BROWN, J.

All Citations

132 Ohio St.3d 186, 970 N.E.2d 916, 2012 -Ohio- 2370

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Eagle Harbor, L.L.C. v. Isle of Wight County, Va., April 21, 2006

256 Va. 304
Supreme Court of Virginia.

MOUNTAIN VIEW LIMITED PARTNERSHIP, and Clifton Woods Limited Partnership
v.
The CITY OF CLIFTON FORGE.

Record No. 972275.
|
Sept. 18, 1998.

Apartment complex owner sued city, challenging ordinance under which fee that city charged owner for garbage collection was increased from $7 per month for each residential unit to $12.55 per month for each unit. The Circuit Court, City of Clifton Forge, Duncan M. Byrd, Jr. J., entered judgment for city. Owner appealed. The Supreme Court, Keenan, J., held that: (1) fee charged under ordinance was not impermissible revenue-generating device; (2) city was entitled to use governmental **fund accounting** method in determining whether proprietary fees derived from ordinance approximated costs of providing such services; and (3) classifications contained in ordinance were reasonable.

Affirmed.

West Headnotes (10)

[1] **Municipal Corporations**
Removal and Disposition of Garbage, Refuse, and Filth

Municipal ordinance setting a fee for refuse collection and disposal is not an invalid revenue-generating device solely because the fee set by the ordinance generates a surplus; rather, the relevant inquiry is whether there is a reasonable correlation between the benefit conferred and the cost exacted by the ordinance.

6 Cases that cite this headnote

[2] **Environmental Law**
Collection and Transportation of Waste
Municipal Corporations
Removal and Disposition of Garbage, Refuse, and Filth

Benefit conferred by municipal ordinance setting fee for refuse collection and disposal had reasonable correlation with increased fees imposed thereby, even though ordinance generated budget surplus; benefit conferred by ordinance included refuse collection service itself, payment of projected costs relating to landfill closing regulations, greatly increased "tipping" fees for disposal of waste at new landfill, and new equipment, and evidence showed that municipalities commonly maintained surpluses in solid waste funds.

5 Cases that cite this headnote

[3] **Municipal Corporations**
Removal and Disposition of Garbage, Refuse, and Filth

City's allocation of 25% of its costs from other departments to solid waste department did not show that city improperly supported other city functions with income generated by municipal ordinance that imposed increased fee for refuse collection and disposal; evidence showed that 25% figure was reasonable estimate of amount of work performed by other departments relating to solid waste management.

Cases that cite this headnote

[4] **Municipal Corporations**
Removal and Disposition of Garbage, Refuse, and Filth
Municipal Corporations
Nature and Scope of Power

Loan made from solid waste fund to other

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governmental units included in city's general fund did not show that municipal ordinance that imposed increased fee for refuse collection and disposal was impermissible revenue-generating device, rather than valid fee; city had authority to borrow money, and because loan always had been accounted for as part of solid waste fund surplus, money was not improperly diverted to other governmental units within general fund.

4 Cases that cite this headnote

[5] **Municipal Corporations**
⚖Removal and Disposition of Garbage, Refuse, and Filth

City was entitled to use governmental **fund accounting** method in determining whether proprietary fees derived from refuse collection and disposal approximated costs of providing such services; both accountants who testified agreed that city's use of governmental fund method was proper and that accounting principles did not require city to use enterprise fund method, and city's use of governmental fund method assisted city in complying with requirement of State Auditor of Public Accounts that city use this method of accounting in its reports to that office.

Cases that cite this headnote

[6] **Municipal Corporations**
⚖Reasonableness and Uniformity of Operation

Classifications contained in municipal ordinance that imposed increased fee for refuse collection and disposal were reasonable, even though apartment building owners were charged more than business customers, and even though former city manager conceded that cost associated with refuse collection from businesses was no different from cost involved in refuse collection from apartment buildings; evidence showed that it was impractical to weigh refuse at point of collection, that fee for apartment complex was based on charge per residential unit to account for greater volume of waste generated by this type of facility, and that fee charged for other types of residential dwellings, such as rooming houses and single family residences, also was based on per unit basis.

2 Cases that cite this headnote

[7] **Municipal Corporations**
⚖Reasonableness of Ordinances
Municipal Corporations
⚖Presumptions and Burden of Proof

Municipal corporations are prima facie the sole judges of the necessity and reasonableness of their ordinances, and the presumption of their validity governs unless it is overcome by unreasonableness apparent on the face of the ordinance or by extrinsic evidence which clearly establishes the unreasonableness.

Cases that cite this headnote

[8] **Municipal Corporations**
⚖Presumptions and Burden of Proof

A party challenging the validity of an ordinance has the burden of proving that the ordinance is unreasonable.

Cases that cite this headnote

[9] **Municipal Corporations**
⚖Presumptions and Burden of Proof

When the presumptive reasonableness of an ordinance is challenged by probative evidence of its unreasonableness, the municipality must present evidence that the ordinance is reasonable.

Cases that cite this headnote

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[10] **Municipal Corporations**
Presumptions and Burden of Proof

If the evidence of reasonableness of an ordinance is sufficient to render the issue fairly debatable, the ordinance must be sustained; however, if such evidence is insufficient to make the issue fairly debatable, the evidence of unreasonableness defeats the presumption and the ordinance cannot be sustained.

Cases that cite this headnote

Attorneys and Law Firms

****372 *306** Ellen M. Arthur, Lexington, for appellants.

Frank K. Friedman (Elizabeth K. Dillon; Woods, Roger & Hazelgrove, on brief), Roanoke, for appellee.

Present: All the Justices.

Opinion

KEENAN, Justice.

In this appeal, we decide whether a former ordinance setting rates for refuse collection constituted an impermissible tax and whether the rate classifications contained in the ordinance were reasonable.

I.

In June 1991, the City Council for the City of Clifton Forge (City) enacted an ordinance increasing refuse collection charges in the City based on a classification system of residential and commercial users (1991 Ordinance).[1] The fees imposed by the 1991 Ordinance varied in accordance with the described classifications. For example, single family residences receiving weekly service were charged $13.50 per month. Apartment house owners who collected refuse in "dumpsters" and received weekly or biweekly service were charged $12.55 per month for each residential unit. Rooming house ***307** owners receiving weekly service were charged $6.75 per room per month. Stores, businesses, restaurants, banks, and office buildings requiring one collection per week also were charged $13.50 per month. However, some ****373** businesses, such as beauty shops, dry cleaners, and service stations, were charged higher fees, due to the nature of the waste that they generated.

Mountain View Limited Partnership owns and operates an apartment complex known as Mountain View Apartments, which consists of 54 residential units. Clifton Woods Limited Partnership owns and operates an apartment complex known as Clifton Woods Apartments, which contains 66 residential units. Both complexes are located within the City of Clifton Forge and each uses one "dumpster" for the disposal of solid waste. The "dumpster" at the Mountain View complex is emptied by the City twice per week, while the "dumpster" at the Clifton Woods complex is emptied once per week.

Before July 1991, Mountain View Limited Partnership and Clifton Woods Limited Partnership (collectively, Mountain View) paid the City a refuse collection fee of $7.00 per month for each residential unit. Under the 1991 Ordinance, Mountain View was required to pay $12.55 per month for each residential unit.

In October 1992, Mountain View filed a motion for judgment and motion for declaratory judgment against the City, challenging the validity of the 1991 Ordinance.[2] The issues raised at trial were whether the fee imposed by the 1991 Ordinance constituted an impermissible tax and whether the fee classifications contained in the Ordinance were valid.

At trial, Thomas C. Trinkle, the managing general partner of Mountain View, testified that other local jurisdictions charged comparable apartment complexes refuse collection fees at a flat rate of $28 a month and $132 a month. He also testified that the City of Covington charged $5.23 per dwelling unit per month for refuse collection.

At Mountain View's request, Jason Hartman, a certified public accountant, made a comparative analysis of the City's annual financial reports pertaining to refuse collection for fiscal years 1990-91 ***308** through 1995-96. Hartman testified that these documents showed a total accumulated surplus of about $832,000 over the six-year period. As of June 1996, the accumulated surplus was $615,742.12. This amount included a $125,000 loan made in June 1996 from the solid waste fund to other governmental units included in the City's general fund.

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Hartman stated that the City maintains its solid waste fund as a unit of the "general fund" of the City. He explained that the general fund is a "governmental fund," which is analyzed under accounting principles by tracking the flow of financial resources, rather than by measuring individual costs and related revenue for those costs.

Hartman testified that in order to determine whether a proprietary fee approximates the cost of providing a service, the "enterprise fund" method of accounting should be used. The governmental fund and the enterprise fund methods differ in the manner in which future expenses are listed. Under the governmental fund method, an expense is recorded only in the year the expenditure is made, while the enterprise fund method accounts for future expenses prior to the actual expenditure. Hartman agreed, however, that both methods of accounting are appropriate for use by a municipality, and that there is no requirement that one method be used over the other.

Hartman further noted that in 1995 and 1996, the City's expenditures for solid waste management almost doubled. He explained that this increase was due to the fact that, in these years, the City allocated to the solid waste fund 25% of the costs incurred by other departments in performing duties related to solid waste management. Although Hartman was "skeptical" of this allocation, he acknowledged that there are many ways to estimate a proper allocation of costs, and that ****374** accounting principles dictate only that the method be reasonable and consistent.

Stephen A. Carter, the City Manager of Clifton Forge from June 1989 through June 1994, testified that the City paid for refuse disposal based on volume. He stated that since it is impractical to weigh refuse collected at every separate location in the City, the 1991 Ordinance classifications were created in an attempt to account for the difference in the volume of refuse generated by various commercial and residential users.

Carter explained that the City raised the refuse collection fees in 1991 based on an expected increase in operating costs and future expenditures relating to the closing of the landfill used by the City. Carter stated that, in 1991, the City disposed of its solid waste in the ***309** Peters Mountain Landfill, which was scheduled to close in the "near future."

Based on a consultant's report detailing the cost of complying with state and federal regulations relating to landfill closings, the City determined that its current fee structure would not support the expenses related to the Peters Mountain closing and other anticipated expenses. Carter stated that the City Council enacted the increased fees in the 1991 Ordinance to ensure that the City could meet its anticipated expenses, and that an unexpected delay in the landfill closing resulted in a surplus in the solid waste fund.

Beginning in fiscal year 1994, Carter decided to allocate to the solid waste fund the cost of work performed by other City departments on solid waste management, which previously had been billed to those other departments within the City's general fund. After discussions with managers of the relevant city departments, Carter determined that about 25% of the costs incurred by other City departments were related to solid waste management. Other city employees testified that Carter's estimate was reasonable.

Thomas Price Smith, the City's independent auditor, testified that he reviewed the 25% allocation and concluded that it was reasonable. Smith also stated that, in his experience performing audits for about 70 counties, towns, and cities in Virginia, many local governments maintain a solid waste fund surplus.

Smith explained that maintaining a surplus is desirable because a municipality must plan for future expenses. He testified that if a local governing body "spend[s] down" to zero at the end of its fiscal year, the governing body will have no funds with which to operate in the first month of the new fiscal year. Smith also stated that the State Auditor of Public Accounts requires that solid waste expenditures be reported under the governmental fund method of accounting.

Richard Magnifico, the current city manager, testified that the City no longer uses the Peters Mountain Landfill and presently disposes of its solid waste at the Alleghany transfer station. He explained that "tipping fees," the cost for disposing of each ton of solid waste, increased from approximately $20 per ton at the Peters Mountain Landfill to $65 per ton at the Alleghany transfer station.

Magnifico projected that the City's solid waste fund would have a zero or a negative balance by the next fiscal year. He attributed this situation to the costs associated with the closing of the Peters Mountain Landfill, the increased "tipping" fees, the purchase of a new ***310** garbage truck for $78,000, and the purchase of a recycling truck for $30,000 and recycling containers for $22,000.

After hearing this evidence, the trial court held that the 1991 Ordinance imposed a valid fee, rather than an impermissible tax, and that there was sufficient evidence

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of the reasonableness of the Ordinance classifications to render the issue fairly debatable. Thus, the trial court upheld the 1991 Ordinance and entered judgment in favor of the City in the total amount of $59,046 plus interest.

II.

On appeal, Mountain View argues that the City enacted the 1991 Ordinance as a means of generating revenue to pay for the cost of performing other municipal functions. Mountain View asserts that under *McMahon v. City of Virginia Beach,* 221 Va. 102, 267 S.E.2d 130, *cert. denied,* 449 U.S. 954, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980), and *Tidewater* ****375** *Ass'n of Homebuilders, Inc. v. City of Virginia Beach,* 241 Va. 114, 400 S.E.2d 523 (1991), the fee imposed by the Ordinance was an impermissible tax, because the fee exceeded the actual cost of providing the service and there was no reasonable correlation between the benefit conferred and the burden imposed.

Although Mountain View concedes that the City may collect fees and maintain a surplus to pay for anticipated expenses, it contends that the present evidence in support of the need for a surplus is incredible as a matter of law. Mountain View argues that the surplus in the solid waste fund of at least $615,000 far exceeded the estimated costs associated with the closing of the Peters Mountain Landfill, particularly since those costs were payable over a period of 30 years.

Mountain View also asserts that the City's allocation of 25% of costs from other municipal departments to the solid waste fund, and the loan in the amount of $125,000 to other governmental units included in the general fund, indicate that the City improperly used the revenue generated by the 1991 Ordinance to support other city functions. Mountain View contends that, through use of the governmental **fund accounting** method, the City has attempted to hide its use of funds generated from solid waste collection fees to support other municipal functions. We disagree with Mountain View.

We first consider the principles set forth in *McMahon* and *Tidewater.* In *McMahon,* the City of Virginia Beach had enacted an ordinance requiring landowners to connect their properties to the municipal water supply system, even if the owners did not intend to ***311** use any water from the system. 221 Va. at 104, 267 S.E.2d at 132. Several landowners filed a declaratory judgment suit against the City alleging, among other things, that the water connection fee was an impermissible tax. The trial court disagreed, ruling that the fee was valid. *Id.* at 106, 267 S.E.2d at 133. We affirmed the trial court, holding that "because the charges imposed by the ordinance would not exceed the actual cost to the City of installing the waterlines in the streets in front of the landowners' residences, a reasonable correlation arose between the benefit conferred and the cost exacted." *Id.* at 107, 267 S.E.2d at 134. Thus, we concluded that the evidence refuted the landowners' contention that the ordinance was adopted solely as a revenue-generating measure. *Id.* at 108, 267 S.E.2d at 134.

Later, in *Tidewater,* we addressed the validity of a Virginia Beach ordinance that assessed a "water resource recovery fee" on all new connections to the City's water system. 241 Va. at 117, 400 S.E.2d at 525. The fee was designed to finance, in part, the acquisition of water from Lake Gaston for use by the City's residents. A homebuilders' organization challenged the ordinance alleging, among other things, that the ordinance imposed a tax rather than a valid fee. *Id.* at 120, 400 S.E.2d at 527. The trial court upheld the ordinance. Under the principles set forth in *McMahon,* we approved the trial court's ruling and held that under the facts presented, there was a reasonable correlation between the benefit of the service provided and the burden imposed by the fee. *Id.* at 121, 400 S.E.2d at 527.

We did not hold in either case that a fee charged by a municipality could not exceed the projected cost of providing the service, or that a municipality may not maintain a surplus in anticipation of future expenses. In fact, Code § 15.2-2505[3] expressly provides that a locality may include in its budget a reasonable reserve for contingency expenditures. Under the facts presented in *McMahon* and *Tidewater,* we merely concluded that since the costs of the planned services exceeded the fees imposed for those services, there was no merit to the contention that either of the ordinances constituted an impermissible tax. *See Tidewater,* 241 Va. at 121, 400 S.E.2d at 527; *McMahon,* 221 Va. at 107, 267 S.E.2d at 134.

In *Tidewater,* we implicitly acknowledged that a municipality may collect fees in anticipation of future expenses when we stated that the City was not only making significant ****376** expenditures presently, ***312** but would be required to make future expenditures to implement the project. 241 Va. at 122, 400 S.E.2d at 528. We also stated in *McMahon* that a municipality may enact ordinances in anticipation of future problems, and that there "is no requirement that protective measures be limited to actions taken after a crisis." 221 Va. at 107, 267 S.E.2d at 134.

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[1] In accordance with these principles, we hold that a municipal ordinance setting a fee for refuse collection and disposal is not an invalid revenue-generating device solely because the fee set by the ordinance generates a surplus. The relevant inquiry, as set forth in *McMahon* and reaffirmed in *Tidewater,* is whether there is a reasonable correlation between the benefit conferred and the cost exacted by the ordinance. *Tidewater,* 241 Va. at 121, 400 S.E.2d at 527; *McMahon,* 221 Va. at 107, 267 S.E.2d at 134.

In applying this test to the 1991 Ordinance, we consider the evidence in the light most favorable to the City, the prevailing party at trial. *Hudson v. Lanier,* 255 Va. 330, 331, 497 S.E.2d 471, 472 (1998); *Cardinal Dev. Co. v. Stanley Constr. Co.,* 255 Va. 300, 302, 497 S.E.2d 847, 849 (1998). We will not disturb the trial court's decision unless it is plainly wrong or without evidence to support it. Code § 8.01-680; *Hudson,* 255 Va. at 333-34, 497 S.E.2d at 473; *Cardinal,* 255 Va. at 302, 497 S.E.2d at 849.

[2] We conclude that the record contains sufficient evidence to support the finding of a reasonable correlation between the benefit conferred and the cost exacted by the 1991 Ordinance. The evidence showed that the benefit conferred by the Ordinance included the refuse collection service itself, as well as payment of projected costs relating to landfill closing regulations, greatly increased "tipping" fees, and new equipment.

The maintenance of a budget surplus to pay for future costs was supported by the testimony of Thomas Price Smith, the City's auditor, and Jason Hartman, Mountain View's accounting expert. Both witnesses testified that municipalities commonly maintain surpluses in solid waste funds, and Smith added that such a practice is desirable to ensure that a municipality can meet the public's needs. The evidence also showed that the City's solid waste fund surplus essentially has been depleted due to recent expenditures necessary for the provision of solid waste collection services.

[3] We disagree with Mountain View that a different outcome is required based on the City's allocation of 25% of its costs from other departments to the solid waste department. This allocation was supported ***313** by Stephen Carter's testimony, as well as the testimony of Richard Magnifico, and Lee Anna Tyler, the City's accounting supervisor, who confirmed that the 25% figure was a reasonable estimate of the amount of work performed by other departments relating to solid waste management. Even Mountain View's expert, Hartman, agreed that the practice of allocating costs from other departments is reasonable, and that formal studies are not required to determine an appropriate allocation.

[4] We also find no merit in Mountain View's contention that the $125,000 loan made from the solid waste fund to other governmental units included in the City's general fund is evidence that the 1991 Ordinance is a revenue-generating device. Under Code § 15.2-1105,[4] cities have authority to borrow money. Moreover, since the evidence was not refuted that this loan always has been accounted for as part of the solid waste fund surplus, the record does not show that this money was improperly diverted to other governmental units within the general fund.

[5] The City's use of the governmental **fund accounting** method also does not alter our decision. Both accountants who testified agreed that the City's use of this accounting method was proper, and that accounting principles do not require the City to use the enterprise **fund accounting** method. The City's use of the governmental fund method ****377** also assists the City in complying with the requirement of the State Auditor of Public Accounts that the City use this method of accounting in its reports to that office. Therefore, under the principles set forth in *McMahon* and *Tidewater,* we conclude that the evidence supports the trial court's determination that the 1991 Ordinance imposed a valid fee.

III.

[6] Mountain View also argues that the trial court erred in ruling that the classifications contained in the 1991 Ordinance were reasonable. Mountain View notes that Carter, the former city manager, conceded that the cost associated with refuse collection from businesses is no different from the cost involved in refuse collection from apartment buildings. Thus, Mountain View contends that the 1991 Ordinance was invalid because it charged apartment building owners more for ***314** the same service provided to business customers. We disagree with Mountain View's argument.

[7] We review Mountain View's challenge under well-established principles that afford the 1991 Ordinance a presumption of validity. *See Twietmeyer v. City of Hampton,* 255 Va. 387, 390, 497 S.E.2d 858, 860 (1998); *Town of Narrows v. Clear-View Cable TV, Inc.,* 227 Va. 272, 280, 315 S.E.2d 835, 839-40 (1984), *cert. denied,* 469 U.S. 925, 105 S.Ct. 315, 83 L.Ed.2d 253 (1984). "Municipal corporations are prima facie the sole judges of

the necessity and reasonableness of their ordinances, and the presumption of their validity governs unless it is overcome by unreasonableness apparent on the face of the ordinance or by extrinsic evidence which clearly establishes the unreasonableness." *Twietmeyer,* 255 Va. at 390-91, 497 S.E.2d at 860 (quoting *Town of Narrows,* 227 Va. at 280, 315 S.E.2d at 839-40); *accord National Linen Service Corp. v. City of Norfolk,* 196 Va. 277, 279, 83 S.E.2d 401, 403 (1954).

[8] [9] [10] A party challenging the validity of an ordinance has the burden of proving that the ordinance is unreasonable. *Twietmeyer,* 255 Va. at 391, 497 S.E.2d at 860; *Town of Narrows,* 227 Va. at 280, 315 S.E.2d at 840; *Board of Supervisors v. Lerner,* 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980). When the presumptive reasonableness of an ordinance is challenged by probative evidence of its unreasonableness, the municipality must present evidence that the ordinance is reasonable. If the evidence of reasonableness is sufficient to render the issue fairly debatable, the ordinance must be sustained. However, if such evidence is insufficient to make the issue fairly debatable, the evidence of unreasonableness defeats the presumption and the ordinance cannot be sustained. *Tidewater,* 241 Va. at 122, 400 S.E.2d at 528; *Town of Narrows,* 227 Va. at 280-81, 315 S.E.2d at 840; *Board of Supervisors v. Snell Constr. Corp.,* 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).

We accord the trial court's ruling on this issue a presumption of correctness. We also give full credit to the presumption of validity of the 1991 Ordinance and examine the record to determine whether the evidence supports the court's ruling. *Twietmeyer,* 255 Va. at 391, 497 S.E.2d at 860; *Town of Narrows,* 227 Va. at 281, 315 S.E.2d at 840; *see Tidewater,* 241 Va. at 122, 400 S.E.2d at 528.

Applying these principles, we conclude that the evidence supports the trial court's ruling that the City's evidence of the reasonableness of the 1991 Ordinance classifications was sufficient to make the issue fairly debatable. The City presented evidence that it was ***315** impractical to weigh refuse at the point of collection. The evidence also showed that the fee for an apartment complex was based on a charge per residential unit to account for the greater volume of waste generated by this type of facility. The fee charged for other types of residential dwellings, such as rooming houses and single family residences, also was based on a per unit basis.

Although the size of Mountain View's "dumpsters" was the same as those used by some businesses, there was no evidence that the amount of waste generated by these facilities was the same. Thus, we conclude that the record supports the trial court's ruling that the 1991 Ordinance was valid because the evidence of reasonableness of the classifications was fairly debatable.

****378** For these reasons, we will affirm the trial court's judgment.

Affirmed.

All Citations

256 Va. 304, 504 S.E.2d 371

Footnotes

1 In 1993, the 1991 Ordinance was repealed and a new ordinance was enacted (1993 Ordinance). The 1993 Ordinance set rates for refuse collection based on anticipated volume assigned to "equivalent dwelling units."

2 After the 1991 Ordinance became effective, Mountain View refused to pay the applicable garbage collection fee. The City filed two separate motions for judgment against Mountain View seeking payment of fees and penalties plus interest for the failure to pay garbage collection fees. The parties agree that if the ordinance is valid, Mountain View owes the City $59,046 plus interest of 10% per year from November 1, 1993, until paid, for services rendered between November 1, 1992, and September 30, 1995.

3 This section, effective December 1, 1997, does not differ substantively from Code § 15.1-161.1, which was in effect on the date of trial.

4 This section, effective December 1, 1997, does not differ substantively from Code § 15.1-843, which was in effect on the date of trial.

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OPINIONS

OF THE

ATTORNEY GENERAL

OF

OHIO

FOR THE

PERIOD FROM JANUARY 4, 1963
TO DECEMBER 31, 1963

Pages 1-680
Index 681-694
Opinions 3518-3548
3-753

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1966
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(2) Such fee would not be a tax and would, therefore, not constitute double taxation.

(3) A special rotary fund would be required for receipts.

(4) Such fee would have to be charged to all students receiving these items and could not be waived in hardship cases.

Respectfully,
WILLIAM B. SAXBE
Attorney General

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SYLLABUS:

1. A levy under Section 5705.19 or Section 5705.191, Revised Code, to raise revenue for the general fund of a subdivision must be declared by resolution to be a levy "for current expenses" or "current operating expenses" of the subdivision.

2. A levy under Section 5705.191, Revised Code, for "the purpose of supplementing the General Fund for current expenses * * * for the purpose of making an appropriation for Child Welfare Services" is a special levy and all revenue derived therefrom shall be credited to a special fund for the purpose for which the levy was made.

3. The proceeds of a levy under Section 5705.191, Revised Code, for "the purpose of supplementing the General Fund for current expenses * * * for the purpose of making an appropriation for Child Welfare Services" may only be expended for services for children, viz. assistance, maintenance, etc., and may not be used for the construction of permanent improvements.

Columbus, Ohio, April 18, 1963

Hon. John S. Ballard
Prosecuting Attorney
Summit County
Akron, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"Our Child Welfare Board has requested an opinion of whether funds from the levy passed in 1960, copy of

resolution and of ballot enclosed, may be used for new construction of buildings as well as for operating expenses. The Child Welfare Board submits a budget to the Board of County Commissioners which budget contemplates the entire proceeds of the levy, and then the County Commissioners appropriate these funds to the Child Welfare Board.

"We have believed that since the levy was directed for services, rather than for buildings, funds from the levy itself could not be directly diverted to building programs; but if funds were returned to the County general fund, which would create a surplus in the general fund, then any surpluses in the general fund could be devoted for building purposes.

"We attach for your information copy of ballot form, copy of resolution No. 631-60, and other memoranda for such value as they have. We also direct your attention to Opinion 3532, dated January 9, 1963."

The creation of a county child welfare board is the subject of Section 5153.07, Revised Code. Section 5153.15, Revised Code, provides:

"The powers and d u t i e s enumerated in sections 5153.16 to 5153.19, inclusive, of the Revised Code, with respect to the care of children, needing or likely to need public care or services, shall be vested in a single agency or county government, namely, a county department of welfare or a county child welfare board."

In addition to other duties, Section 5153.161, Revised Code, provides:

"The county child welfare board, subject to the rules, regulations, and standards of the commission of mental hygiene shall:

(A) Administer and supervise the provisions of sections 5127.01 to 5127.05, inclusive, of the Revised Code, and exercise such powers and duties as prescribed by the commission:

(B) Submit an annual report of its work and expenditures, pursuant to section 5127.01 of the Revised Code, to the commissioner and to the board of county commissioners at the close of the fiscal year and at such other times as may be requested;

(C) Employ such personnel and provide such facilities and equipment as are necessary;

(D) Provide such funds as are necessary for the operation of training centers and workshops.

"Any county child welfare board may enter into a contract with another such board of another county to provide the training center and workshop facilities authorized in sections 5127.01 to 5127.05, inclusive, of the Revised Code, upon such terms as may be agreeable."

Your question requires a consideration of Sections 5705.19 and 5705.191, Revised Code, and related sections. Section 5705.19, Revised Code, provides:

"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:

(A) For current expenses of the subdivision;

(B) For the payment of debt charges on certain described bonds, notes, or certificates of indebtedness of the subdivision issued subsequent to January 1, 1925;

(C) For the debt charges on all bonds, notes, and certificates of indebtedness issued and authorized to be issued prior to January 1, 1925;

(D) For a public library of, or supported by, a municipal corporation, township, school district, or county, under whatever law organized or authorized to be supported;

(E) For a municipal university, not to exceed two mills over the limitation of one mill prescribed in section 3349.13 of the Revised Code;

(F) For the construction or acquisition of any specific permanent improvement or class of improvements which the taxing authority of said subdivision may include in a single bond issue;

(G) For the general construction, reconstruction, resurfacing, and repair of roads and bridges in counties or townships;

(H) For recreational purposes, provided the total levy for such purposes authorized by vote of the people shall not exceed five tenths of a mill;

(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;

(J) For the purpose of providing and maintaining motor vehicles, communications and other equipment, used directly in the operation of a police department, or the payment of salaries of permanent police personnel;

(K) For the manitenance and operation of a county home;

(L) For the maintenance and operation of schools, training centers, or workshops for mentally retarded persons.

"Such resolution shall be confined to a single purpose, and shall specify the amount of increase in rate which it is necessary to levy, the purpose thereof, and the number of years during which such increase shall be in effect, which may or may not include a levy upon the duplicate of the current year. The number of years may be any number not exceeding five, except that when the additional rate is for the payment of debt charges the increased rate shall be for the life of the indebtedness and except when the additional rate is for the purpose of providing current operating revenues for a school district, as required in Chapter 3317. of the Revised Code the increased rate may be for any number of years not exceeding ten.

"Whenever the board of education of a city, exempted village, or local school district declares it necessary to levy a tax pursuant to the provisions of section 5705.192 (5705.19.2) of the Revised Code, such tax may be in effect for an indefinite period of time, or if a definite number of years is specified, such number of years shall not exceed ten.

"Such resolution shall go into immediate effect upon its passage, and on publication of the same shall be necessary, other than that provided for in the notice of election."

Section 5705.191, Revised Code, reads in part as follows:

"The taxing authority of any subdivision, other than the board of education of a school district, by a vote of two-thirds of all its members, may declare by resolution that the amount of taxes which may be raised within the

ten-mill limitation by levies on the current tax duplicate will be insufficient to provide an adequate amount 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 purposes in section 5705.19 of the Revised Code, or to supplement the general fund for the purpose of making appropriations for one or more of the following purposes: relief, welfare, hospitalization, health, and support of general or tuberculosis hospitals, and that the question of such additional tax levy shall be submitted to the electors of the subdivision at a general, primary or special election to be held at a time therein specified. Such resolution shall conform to the requirements of section 5705.19 of the Revised Code, excepting that such levy may not be for a longer period than five years, and such resolution shall specify the date of holding such election, which shall not be earlier than ninety days after the adoption and certification of such resolution nor later than one hundred and twenty days thereafter. Said resolution shall go into immediate effect upon its passage and no publication of the same shall be necessary other than that provided for in the notice of election. A copy of such resoltuion shall, immediately after its passage, be certified to the board of elections of the proper county or counties in the manner provided by section 5705.25 of the Revised Code, and the provisions of said section shall govern the arrangements for the submission of such question and other matters with respect to such election, to which said section 5705.25 of the Revised Code refers, excepting that such election shall be held on the date specified in the resolution, provided, only one special election for the submission of such question may be held in any one calendar year and may not be held during the thirty days immediately preceding or following a primary or general election. Provided, that a special election may be held upon the same day a primary election is held. Publication of notice of such election shall be made in one or more newspapers of general circulation in the county once a week for four consecutive weeks.

"If a majority of the electors voting on the question in an election held on the first Tuesday after the first Monday in November or in even numbered years on the first Tuesday after the first Monday in May or fifty-five per cent of those voting on the question at a special election held on any other day vote in favor thereof, the taxing authority of the subdivision may make the necessary levy within such subdivision at the additional rate or at any lesser rate outside the ten-mill limitation on the tax list and duplicate for the purpose stated in the resolution.

Such tax levy shall be included in the next annual tax budget that is certified to the county budget commission."

Section 5705.19, Revised Code, authorizes a tax levy outside the ten-mill limitation, when approved by the electors voting on the question at a general election, for the purposes enumerated therein. Significantly one purpose is "(A) For current expenses of the subdivision." Section 5705.191, Revised Code, permits a tax levy outside the ten-mill limitation for any of the purposes in Section 5705.19 and for other stated purposes when approved by a majority of the electors voting on the issue at a primary or general election and fifty-five per cent of the electors voting on the issue at a special election.

The declaration of the resolution of the board of county commissioners in this case is:

"* * * * * * * * *

"WHEREAS, section 5705.19 of the Revised Code of Ohio, provides for a method of levying additional taxes for current expenses of Summit County; and

"WHEREAS, the Board of Commissioners determined that if the proposed requirement for Child Welfare Services (Children's home and Foster Care of Children) are removed from the funds raised by present levies, through the process of making a special levy intended to be used for Child Welfare services only; the result of this removal of the sums formerly appropriated for Child Welfare services will permit increases in the sums necessary for the operating of the Juvenile Court and for the Detention Home; and

"* * * * * * * * *

"THEREFORE BE IT RESOLVED by this Board of County Commissioners that:

Section 1—The amount of taxes which may be raised within the 10 mill limitation will be insufficient to provide for the necessary requirements of Summit County and that it is necessary to levy a tax in excess of such limitations for the purpose of supplementing the General Fund for current expenses of Summit County for the purpose of making an appropriation for Child Welfare Services. (Children's Home and Foster Care of Children).

"* * * * * * * * *"

The sample ballot you have supplied me proposes a levy for:

"An additional tax for the benefit of Summit County for the purpose of CURRENT EXPENSES OF THE SUBDIVISION TO PROVIDE FOR THE CHILDREN'S HOME AND CHILD WELFARE SERVICES."

It is apparent that the board of county commissioners sought to effect a levy under Section 5705.19, Revised Code, to increase the general fund but used the language (in substance) in the resolution, and thus the ballot, of Section 5705.191, Revised Code, viz. "to supplement the general fund for the purpose of making appropriations for * * * welfare." The declaration of purpose contained in the resolution is controlling.

The initial question is whether the levy is a special levy for child welfare services or a levy for current expenses of the county. If the former, the revenues are not paid into the general fund and can only, without statutory transfer, be used for child welfare services. To the extent material Section 5705.10, Revised Code, provides:

> "All revenue derived from the general levy for current expense within the ten-mill limitation, f r o m a n y general levy for current expense authorized by vote in excess of the ten-mill limitation, and from sources other than the general property tax, unless its use for a particular purpose is prescribed by law, shall be paid into the general fund.
>
> "* * * * * * * * *
>
> "All revenue derived from a special levy shall be credited to a special fund for the purpose for which the levy was made.
>
> "* * * * * * * * *
>
> "Money paid into any fund shall be used only for the purposes for which such fund is established."

Upon consideration I am of the opinion that the levy under consideration is a special levy and that the proceeds thereof may only be used for the specific purpose of child welfare services. The language "for the purpose of supplementing the general fund for current expenses" and "to supplement the general fund for the purpose of making appropriations" found in the resolution and in Section 5705.191, Revised Code, respectively, can only be considered as descriptive of the reason for or motivation of the levy.

The more limiting language "welfare" as used in the statute and "child welfare services" as used in the resolution and ballot define the purpose. I am brought to this conclusion by the fact that the contrary one would largely destroy the efficiency of the singleness of purpose provision of Section 5705.19, Revised Code, (which is incorporated by reference in Section 5705.191, Revised Code) and of Section 5, Article XII, Constitution of Ohio. It would, for instance, enable a taxing authority to trade on the appeal of something like child welfare to raise funds for a totally unrelated object payable from the general fund as current expense.

It is apparent, too, that the legislature intended the expression "to supplement the general fund for the purpose of making appropriations for one or more of the following purposes" in Section 5705.191, Revised Code, to be more (less definitively) than a restatement of the language "current expenses" in Section 5705.19, Revised Code, or it could and presumably would have stopped with an incorporation of the purpose of Section 5705.19, Revised Code.

While any general comparison of the reach of Sections 5705.19 and 5705.191, Revised Code, may seem to be largely academic, it must be borne in mind that a levy under the former requires a vote of the majority of electors voting on the issue at a general election while a levy under Section 5705.191, Revised Code, may be submitted to the electors at a general, primary or special election (in this last instance approval of fifty-five per cent of those voting is necessary.)

In my opinion a levy under Section 5705.19 or Section 5705.191, Revised Code, to raise revenues for the general fund of a subdivision must be declared by resolution to be a levy "for current expenses" or "current operating expenses" of the subdivision.

The nearly identical question was before my predecessor in office in Opinion No. 2997, Opinions of the Attorney General for 1962, in which is was held that a levy for the purpose of health and mental health under Section 5705.191, Revised Code, was a special levy and that:

> "Revenue derived from a special tax levy pursuant to Section 5705.191, Revised Code, may not be paid into the general fund to reimburse such fund, but must be credited, in accordance with Section 5705.10, Revised Code,

> to a special fund for the purpose for which such levy was made. No transfer can be made from a special fund to the general fund except as authorized in Section 5705.14, Revised Code."

See also Opinion No. 1504, Opinions of the Attorney General for 1958, in which it was held that a levy under authority of Section 5705.22, Revised Code, which is comparable in language to Section 5705.191, Revised Code, was a special levy for the purpose stated and could not be placed in the general fund of the county and used for current expenses of the county.

There remains, of course, the question whether funds for the purpose of child welfare services can be expended for building purposes. I think not. Even if the building contemplated is to house children or agencies to service children. "Services" in the context in which used carries the idea of assistance or maintenance and not the construction of permanent improvements. This narrower construction is required by the singleness of purpose provisions of statute and constitution.

Lastly, you have called my attention to Opinion No. 3532, Opinions of the Attorney General for 1963. That Opinion, as stated therein, was based entirely on the legislative amendment to Section 339.06, Revised Code, to allow expenditures from the hospital operating fund (from whatever source) for purchases of equipment and construction of improvements. Such a legislative expression is conclusive on this office.

Accordingly it is my opinion and you are advised:

1. A levy under Section 5705.19 or Section 5705.191, Revised Code, to raise revenue for the general fund of a subdivision must be declared by resolution to be a levy "for current expenses" or "current operating expenses" of the subdivision.

2. A levy under Section 5705.191, Revised Code, for "the purpose of supplementing the General Fund for current expenses * * * for the purpose of making an appropriation for Child Welfare Services" is a special levy and all revenue derived therefrom shall be credited to a special fund for the purpose for which the levy was made.

3. The proceeds of a levy under Section 5705.191, Revised

Code, for "the purpose of supplementing the General Fund for current expenses * * * for the purpose of making an appropriation for Child Welfare Services" may only be expended for services for children, viz. assistance, maintenance, etc., and may not be used for the construction of permanent improvements.

Respectfully,
WILLIAM B. SAXBE
Attorney General

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SYLLABUS:

A board of education cannot expend monies from recreational funds raised by a special tax levy pursuant to Section 5705.19, subparagraph (H), Revised Code, for the purchase of football equipment for students participating in extracurricular football, whether it be inter-scholastic or intra-scholastic practice and competition.

Columbus, Ohio, April 19, 1963

Hon. John D. Sears, Jr.
Prosecuting Attorney
Crawford County
Bucyrus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I have been requested by the Board of Education of the Buckeye Central Local School District for an opinion as to whether or not the said Board of Education can purchase football equipment such as helmets, shoulder pads and uniforms to be worn by the students participating in football games out of the Recreational Fund, which was obtained through a tax levy pursuant to Section 5705.19 of the Revised Code of Ohio.

"I was further requested for an opinion as to whether or not they could use this fund for the purchasing of a site for a football field, which field would be used not only for football but as a playground for other activities.

"I am satisfied that Opinion No. 2479, dated August 25, 1961, answers the question as to the purchasing of a piece of land and that the said school does have that

1992 Ohio Op. Atty. Gen. 2-101 (Ohio A.G.), 1992 Ohio Op. Atty. Gen. No. 92-027, 1992 WL 526415

Office of the Attorney General

State of Ohio
Opinion No. 92-027
June 26, 1992

***1 SYLLABUS:**
1. Proceeds of a tax levied pursuant to R.C. 5705.19(L) for the benefit of a county board of mental retardation and developmental disabilities for the purpose of maintenance and operation of schools, training center, workshops, clinics, and residential facilities for mentally retarded persons may be expended by the county board of mental retardation and developmental disabilities for any of the stated purposes.

2. There is no authority for the automatic transfer to a school district of the proceeds of a levy for the benefit of a county board of mental retardation and developmental disabilities when the school district assumes responsibility for the education of individuals who were previously educated by the county board.

3. A county board of mental retardation and developmental disabilities may pay proceeds from a voted tax levy to a school district in exchange for facilities, programs, goods, or services to the extent that the county board has authority to carry out the purposes for which the tax was levied by acquiring those facilities, programs, goods, or services from the school district.

The Honorable Rebecca J. Ferguson
Preble County Prosecuting Attorney
Courthouse, Third Floor
Eaton, Ohio 45320

Dear Prosecutor Ferguson:
You have requested an opinion on the question whether proceeds of a tax levy for the benefit of a county board of mental retardation and developmental disabilities ("county MR/DD board") are automatically transferred to the public school system when the school system takes over the function of educating certain students who were previously educated by the county MR/DD board. In the instant case, the county MR/DD board closed an education program because of a statutory change expanding the responsibility of public schools for the education of handicapped children. See 1989-1990 Ohio Laws, Part III, 3747 (Am.Sub.H.B. 248, eff. Oct. 30, 1989, with certain provisions eff. July 1, 1991).

Purpose of Tax Levy at Issue

The tax levy at issue was adopted by voters of the county, in accordance with R.C. 5705.19(L), as a renewal levy for the benefit of the Preble County Board of Mental Retardation and Developmental Disabilities for the purpose of maintenance and operation of schools, training center, workshops, clinics, and residential facilities for mentally retarded persons. The levy was authorized by the board of county commissioners, which is the taxing authority of a county. See R.C. 5126.05(I); R.C. 5705.01, .19(L).[1]

Use of Tax Levy Proceeds

When voters adopt a tax levy for specified purposes, proceeds of that levy may be used only for the specified purposes. See Ohio Const. art. XII, § 5; R.C. 5705.10–.19; In re Petition for Transfer of Funds by Perry Township, 52 Ohio App.3d 1, 556 N.E.2d 191 (Montgomery County 1988); 1986 Op.Att'y Gen. No. 86–103. The levy in question was adopted for the benefit of the county MR/DD board for the uses stated in the resolution adopted by the county commissioners and in the ballot language. See R.C. 5705.19, .25; Op. No. 86–103. Although the board has terminated some of its educational functions, it has statutory authority to provide, and does in fact provide, other programs and services that serve the purposes for which the tax was levied. See R.C. 5126.05. Your representative has, for example, stated that the board operates a sheltered workshop

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program. See R.C. 5126.05, .12. The board thus performs functions for which it may properly expend levy proceeds. In accordance with constitutional and statutory requirements, the proper use of the levy proceeds is expenditure by the county MR/DD board for any of the purposes stated in the resolution and ballot language.[2] See In re Petition for Transfer of Funds by Perry Township; Op. No. 86–103; 1967 Op.Att'y Gen. No. 67–088.

Transfer of Tax Levy Proceeds

***2** A school district is an entity apart from a county or a county MR/DD board; it is a body politic and corporate with its own mechanisms for obtaining funding. See, e.g., R.C. Chapter 3311; R.C. 3313.17; R.C. Chapters 3315–3318; R.C. 5705.01(A), (C), (D), (I); R.C. 5705.194–.197, . 21–.216.[3] There is no basis for automatically transferring to a school district moneys derived from a tax levy that was adopted by voters of the county for the benefit of the county MR/DD board. In fact, R.C. 5705.19, under which the levy in question was adopted, expressly states that its provisions do not apply to school districts.

There are statutory procedures for transferring moneys raised by tax levies from one fund to another in certain circumstances, but those procedures are not applicable in this instance. See, e.g., R.C. 5705.14–.17; In re Petition for Transfer of Funds by Perry Township.[4] The legislation that prompted your question contained no provisions affecting levies that had been adopted to finance the activities of county MR/DD boards. Cf. Op. No. 67–088 (taxes levied for a county child welfare board could not be expended by a county MR/DD board).

Proceeds of the levy in question are not automatically transferred to a school board when the school district assumes responsibility for the education of individuals who were previously educated by the county board. Rather, the tax levy proceeds continue to be available to the county MR/DD board for the purposes set forth in the resolution and ballot language. The county MR/DD board may, however, pay amounts of the tax levy proceeds to a school district in exchange for facilities, programs, goods, or services to the extent that the county MR/DD board has authority to carry out the purposes for which the tax was levied by acquiring those facilities, programs, goods, or services from the school district. See, e.g., R.C. 5126.05(E), (G).

Conclusion

It is, therefore, my opinion, and you are hereby advised, as follows:
1. Proceeds of a tax levied pursuant to R.C. 5705.19(L) for the benefit of a county board of mental retardation and developmental disabilities for the purpose of maintenance and operation of schools, training center, workshops, clinics, and residential facilities for mentally retarded persons may be expended by the county board of mental retardation and developmental disabilities for any of the stated purposes.

2. There is no authority for the automatic transfer to a school district of the proceeds of a levy for the benefit of a county board of mental retardation and developmental disabilities when the school district assumes responsibility for the education of individuals who were previously educated by the county board.

3. A county board of mental retardation and developmental disabilities may pay proceeds from a voted tax levy to a school district in exchange for facilities, programs, goods, or services to the extent that the county board has authority to carry out the purposes for which the tax was levied by acquiring those facilities, programs, goods, or services from the school district.

Respectfully,

***3** Lee Fisher
Attorney General

Footnotes

[1] The levy to which your question relates was adopted in an election in 1987, prior to the enactment of R.C. 5705.222, which establishes current procedures for the adoption of a tax levy under R.C. 5705.19(L). See R.C. 5705.19(L); 1987–1988 Ohio Laws, Part I, 648, 717 (Sub.S.B. 155, eff. June 24, 1988); 1991 Op.Att'y Gen. No. 91–042.

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[2] It should be noted that the ballot language established a maximum millage that could be levied. If, for any year, proceeds derived from levying the maximum rate would exceed the amount needed by the county MR/DD board to fulfill its purposes, the tax could be levied at a lesser rate. See, e.g., In re Petition for Transfer of Funds by Perry Township, 52 Ohio App.3d 1, 556 N.E.2d 191 (Montgomery County 1988).

[3] Even though a county school district receives office space from the board of county commissioners, see R.C. 3319.19, the county school district is an independent entity, rather than an agency of the county. See, e.g., R.C. 3313.17; R.C. 5705.01(I); see also R.C. 3301.0712; R.C. 3317.11.

[4] R.C. 5705.091, effective January 10, 1992, provides for the establishment in each county of a county mental retardation and developmental disabilities general fund to hold proceeds from levies under R.C. 5705.19 and 5705.222 and from other sources for the purposes of R.C. Chapters 3323 and 5126. See Am.Sub.S.B. 156, 119th Gen. A. (1992) (eff. Jan. 10, 1992); note 1, supra. The fund contains accounts "for each of the several particular purposes of the levies as specified in the resolutions under which the levies were approved." R.C. 5705.091. The board of county commissioners may also establish a county mental retardation and developmental disabilities capital fund, and moneys may be transferred among funds created for the purposes of the county MR/DD board as provided in R.C. 5705.14(H). R.C. 5705.091, .14.

1992 Ohio Op. Atty. Gen. 2-101 (Ohio A.G.), 1992 Ohio Op. Atty. Gen. No. 92-027, 1992 WL 526415

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2016 Ohio Op. Atty. Gen. No. 2016-002 (Ohio A.G.), 2016 WL 463430

Office of the Attorney General

State of Ohio
Opinion No. 2016-002
February 1, 2016

SYLLABUS:
***1** 1. R.C. 3709.28 and R.C. 3709.29 do not require a county budget commission to reduce the amount of a general health district appropriation measure that the county auditor apportions to a township under R.C. 3709.28(C) to an amount that does not exceed the revenue generated by the township general levy for current expenses within the ten-mill limitation.

2. The amount of a general health district appropriation measure that has been apportioned to a township by the county auditor pursuant to R.C. 3709.28(C) may be adjusted, as necessary, by the county budget commission when the commission reviews a township tax budget pursuant to R.C. 5705.32(A). An adjustment should be made to ensure that the deductions taken from the township's real property tax revenue at the semiannual apportionment of funds do not exceed the amount of revenue that may be used for those deductions and that the township is left with sufficient general levy revenue for other appropriations that the county budget commission determines may be made from the township general fund. At the semiannual apportionment of funds, the county auditor shall retain one-half of the amount of the general health district appropriation measure that has been apportioned to a township as adjusted by the county budget commission pursuant to R.C. 5705.32(A).

3. Revenue that is generated by a special levy shall be used for the purpose specified in the language of the ballot or resolution authorizing the levy. Revenue generated by the special levy may not be used for the amount of a general health district appropriation that has been apportioned to a township if the purpose of the special levy is unrelated to the general health district's expenses.

4. R.C. 3709.29 requires the board of health of a general health district to certify an insufficiency to the board of county commissioners when the board of health determines that the moneys in the district health fund will not meet the health district's expenses because the taxes levied within the ten-mill limitation are insufficient to pay those expenses.

Michael Vaccaro
Jackson Township Law Director
5735 Wales Avenue N.W.
Massillon, Ohio 44646

Charles D. Hall III
Perry Township Law Director
3111 Hilton Street N.W.
Massillon, Ohio 44646

Eric Williams
Plain Township Law Director
2600 Easton Street N.E.
Canton, Ohio 44721

Dear Law Director Vaccaro, Law Director Hall, and Law Director Williams:
You have requested an opinion on behalf of Jackson, Perry, and Plain Townships[1] about the apportionment of the Stark County Combined General Health District aggregate appropriation measure among the townships and municipal corporations of the district. Your letter states that after deducting the portion of the health district appropriation that has been apportioned to Jackson, Perry, and Plain Townships, a negative balance results in the townships' general funds. You believe that R.C.

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3709.28(C) and R.C. 3709.29 require the county budget commission to reduce the amount of the general health district aggregate appropriation measure that is apportioned to the townships. You assert that under R.C. 3709.28(C) and R.C. 3709.29 the amount of a general health district appropriation measure that is apportioned to each subdivision should not exceed the amount of revenue that may be generated by each subdivision's general levy for current expenses within the ten-mill limitation.

***2** You ask the following questions:
1. Do R.C. 3709.28(C) and R.C. 3709.29 limit the amount of a general health district appropriation measure that is apportioned to a township or municipal corporation to an amount that does not exceed the revenue generated by that subdivision's general levy for current expenses within the ten-mill limitation?[2]

2. May tax revenue that is generated by a township special levy within the ten-mill limitation be restricted to uses other than the expenses of the combined general health district?

3. When the board of health of a combined general health district determines that the taxes levied by the townships and municipal corporations within the ten-mill limitation will be insufficient to meet the expenses of the district, does R.C. 3709.29 require the board of health to certify that insufficiency to the board of county commissioners for the purpose of placing upon the ballot a special levy for a tax in excess of the ten-mill limitation?

Limitation upon the Aggregate Appropriation Measure of a General Health District and the Amount of the Appropriation Apportioned to Individual Subdivisions of the General Health District

The territory of the state is divided into health districts, with each city constituting a city health district, and the townships and villages of each county constituting a general health district. R.C. 3709.01. One or more city health districts may join with a general health district. R.C. 3709.07. "The combined district shall constitute a general health district[.]" *Id.* Jackson, Perry, and Plain Townships are part of the Stark County Combined General Health District, which was formed pursuant to R.C. 3709.07 by combining the general health district with three city health districts located in Stark County.

According to R.C. 3709.28(F):
[w]hen any general health district has been united with ... a city health district located therein, the chief executive of the city shall, annually ... certify to the county auditor the total amount due for the ensuing fiscal year from the municipal corporations and townships in the district as provided in the contract between such city and the district advisory council of the original general health district. After approval by the county budget commission, the county auditor shall thereupon apportion the amount certified to the townships and municipal corporations, and shall withhold the sums apportioned as provided in this section.

Numbered paragraph six of the contract forming the Stark County Combined General Health District states, in part, that "the necessary funds to meet the [[combined general health district's] budget shall be apportioned by the county auditor on the basis of taxable valuations among each township, village and city composing the combined general health district and paid into the district health fund, as provided by [R.C. 3709.28]."

***3** Pursuant to R.C. 3709.28(A), "[i]f a general health district will receive any part of its revenue for a fiscal year from an appropriation apportioned among the townships and municipal corporations composing the district, the board of health of the district shall adopt an itemized appropriation measure[[.]" A general health district's itemized appropriation measure "shall set forth the amounts for the current expenses of the district for the ensuing fiscal year." R.C. 3709.28(B). Once the appropriation measure has been adopted by the board of health, the board shall certify the measure to the county auditor, along with an estimate of revenue that may be received by the district from all other sources.[3] *Id.* The county auditor then submits the appropriation measure to the county budget commission, "which may reduce the appropriation to be apportioned among the townships and municipal corporations composing the district in accordance with [R.C. 3709.28(C)]." R.C. 3709.28(B).

The revenue that is available to the general health district from state subsidies, health district fees, and taxes, including any unencumbered revenue that remains from a previous appropriation, shall be deducted from the aggregate appropriation that is

approved by the county budget commission. R.C. 3709.28(C). The county auditor shall allocate a portion of the aggregate appropriation measure to each of the townships and municipal corporations comprising the general health district. *Id.* The share of the aggregate appropriation measure that is allocated to each township or municipal corporation is determined "on the basis of the taxable valuations in such townships and municipal corporations." *Id.*

In February and August of each year, the county auditor and county treasurer settle the real and public utility property taxes and assessments that have been collected. R.C. 319.43(A); R.C. 321.24(A), (C). As soon as the settlement is completed, "the county treasurer shall pay to the township fiscal officer, or the treasurer of a municipal corporation ... all moneys in the county treasury payable to such ... subdivisions." R.C. 321.31; *see also* 1985 Op. Att'y Gen. No. 85-067, at 2-261. "The [county] auditor, when making the auditor's semiannual apportionment of funds, shall retain at each semiannual apportionment one-half of the amount [of the general health district appropriation] apportioned to each township and municipal corporation." R.C. 3709.28(C). The moneys retained by the county auditor "shall be placed in a separate fund to be known as the 'district health fund.'" *Id.*

If the expenses of the health district will not be met by the moneys in the district health fund because the tax revenues that are generated within the ten-mill limitation by the subdivisions of the general health district are insufficient, "the board of health [of the health district] shall certify the fact of such insufficiency to the board of county commissioners of the county in which such district is located." R.C. 3709.29. When a certification of insufficiency has been submitted to the board of county commissioners, the board of county commissioners has a mandatory duty to pass a resolution to place upon the ballot a special levy in excess of the ten-mill limitation for the benefit of the general health district. *Id.*; 2001 Op. Att'y Gen. No. 2001-013 (syllabus).

***4** A county budget commission is not required to reduce a general health district appropriation measure when it exceeds the amount of tax revenue that may be generated by the townships and municipal corporations within the ten-mill limitation. Before the aggregate appropriation measure is allocated among the townships and municipal corporations of the general health district, revenues from other sources, such as state subsidies, fees charged by the health district, any unencumbered balance in the district health fund from a prior year, and any taxes that may be levied for the benefit of the health district, are deducted from the appropriation measure that is fixed by the county budget commission. R.C. 3709.28(B)-(C). Insofar as a general health district has revenue available to it from those sources, the district may meet its expenses even if the expenses exceed the revenue that may be generated from taxes levied within the ten-mill limitation.

In addition, the plain language of R.C. 3709.29 is recognition that a general health district's aggregate appropriation measure may exceed the revenue that may be generated by taxes levied within the ten-mill limitation. Indeed, the purpose of a tax levied pursuant to R.C. 3709.29 is to provide for the expenses of a general health district when the amount of revenue generated by taxes levied by the subdivisions of the general health district within the ten-mill limitation is insufficient to pay those expenses. *See* 1986 Op. Att'y Gen. No. 86-022, at 2-119 (a special levy is imposed pursuant to R.C. 3709.29 "because of the inability of townships and municipalities within the district to adequately fund the district with taxes within the ten-mill limitation"). If the county budget commission were required to reduce the amount of a general health district appropriation measure whenever it exceeded the amount of tax revenue that may be generated within the ten-mill limitation, there would never be a reason to apply the provisions of R.C. 3709.29. It is well accepted that "the General Assembly is not presumed to do a vain or useless thing, and ... when language is inserted in a statute it is inserted to accomplish some definite purpose." *State ex rel. Cleveland Elec. Illuminating Co. v. Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959).

Neither R.C. 3709.28(C) nor R.C. 3709.29 limits the amount of a general health district appropriation measure that may be apportioned by the county auditor to an individual township based upon the amount of revenue that may be generated from that township's general levy for current expenses within the ten-mill limitation. R.C. 3709.28(B) and (C) authorize a county budget commission to reduce the overall appropriation measure of the general health district. *See* R.C. 3709.28(B) ("the county budget commission ... *may reduce the appropriation* to be apportioned among the townships and municipal corporations" (emphasis added)); R.C. 3709.28(C) ("[t]he *aggregate appropriation*, as fixed by the commission ... shall be apportioned by the county auditor among the townships and municipal corporations" (emphasis added)). The apportionment, or the share of the aggregate appropriation that is allocated to the townships and municipal corporations, is determined "on the basis of taxable valuations[.]" R.C. 3709.28(C). Thus, under R.C. 3709.28 the only way to reduce the amount apportioned to a township or municipal corporation is to reduce the total appropriation measure. As we have already explained, however, a county budget commission is not required to reduce the total amount of a general health district appropriation measure

when that amount exceeds the revenue from taxes levied within the ten-mill limitation.[4]

***5** R.C. 3709.29 authorizes a special levy in excess of the ten-mill limitation to provide for an expense of the general health district when the moneys from taxes levied within the ten-mill limitation are insufficient to meet the health district's expenses. The statute does not address the amount of a general health district appropriation measure that may be apportioned to a particular township. Rather, R.C. 3709.29 provides a mechanism for the general health district to meet its expenses when the moneys retained by the county auditor under R.C. 3709.28(C) and credited to the district health fund are not sufficient to meet the expenses. Therefore, R.C. 3709.28 and R.C. 3709.29 do not require a county budget commission to reduce the amount of a general health district appropriation measure that is apportioned to a township under R.C. 3709.28(C) to an amount that does not exceed the revenue generated by the township general levy for current expenses within the ten-mill limitation.[5]

Nevertheless, R.C. 3709.28 and R.C. 3709.29 must be read *in pari materia* with R.C. 5705.28 through R.C. 5705.39. *See* 1937 Op. Att'y Gen. No. 997, vol. II, p. 1744, 1746. Subject to certain exceptions, R.C. 5705.28 requires every taxing authority to adopt a tax budget for the subdivision. A tax budget shall contain, *inter alia*, "[a] statement of the necessary current operating expenses for the ensuing fiscal year for each department and division of the subdivision ... and the fund from which such expenditures are to be made." R.C. 5705.29(A)(1). To assist in the preparation of a township tax budget, the general health district is required to submit "an estimate of contemplated revenue and expenditures for the ensuing fiscal year" to the board of township trustees. R.C. 5705.28(C)(1). This ensures that a township tax budget includes the township's share of the general health district appropriation measure. 1999 Op. Att'y Gen. No. 99-015, at 2-118; 1937 Op. Att'y Gen. No. 997, vol. II, p. 1744, 1747 (the amount that a general health district requires from each subdivision within the district should be requested from the subdivision in accordance with G.C. 5625-20, the predecessor of R.C. 5705.28, "so that the annual tax budget of each subdivision may show the amount which that subdivision must raise for the benefit of a health district").

Revenues from a township general levy for current expenses within the ten-mill limitation, which are paid into the township general fund, may be used to pay a township's share of the general health district appropriation measure. *See* R.C. 5705.05(C); R.C. 5705.10(A). Accordingly, the amount apportioned to a township for a general health district appropriation measure and the amount of revenue anticipated from the township general levy for current expenses shall be included in the township tax budget each year. *See* R.C. 5705.29(B)(2); 1999 Op. Att'y Gen. No. 99-015, at 2-119 ("[t]ownship moneys paid to the board of health of a general health district pursuant to R.C. 3709.28 are clearly included within the official certificate of estimated resources"); 1986 Op. Att'y Gen. No. 86-022, at 2-117 to 2-118 (tax revenue retained by the county auditor under R.C. 3709.28(C) is included in a township's budget even if it is not paid directly by the township); 1954 Op. Att'y Gen. No. 3525, p. 59, 62 ("when an obligation imposed by law on a township or other subdivision is to be paid on its behalf by the county auditor, out of funds which belong to it, these are expenditures of the subdivision and under any process of accounting would be considered as monies received and paid by the subdivision, just as completely as though they actually passed through the hands of the clerk or treasurer of the subdivision").

***6** Once a township tax budget is adopted by the board of township trustees, the tax budget is submitted to the county auditor, who presents the tax budget to the county budget commission. R.C. 5705.30-.31. "The budget 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 in the county." R.C. 5705.31. In reviewing a township tax budget, "[t]he county budget commission shall adjust the estimated amounts required from the general property tax for each fund ... so as to bring the tax levies required therefor within the limitations specified in [R.C. 5705.01-.47.]" R.C. 5705.32(A). In addition, the county budget commission shall determine the appropriations that may be made from each fund of the township. R.C. 5705.32(A); R.C. 5705.35(A).

The purpose of the county budget commission's review of a subdivision's tax budget is to ensure that taxes are levied within statutory and constitutional limitations and to allocate revenue from real property taxes among the subdivisions and taxing units. *See* 2010 Op. Att'y Gen. No. 2010-031, at 2-227 ("the amount of inside millage available to a city is contingent upon the amount of inside millage sought by the county and other overlapping taxing units"); 1937 Op. Att'y Gen. No. 997, vol. II, p. 1744, at 1747 ("[t]he budget commission is the county financial coordinating body for the revision and readjustment of estimates and generally to see that all necessary items for debt charges and current expenses are contained in the various budgets of the local taxing authorities and to see that the same are within the limitations imposed by the State Constitution"). In reviewing a tax budget, a county budget commission determines that the taxes have been properly authorized. *See* R.C.

5705.31; R.C. 5705.341 (taxes must be "clearly required" by a tax budget). This involves a determination that the moneys generated by the tax are needed by the taxing authority and budgeted for the purpose of meeting that need. *Vill. of S. Russell v. Budget Comm'n of Geauga Cnty.*, 12 Ohio St. 3d 126, 132, 465 N.E.2d 876 (1984). The county budget commission also ensures that the expenditures of a subdivision do not exceed the subdivision's resources. *See* 1999 Op. Att'y Gen. No. 99-020, at 2-142 ("the adoption of a tax budget subjects the finances of the subdivision or taxing unit to public view, to ensure, among other things, the proper expenditure of the moneys of the subdivision or taxing unit and to prevent the expenditures of the subdivision or taxing unit from exceeding its available resources").

After the county budget commission completes its review of a township tax budget, it shall certify the results of its review to the board of township trustees, which "shall authorize the necessary tax levies and certify them to the county auditor[.]" R.C. 5705.34. The board of township trustees "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[.]" R.C. 5705.35(A). This revised tax budget is "the basis of the annual appropriation measure" that is adopted by a board of trustees. *Id.; see also* R.C. 5705.38(A). "The total appropriations from each fund shall not exceed the total of the estimated revenue available for expenditure therefrom, as certified by the budget commission[.]" R.C.5705.39.

***7** In reading R.C. 3709.28 and R.C. 5705.28 through R.C. 5705.39 *in pari materia*, we must endeavor to construe the statutes harmoniously and in such a way as to give effect to all parts of the statutes. *Johnson's Markets, Inc. v. New Carlisle Dep't of Health*, 58 Ohio St. 3d 28, 35, 567 N.E.2d 1018 (1991). The amount of a general health district appropriation that is paid with revenue from a township general levy for current expenses within the ten-mill limitation is limited by other demands on the township general levy for current expenses within the ten-mill limitation. *See* R.C. 5705.05 (revenue from the general levy for current expenses shall be used to pay any current expense of the subdivision); 2007 Op. Att'y Gen. No. 2007-036, at 2-370 ("[t]he amounts so apportioned among the townships and municipal corporations [for a general health district appropriation measure] are levied within the ten-mill limitation and thus are limited by other demands upon inside millage"). If the amount of a general health district appropriation measure that has been apportioned to a township consumes all or most of the revenue from the township general levy for current expenses within the ten-mill limitation, the township will be left without enough general levy moneys to meet its other current expenses. The county auditor also may not be able to retain the amount of moneys that he is required to retain at the semiannual apportionment of funds from the moneys that may be used for that purpose. Additionally, if a county auditor is required to retain the amount of a general health district appropriation that has been apportioned to a township regardless of how the revenue from the township general levy was allocated in the township tax budget, the authority of the county budget commission to balance the appropriations that may be made from the general fund for the other expenses of the township will be nullified.

Although no statute explicitly requires a county budget commission to adjust the amount of a general health district appropriation apportioned to an individual township, we believe that a county budget commission has the authority to make such an adjustment pursuant to R.C. 5705.28 through R.C. 5705.39. The duties assigned to a county budget commission pursuant to R.C. 5705.28 through R.C. 5705.39 place the initial responsibility upon a county budget commission of ensuring that sufficient tax revenues are raised by a township and that expenditures included in a township tax budget do not exceed those revenues. Thus, to give effect to all the provisions in R.C. 3709.28 and R.C. 5705.28 through R.C. 5705.39, we conclude that when the county budget commission reviews a township tax budget pursuant to R.C. 5705.32(A), the county budget commission may adjust, as necessary, the amount of a general health district appropriation measure that has been apportioned to a township. An adjustment should be made to ensure that the deductions taken from the township's real property tax revenue at the semiannual apportionment of funds do not exceed the amount of revenue that may be used for those deductions and that the township is left with sufficient general levy revenue for other appropriations that the county budget commission determines may be made from the township general fund. At the semiannual apportionment of funds, the county auditor shall retain one-half of the amount of the general health district appropriation measure that has been apportioned to a township as determined by the county budget commission pursuant to R.C. 5705.32(A).[6] The county auditor shall not retain moneys to meet the township's one-half share of the general health district appropriation measure from tax revenue that is required to be paid to a special fund of the township, the purpose of which is unrelated to the general health district appropriation measure.[7]

Use of Revenue from a Special Levy within the Ten-Mill Limitation

***8** Your next question asks whether the use of tax revenue that is generated by a township special levy within the ten-mill limitation may be restricted to a particular purpose that does not include a general health district appropriation measure. The following taxes may be levied by the taxing authority of a subdivision:[8]
(A) The general levy for debt charges within the ten-mill limitation;

(B) The general levy for current expense within the ten-mill limitation;

(C) Special levies authorized by [R.C. 5705.01-.47], within the ten-mill limitation;

(D) The general levy for debt charges authorized by law or by vote of the people in excess of the ten-mill limitation;

(E) Other special or general levies authorized by law or vote of the people in excess of the ten-mill limitation.

R.C. 5705.04. Every tax that is levied by a subdivision shall identify the purpose for which it is enacted and the revenue generated by the tax shall be used only for the purpose for which the tax was imposed. Ohio Const. art. XII, § 5; 2010 Op. Att'y Gen. No. 2010-028, at 2-206; 1999 Op. Att'y Gen. No. 99-015, at 2-115 n.1.

"The purpose and intent of the general levy for current expenses is to provide one general operating fund derived from taxation from which any expenditures *for current expenses of any kind* may be made." R.C. 5705.05 (emphasis added). "A special levy is a tax that is levied for a special purpose." 1999 Op. Att'y Gen. No. 99-015, at 2-115. Whether a tax is levied for a special purpose is determined by examining the resolution of the taxing authority, and where a special levy is presented to the electorate, the ballot language. 2010 Op. Att'y Gen. No. 2010-028, at 2-205 to 2-206. Although the language of the resolution or ballot need not use the term "special levy," if the language designates a particular purpose for the tax revenue, other than the current expenses of the subdivision, the levy will be deemed a special levy. *Id.; cf.* 2013 Op. Att'y Gen. No. 2013-005, at 2-51 (proceeds of a general levy for current expenses "'must remain available for all current expenses of the subdivision, rather than being earmarked for a particular purpose'" (quoting 1988 Op. Att'y Gen. No. 88-101, 2-498 n.1)).

To ensure that tax revenue is used only for the purpose for which the tax was imposed, the revenue shall be paid into certain funds of the subdivision. *See* R.C. 5705.10. Revenue from a general levy for current expenses within or in excess of the ten-mill limitation shall be paid to the subdivision's general fund. R.C. 5705.10(A). Revenue from a special levy within or in excess of the ten-mill limitation shall be credited to a special fund that is created for each special levy. R.C. 5705.10(C). "Money paid into any fund shall be used only for the purposes for which such fund is established." R.C. 5705.10(I). Therefore, in response to your question, revenue that is generated by a special levy shall be used for the purpose specified in the language of the ballot or resolution authorizing the levy. Revenue generated by the special levy may not be used for the amount of a general health district appropriation that has been apportioned to a township if the purpose of the special levy is unrelated to the general health district's expenses.

Special Levy Pursuant to R.C. 3709.29

***9** Your final question asks whether R.C. 3709.29 requires the board of health of a general health district to certify an insufficiency to the board of county commissioners for the purpose of placing upon the ballot a special levy for a tax in excess of the ten-mill limitation when the board of health determines that the taxes levied by the townships and municipal corporations within the ten-mill limitation will be insufficient to meet the expenses of the district. R.C. 3709.29 states, in pertinent part:

> If the estimated amount of money necessary to meet the expenses of a general health district program will not be forthcoming to the board of health ... out of the district health fund because the taxes within the ten-mill limitation will be insufficient, the board of health *shall certify* the fact of such insufficiency to the board of county commissioners of the county in which such district is located. (Emphasis added.)

"It is axiomatic that when it is used in a statute, the word 'shall' denotes that compliance with the commands of that statute is *mandatory*." *Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992). Nothing within the context of R.C. 3709.29 indicates that a contrary meaning was intended by the General Assembly. Therefore,

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when the board of health of a general health district determines that the moneys comprising the district health fund will not meet the expenses of the health district because the taxes levied within the ten-mill limitation are insufficient, R.C. 3709.29 requires the board of health to certify the insufficiency to the board of county commissioners.

The special levy authorized by R.C. 3709.29 may be resorted to only after it is determined that "the estimated amount of money necessary to meet the expenses of a general health district program will not be forthcoming to the board of health of such district out of the district health fund because the taxes within the ten-mill limitation will be insufficient[.]" *See* 2001 Op. Att'y Gen. No. 2001-013, at 2-79 ("board of county commissioners would have no duty, and indeed no authority, to pass a resolution submitting the question of the tax levy to the voters if there were no insufficiency of funds within the ten-mill limitation to meet the expenses of the health district"). A township or municipal corporation may not create this insufficiency by levying less than the maximum permissible amount of taxes within the ten-mill limitation. R.C. 5705.05(C) requires the subdivisions to include in their general levy for current expenses an amount sufficient to pay their share of the general health district appropriation. In addition, a board of health of a general health district may not forgo revenues generated by the townships and municipal corporations within the ten-mill limitation and instead rely solely upon a special levy authorized by R.C. 3709.29 for satisfaction of its appropriation measure. 1953 Op. Att'y Gen. No. 2569, p. 163, 167 ("the board [of health of a general health district] has no right to resort to the extra tax levy ... until it has allocated to its requirements the funds provided by the regular levies, and it has been determined that there will be a deficiency"). It follows that the townships and municipal corporations shall have levied the maximum permissible amount of taxes within the ten-mill limitation before it may be determined that the taxes within the ten-mill limitation will be insufficient to meet a general health district's expenses pursuant to R.C. 3709.29.

Conclusions

***10** Based on the foregoing, it is my opinion, and you are hereby advised that:
1. R.C. 3709.28 and R.C. 3709.29 do not require a county budget commission to reduce the amount of a general health district appropriation measure that the county auditor apportions to a township under R.C. 3709.28(C) to an amount that does not exceed the revenue generated by the township general levy for current expenses within the ten-mill limitation.

2. The amount of a general health district appropriation measure that has been apportioned to a township by the county auditor pursuant to R.C. 3709.28(C) may be adjusted, as necessary, by the county budget commission when the commission reviews a township tax budget pursuant to R.C. 5705.32(A). An adjustment should be made to ensure that the deductions taken from the township's real property tax revenue at the semiannual apportionment of funds do not exceed the amount of revenue that may be used for those deductions and that the township is left with sufficient general levy revenue for other appropriations that the county budget commission determines may be made from the township general fund. At the semiannual apportionment of funds, the county auditor shall retain one-half of the amount of the general health district appropriation measure that has been apportioned to a township as adjusted by the county budget commission pursuant to R.C. 5705.32(A).

3. Revenue that is generated by a special levy shall be used for the purpose specified in the language of the ballot or resolution authorizing the levy. Revenue generated by the special levy may not be used for the amount of a general health district appropriation that has been apportioned to a township if the purpose of the special levy is unrelated to the general health district's expenses.

4. R.C. 3709.29 requires the board of health of a general health district to certify an insufficiency to the board of county commissioners when the board of health determines that the moneys in the district health fund will not meet the health district's expenses because the taxes levied within the ten-mill limitation are insufficient to pay those expenses.

Very respectfully yours,

Michael Dewine
Ohio Attorney General

Footnotes

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1 Jackson, Perry, and Plain Townships have adopted a limited home rule government pursuant to R.C. 504.01.

2 In your letter, you question whether a township's share of the general health district appropriation measure may exceed the township's ""general fund, inside millage." "Inside millage" is the tax revenue that is generated within the ten-mill limitation. *See Sanborn v. Hamilton Cnty. Budget Comm'n*, 142 Ohio St. 3d 20, 2014-Ohio-5218, 27 N.E.3d 498, at ¶ 7. The ten-mill limitation is created by Ohio Const. art. XII, § 2, which states:

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation.

See also R.C. 5705.02 ("[t]he aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof"). The ten-mill limitation applies to both general levies and special levies. *See* R.C. 5705.04; 2013 Op. Att'y Gen. No. 2013-005, at 2-50 ("[l]evies in excess of the ten-mill limitation that are authorized by the electorate may be either general or special levies").

Every township is required to establish eight funds, one of which is a general fund. R.C. 5705.09. A township's general fund is composed of tax revenue from general levies for current expenses within and in excess of the ten-mill limitation, as well as, moneys "from sources other than the general property tax" that have not been designated by law to be used for a particular purpose. R.C. 5705.10(A). Moneys in a township's general fund resulting from a general levy for current expenses shall be used for any of the current expenses of the township and their expenditure may not be restricted to particular purposes in a resolution or by ballot language. 2013 Op. Att'y Gen. No. 2013-005, at 2-51; *see* R.C. 5705.05 ("[t]he purpose ... of the general levy for current expenses is to provide one general operating fund ... from which any expenditures for current expenses of any kind may be made"). *But see* 2011 Op. Att'y Gen. No. 2011-026, at 2-217 to 2-218 n.5 (accounts may be established in a general fund to set apart moneys that are appropriated for certain purposes). The taxing authority of a political subdivision shall include in the general levy for current expenses "[t]he amounts necessary for boards and commissioners of health[.]" R.C. 5705.05(C). For the purpose of this opinion, we understand your use of the term "general fund, inside millage" to mean revenue from a township general levy for current expenses within the ten-mill limitation.

3 Other sources of revenue that may be available to a general health district include subsidies from the state paid pursuant to R.C. 3709.32, fees the health district may charge for services, and taxes "levied for the benefit of the district[.]" R.C. 3709.28(B). Special tax levies may be imposed for the benefit of a general health district under the authority provided in R.C. 3709.29, which authorizes imposing a special levy in excess of the ten-mill limitation "in order to provide the board of health [of a general health district] with sufficient funds[,]" or R.C. 5705.191, which authorizes a subdivision to impose a special levy in excess of the ten-mill limitation "to supplement the [subdivision's] general fund for the purpose of making appropriations for ... health[.]"

4 A county budget commission has discretion to reduce the total appropriation measure of a general health district. R.C. 3709.28(B). Several factors may influence that decision, including the amount of revenue generated by taxes levied within the ten-mill limitation. However, R.C. 3709.28 does not require a county budget commission to reduce the appropriation measure based upon that amount.

5 The special levy in excess of the ten-mill limitation that is authorized by R.C. 3709.29 shall be relied upon when tax revenues generated within the ten-mill limitation are insufficient to satisfy a general health district's expenses. From the language of R.C. 3709.29 we may infer that a township is permitted, but not required, to meet its share of the general health district appropriation measure out of township revenues received from sources other than taxes levied within the ten-mill limitation. A township may use other moneys in its general fund that are not required to be used for another purpose to satisfy its share of the general health district appropriation measure. *See generally*, R.C. 5705.10(A) (moneys composing a township general fund). Alternatively, a board of township trustees may adopt a resolution that states that a levy in excess of the ten-mill limitation is necessary to meet the current expenses of the township, R.C. 5705.19(A), or to supplement the township general fund in order to make appropriations for health, R.C. 5705.191.

6 When a county budget commission reduces the amount of the general health district appropriation measure that has been apportioned to a specific township, the moneys comprising the district health fund will be insufficient to meet the expenses of the general health district, which will require the general health district to apply the provisions of R.C. 3709.29.

7 Further discussion of the use of revenue from a special levy or moneys credited to a special fund is presented below.

8 A township is a "subdivision" and the board of township trustees is the "taxing authority" for the purpose of R.C. Chapter 5705. R.C. 5705.01(A); R.C. 5705.01(C).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by regular mail and email this 6 day of July, 2016, to:

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