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#93063

NO.
STATE OF NEBRASKA
OFFICIAL
AUG 11 1993
DEPT. OF JUSTICE

DATE: August 10, 1993

SUBJECT: Levy for Support of County Hospital

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 on two questions relating to the authority of the Harlan County Board of Supervisors [the "Board"] to levy taxes for support of the county hospital. At the primary election held on May 15, 1990, the following ballot proposition was placed before the electorate pursuant to Neb. Rev. Stat. §§ 23-119 and 23-125 to -130 (1991 and Cum. Supp. 1992):

> Shall Harlan County be authorized to increase the spending limit for the Harlan County Hospital from the statutory maximum as set forth in Nebraska Revised Statute 23-343.11 of seven cents ($.07) on each one hundred dollars ($100.00) of actual valuation to a maximum of nineteen cents ($.19) per one hundred dollars ($100.00) of actual valuation and also increase the maximum statutory levy for Harlan County as set forth in Nebraska Revised Statute 23-119 from fifty cents ($.50) per one hundred dollars ($100.00) of actual valuation to sixty-two cents ($.62) per one hundred dollars ($100.00) of actual valuation?

A majority of the voters of Harlan County voted for "increasing [the] maximum tax levy" pursuant to this ballot question.

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The first question is whether Board "has any power or authority to alter, amend, or rescind this proposition by eliminating, in whole or in part, the .12 voted in for the Hospital." Prior to addressing this issue, it is necessary to review the constitutional and statutory provisions relating to the tax levy limits on counties contained under Nebraska's Constitution and statutes.

Article VIII, § 5, of the Nebraska Constitution provides: "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).

In recognition of this constitutional provision, Neb. Rev. Stat. § 23-119 (Cum. Supp. 1992) provides, in pertinent part:

> It shall be the duty of the county board of each county 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, ... An additional amount may be levied in any county if authorized by a vote of the people of the county.

The Legislature, consistent with § 23-119, has set forth a statutory procedure establishing the requirements for an election authorizing the county to exceed the mill levy limit. Neb. Rev. Stat. §§ 23-125 to -130 (1991); ***see State ex rel. Shelley v. Board of County Commissioners***, 156 Neb. 583, 57 N.W.2d 129 (1953). Section 23-125 provides, in pertinent part:

> Whenever the county board shall deem it necessary to assess taxes, the aggregate of which shall exceed the rate of fifty cents on every one hundred dollars of the actual value of all the taxable property in such county, . . ., the county board may, by an order entered of record, set forth substantially the amount of such excess required and the purpose for which the same will be required, . . ., and provide for the submission of the question of assessing the additional rate required to a vote of the people of the county at the next election for county officers after the adoption of the resolution, or

at a special election ordered by said county board for that purpose.

Section 23-126 sets forth the requirements regarding the manner in which such question is to be submitted to the voters. Section 23-129 provides that, if the measure is approved by the electorate, the county board "shall [ ] have power to levy and collect the special tax in the same manner as other taxes are collected." This section further provides: "Propositions thus acted upon cannot be rescinded by the county board." *Id.*

While not specifically addressed in your request, a threshold issue which must be considered is whether the board's submission of the ballot question at issue satisfied the requirements of §§ 23-125 to -130. In particular, § 23-125 requires that a special tax in excess of constitutional and statutory limits requires "an order entered of record, set[ting] forth substantially the amount of excess required. . . ." While the order specified an increase in the maximum levy rate, it did not specify the amount of tax revenue required for the purpose of supporting the county hospital.

In *People ex rel. Hargrove v. Baltimore & Ohio R.R. Co.*, 394 Ill. 471, 68 N.E.2d 768 (1946), the Supreme Court of Illinois addressed the effect of a statutory limitation on county taxing authority virtually identical to the limits provided under Nebraska law, as well as a statute authorizing counties to exceed such limits similar to § 23-125. The Illinois statute provided that, in order for a county to exceed the statutory limit, the county board was required, by resolution, to specify the number of years for which the tax levy was to be extended, and the amount necessary to be raised. *Id.* at ____, 68 N.E.2d at 770. The record of the board did not, however, set forth the amount to be raised, or the number of years the levy in excess of the limit was to be made. The court, noting that the authority to exceed such limitation "should be construed strictly when examined from the standpoint of the county's power, and be construed liberally when considered with reference to the protection of the taxpayer," *id.* at ____, 68 N.E.2d at 770 (citations omitted), held that the board's failure to specify the number of years that the excess levy could be made rendered the excess levy illegal, and further held that the board's attempted later "correction" of this defect could not cure the illegality. *Id.* at ____, 68 N.E.2d at 770-71.

While § 23-125 does not mandate that the number of years of a levy in excess of statutory and constitutional limits be specified as part of the county board's order, it does require that the order "set forth substantially the amount of [the] excess required," as well as the purpose for the levy of a tax in excess of such limits.

In view of our State Supreme Court's prior approval of Illinois precedent in construing our constitutional and statutory limitations, *see Chicago, B. & Q. R.R. Co. v. Gosper County*, 153 Neb. 805, 46 N.W.2d 147 (1951), we believe some question exists as to whether the Board's possible failure to comply strictly with § 23-125 renders void the initial electoral "approval" of the question presented in May, 1990.

Assuming that such approval is valid, a further question is presented regarding the interpretation of the scope of the voters approval of the ballot question. In this regard, we note that, while the ballot question asked the voters to approve whether the county "[s]hall [ ] be authorized to increase the spending limit for the hospital in excess of the limit in § 23-343.11 (now Neb. Rev. Stat. § 23-3511 (Cum. Supp. 1992)), and whether the county was also authorized to "increase the maximum statutory levy for Harlan County" above the limit in § 23-119, it specified no time limitation for such levy increases.

While not directly on point, the case of *Board of County Commissioners of Marion County v. McKeever*, 436 So.2d 299 (Fla. Dist. Ct. App. 1983), is instructive. In *McKeever*, the court addressed, *inter alia*, whether an ordinance approved by referendum, which placed a millage cap for ten years on ad valorem taxes for county transportation fund purposes, was valid. The court held that the millage cap was in conflict with general law regarding the formation of county budgets and the determination of millage levies, and further held that the cap would also impermissibly bind future county commissioners with respect to the exercise of their taxing power. *Id.* at 301-303. The court specifically noted that Florida law contemplated the annual preparation of county budgets and the fixing of millage rates. *Id.* at 302.

Nebraska law similarly provides for the annual adoption of county budgets, and the annual establishment of levy rates to meet such expenditures. *See* Neb. Rev. Stat. §§ 23-901 to -920 (1991) and Neb. Rev. Stat. §§ 77-1601 to -1627 (1990 and Cum. Supp. 1992). The ballot question at issue, of course, contained no reference to the time period for which the excess levy for the county hospital was to be authorized. In view of the circumstances, it is at least debatable whether the electorate's approval of this measure can be construed to constitute continued voter approval for the county to exceed the statutory levy limit for the county hospital under § 23-3511 (formerly § 23-343.11) with respect to the current or future tax years.

Assuming that the Board determines that it continues to retain the power to levy the additional tax authorized by the 1990

election, we do not believe that it is compelled to levy the maximum amount ($.12 per each one hundred dollars of actual valuation) specified under the ballot question. The ballot proposition asked the voters to decide whether the county "[s]hall [ ] be authorized to increase the maximum spending limit" for the county hospital "to a maximum of" $.19 and to "also increase the maximum statutory levy" for the county. By phrasing the proposition in terms of whether the county would be "authorized" to increase the levy for the hospital "to a maximum" of $.19, it is our opinion that the proposition as submitted to the voters was intended to permit a levy of less than the maximum authorized, should such be adequate for the support of the county hospital.

"[V]oters at an election are entitled to such information as will enable them to consider, weigh, discuss, and vote upon the actual merits of a proposition." ***Geer-Melkus Constr. Co. v. Hall County Museum Bd.***, 186 Neb. 615, 621, 185 N.W.2d 671, 675 (1971) (***citing Drummond v. City of Columbus***, 136 Neb. 87, 285 N.W. 109, ***reh. denied*** 136 Neb. 99, 286 N.W. 779 (1939)). The voters, in approving this ballot measure, apparently intended to authorize the levy of a tax in excess of statutory and constitutional limitations for the hospital "to a maximum" specified rate. To "authorize" means "to give official approval or legal power to; to give a right to act; to empower; . . . ." Webster's New Universal Unabridged Dictionary 126 (2d ed. 1979). The language of the amendment is not indicative of an intent to compel a levy of $.19 per one hundred dollars of valuation for support of the county hospital; rather, the language contemplates authorizing a levy rate "to a maximum" of this amount. While § 23-129 indicates the board may not "rescind[]" taxes approved pursuant to §§ 23-125 to -130, recognition of authority to levy less than the maximum authorized is not in conflict with this provision, in view of the nature of the ballot question presented.[1]

Your second question concerns what effect, if any, the amendment of former § 23-343.11 (now § 23-3511) by 1991 Neb. Laws, L.B. 798, § 3, has on the ability of the Board to levy the maximum specified under this provision, in addition to the special tax authorized by the May, 1990, election. Neb. Rev. Stat. § 23-3511 (Cum. Supp. 1992) provides:

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[1] As we have not been asked to address the question, we express no opinion as to whether the Board of Supervisors may levy an amount for support of the hospital which is less than the amount requested by the hospital board when the hospital board's request is equal to or less than the total mill levy the Board of Supervisors is authorized to levy for hospital purposes.

> The county board shall have power to levy a tax each year of not to exceed three and five-tenths cents on each one hundred dollars upon the actual value of all the taxable property in such county for the purpose of acquiring, remodeling, improving, equipping, maintaining, and operating such facility or facilities as provided by § 23-3501. In counties having a population of not more that seven thousand persons, such tax shall not exceed seven cents on each one hundred dollars of the actual value. The county board shall, by resolution, determine and declare how the same shall be managed. The tax authorized by this section shall not be included within the levy limitations for general county purposes prescribed in section 23-119 or Article VIII, section 5, of the Constitution of Nebraska. (Emphasis added).

Initially, we note that, as previously discussed, the board may not be bound to levy the additional tax of $.12 per one hundred dollars of valuation by the electorates action in 1990, either because of the Board's possible initial failure to comply with § 23-125, or, alternatively, because the voters action could conceivably be construed not to apply to the current budget and tax year. We will, however, address your question as to the effect of the 1991 amendment to § 23-3511 accomplished by L.B. 798, § 3, should the Board determine this special tax is still authorized.

The genesis of the 1991 amendment was L.B. 65, which was intended to "clarify" language regarding constitutional and statutory levy limits to provide "that taxes levied by the county board in a purely ministerial capacity on behalf of other entities or subdivisions shall not count toward the 50-cent levy limitation" imposed by the Constitution and § 23-119. Committee Records on L.B. 65, 92nd Neb. Leg., 1st Sess. (Introducer's Statement of Intent). The committee bill was amended and incorporated into L.B. 798 to include only levies for county hospitals or medical facilities as falling outside of the constitutional and statutory county levy limits. Floor Debate on L.B. 798, 92nd Neb. Leg., 1st Sess. 3759-4038 (April 23 and 29, 1991). The Legislature's sole purpose was to clarify that the constitutional and statutory levy limits on counties were to be defined so as not to include the levy authorized for maintenance of county hospitals. *Id.* at 3759-3761.

In light of this legislative history, it is apparent that the Legislature sought to clarify that levies made pursuant to § 23-3511 for county hospitals are not to be considered as levies for general county purposes subject to Article VIII, § 5 and § 23-119, but, rather, are to be considered as special levies not subject to these restrictions. As such, levies for county hospitals under §

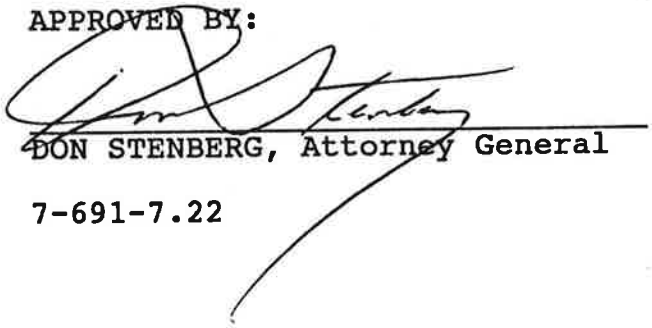
23-3511, up to the maximum authorized, are not deemed part of a county's general levy as a result of the amendment. Thus, the board may levy the maximum special levy provided for under § 23-3511, irrespective of its determination as to its authority to levy all or part of the additional levy included in the May, 1990, ballot question.[2]

Very truly yours,

DON STENBERG
Attorney General

L. Jay Bartel
Assistant Attorney General

APPROVED BY:



DON STENBERG, Attorney General

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[2] We express no opinion at this time as to whether the 1991 amendment to § 23-3511 conflicts with Neb. Const. art. VIII, § 5.