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#95052
NO.
STATE OF NEBRASKA
OFFICIAL
JUN 21 1995
DEPT. OF JUSTICE

DATE: June 16, 1995

SUBJECT: Inclusion of Levy for Predator Control Under Neb. Rev. Stat. § 23-260 (Cum. Supp. 1994) as Part of the Maximum Property Tax Levy Which May be Made by A County Under Neb. Const. art. VIII, § 5.

REQUESTED BY: Roger L. Benjamin, Harlan County Attorney

WRITTEN BY; Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding whether the tax levy made by the Harlan County Board for predator control purposes under Neb. Rev. Stat. § 23-360 (Cum. Supp. 1994) must be included in determining the limit on county levies contained in Neb. Const. art. VIII, § 5. For the reasons set forth below, we conclude that levies made under § 23-360 are to be included in calculating the maximum county levy under the Constitution.

Article VIII, § 5, of the Nebraska Constitution, provides, in pertinent part: "County authorities shall never assess taxes the aggregate of which shall exceed fifty cents per one hundred dollars actual valuation as determined by the assessment rolls,. . ., unless authorized by a vote of the people of the county." This provision constitutes an express limitation on the powers of both counties and the Legislature. ***Chicago, B. & Q. R.R. Co. v. Gosper County,*** 153 Neb. 805, 46 N.W.2d 147 (1951); ***Grand Island & W.C. R.R. Co. v. Dawes County,*** 62 Neb. 44, 86 N.W. 934 (1901). As a result, the Legislature cannot authorize counties to levy taxes in excess of the constitutional maximum set by art. VIII, § 5. ***Dwyer***

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v. Omaha-Douglas County Public Building Commission, 188 Neb. 30, 195 N.W.2d 236 (1972). County taxes exceeding the constitutional limit, absent a vote of the people, are illegal and void. *Chicago, B. & Q. R.R. Co. v. Nemaha County,* 50 Neb. 393, 69 N.W. 958 (1897). Article VIII, § 5, and its predecessors, were "intended to protect each and every taxpayer against an abuse of the taxing power of county authorities, and the limitation therein fixed must be held to apply to every case where such power is exercised." *Union Pacific R.R. Co. v. Howard County,* 66 Neb. 663, 670, 97 N.W. 280, 281 (1903).[1]

Neb. Rev. Stat. § 23-358 (1991) authorizes a county board to cooperate with other entities or individuals to conduct an animal damage control program to control predatory animals "that are injurious to livestock, poultry, and game animals and the public health." To aid in this purpose, Neb. Rev. Stat. § 23-360 (Cum. Supp. 1994) authorizes a county board to make a levy to aid in carrying out the animal damage control program. Specifically, § 23-360 provides:

> In addition to levies now authorized by law, the county board of each county in this state may levy upon each and every dollar of the taxable value of all of the taxable property in such county, <u>for the use of the county board in carrying out the animal damage control program,</u> such amount as may be determined to be necessary therefor but not to exceed one cent on each one hundred dollars upon such taxable value. The entire fund derived from such levy shall be set apart in a separate fund and expended only for animal damage control as defined by sections 23-358 to 23-360. (emphasis added).

In a previous opinion, we addressed "whether the tax levy authorized by section 2-958, R.R.S. 1943, for the noxious weed control fund was included in the maximum county levy, limited by Article VIII, Section 5 of the Constitution to fifty cents per one hundred dollars actual valuation." 1975-76 Rep. Att'y Gen. 342 (Opinion No. 240, dated July 23, 1976). We concluded that the levy made by the county board for this purpose was to be included in the calculation of the maximum county levy limit under art. VIII, § 5, as the statute implied that the levy was part of the county budget, and was not "a separate levy for an independent taxing entity." *Id.*

This is similar to the situation presented by your question, in that § 23-360 authorizes the county board to determine whether to make a levy for animal damage control purposes, and to determine

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[1] In recognition of this constitutional provision, Neb. Rev. Stat. § 23-119 (Cum. Supp. 1994), provides, in part, that county boards have the duty "to cause to be annually levied and collected taxes authorized by law for county purposes, not exceeding fifty cents on each one hundred dollars of taxable valuation,. . . ."

the amount of such levy. Funds generated by the levy are to be placed in a separate fund and expended by the county only for animal damage control purposes. The decision to make a levy under § 23-360 is made by the county board, and the board determines the amount of the levy. Thus, a levy made pursuant to § 23-360 is a levy made by the county for county purposes, not a "separate levy for an independent taxing entity." As such, we believe that the levy authorized by § 23-360 must be included in the maximum county levy allowed under art. VIII, § 5.

Because § 23-360 provides that the levy authorized is "[i]n addition to levies now authorized by law", it could be suggested that this language somehow removes the levy for predator control purposes from being part of the constitutional levy limit placed on counties. We do not believe the language was intended to have this effect but, rather, merely recognizes that counties are authorized to make various levies for certain purposes. More importantly, however, since the Legislature cannot authorize counties to levy taxes in excess of the constitutional maximum set by art. VIII, § 5, § 23-360 cannot be construed in a manner which would negate the constitutional limit by providing that certain taxes levied for county purposes are not to be considered as part of the total county levy. Such a construction would render this portion of the statute ineffective. A grant of power by the Legislature which is contrary to the Constitution is unconstitutional and void. ***State ex rel. Bottcher v. Bartling,*** 149 Neb. 491, 31 N.W.2d 422 (1948). Therefore, this language in § 23-360 cannot be construed to place the levy outside the limit imposed under art. VIII, § 5, of the Constitution.

In sum, we conclude that the levy made by the Harlan County Board for predator control purposes under § 23-360 must be included in determining the limit on the County's levy contained in art. VIII, § 5.

Very truly yours,

DON STENBERG
Attorney General

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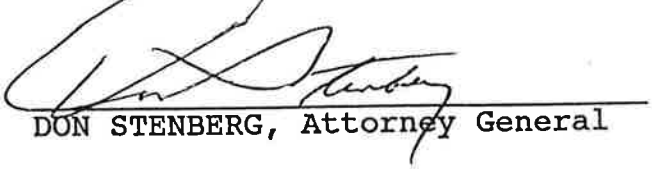
7-2023-7.34

APPROVED BY:



DON STENBERG, Attorney General