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DATE: September 28, 1993

SUBJECT: Exclusion of tax levies for county hospitals from the levy limits of Article VIII, Section 5 of the Nebraska Constitution on the basis of *Neb. Rev. Stat.* § 23-3511 (Cum. Supp. 1992).

REQUESTED BY: Victor Faesser
Pawnee County Attorney

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

The State Auditor of Public Accounts recently completed an audit of Pawnee County for fiscal year 1992. Among other things, that audit indicated that the tax levy for Pawnee County for general county purposes, exclusive of the taxes levied by the county for the county hospital, was 50.00 cents for each one hundred dollars of actual valuation. With the taxes levied for the county hospital included, however, the total Pawnee County tax levy rose to 51.85 cents for each one hundred dollars of actual valuation. Based upon the total Pawnee County tax levy, the State Auditor added a note to his audit report questioning the propriety of the county's levy under the Nebraska Constitution. That auditor's note led to your opinion request.

Article VIII, Section 5 of the Nebraska Constitution provides that:

> 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, except for the payment of indebtedness existing at the adoption hereof, unless authorized by a vote of the people of the county.

The total tax levy for Pawnee County including the levy for the county hospital obviously exceeds the limit set out in Article VIII, Section 5, and we have no information which indicates that the people of Pawnee County have voted to authorize a total tax levy over 50 cents per one hundred dollars of actual valuation. Therefore, simply on the basis of the constitutional provision, there appears to be a problem with the tax levy for Pawnee County. However, a specific Nebraska statute also impacts this situation.

***Neb. Rev. Stat.* § 23-3511** (Cum. Supp. 1992) provides, as is pertinent here:

> 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 taxable values 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 section 23-3501 [a county hospital]. . . . ***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 supplied). Application of ***Neb. Rev. Stat.* § 23-3511** to the total Pawnee County tax levy reduces that tax levy for fiscal year 1992 to a permissible level if Section 23-3511 is constitutional and effective to remove the hospital taxes from consideration under Article VIII, Section 5. Based upon a recommendation from the State Auditor, you have therefore requested our opinion as to whether Section 23-3511 is constitutional. After reviewing the applicable law, we do not believe that Section 23-3511 can suspend the application of Article VIII, Section 5 of the Nebraska Constitution. The taxes levied for the county hospital cannot constitutionally be removed from consideration in determining the total tax levy for the county.

Article VIII, Section 5, in its current form, dates from 1920. However, there has been a similar provision in our state constitution limiting the amount of taxation by counties since at least 1875. *See* Nebraska Constitution of 1875, Article IX, Section 5. Article VIII, Section 5 is clear and needs no construction. ***Chicago, B.& Q. Railroad Co. v. Gosper County***, 153 Neb. 805, 46 N.W.2d 147 (1951). It is not a grant of taxing power, but rather a limitation on the authority of the Legislature and the counties to tax. ***Grand Island & W.C.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 Article VIII, Section 5. ***Dwyer 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. Railroad Co. v. County of Nemaha***, 50 Neb. 393, 69 N.W. 958 (1897). Article VIII, Section 5 and it 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 Pac. Railroad Co. v. Howard County***, 66 Neb. 663, 670, 97 N.W. 280, 281 (1903).

While it is clear that Article VIII, Section 5 prevents a county from levying taxes over a certain amount for county purposes, it is also clear that Article VIII, Section 5 does not prevent a county from levying taxes on behalf of other governmental subdivisions and taxing entities, even if those additional taxes for other entities put the total county levy over the constitutional limit. ***Dwyer v. Omaha-Douglas County Public Building Commission, supra.*** In the ***Dwyer*** case, the Nebraska Supreme Court considered the application of Article VIII, Section 5 to taxes levied by Douglas County on behalf of the Omaha-Douglas County Public Building Commission, an entity which was a body politic and corporate with its own authority to levy taxes. Douglas County had reached the constitutional levy limit with its own taxing levy, and the plaintiffs in ***Dwyer*** argued that the levy for the County and the Building Commission, when combined, violated Article VIII, Section 5. However, the Court concluded that the levy in question did not violate Article VIII, Section 5 because the extra taxes were levied on behalf of the Building Commission and not the county. Since it was the Building Commission's levy, it did not fall under the provisions of Article VIII, Section 5.

Using a similar analysis, we have previously concluded that levies assessed by counties for county agricultural societies and school districts are not subject to Article VIII, Section 5. 1977-78 Rep. Att'y Gen. 131 (Opinion No. 86, dated May 5, 1977); 1975-76 Rep. Att'y Gen. 278 (Opinion No. 198, dated March 10, 1976); 1967-68 Rep. Att'y Gen. 12 (Opinion No. 8, dated January 12, 1967). On the other hand, we have also concluded that tax levies for county ambulance service and for noxious weed control are subject to the constitutional levy limit. Op. Att'y Gen. No. 92063 (April 20, 1992); 1975-76 Rep. Att'y Gen. 342 (Opinion No. 240, dated July 23, 1976).

In 1971-72 Rep. Att'y Gen. 22 (Opinion No. 11, dated February 4, 1971) we considered whether employees of a county community hospital were county employees for purposes of the County Employees' Retirement Act. In the course of that opinion, we stated:

> The question then, is whether a county community hospital operating under the provisions of Sections 23-343 to 23-343.14, R.R.S. 1943 [the predecessors of Sections 23-3501 to 23-3515], is a part of county government, or is an independent political subdivision. We believe that it is clear from the statutes that the operation of such a hospital is a function of county government. . . . Section 23-343 provides that the county board may issue the bonds to finance the construction or acquisition of such a hospital. Section 23-343.01 provides for the appointment of the board of trustees by the county board. The salary of the members of the board of trustees is fixed by an order of the county board. The board of trustees is required to file its by-laws, rules and regulations with the county board. The board of trustees is required to file a report of its proceedings with the county board, and to certify to the county board the amount necessary to maintain and improve its facilities for the ensuing year. The funds for the construction of the facilities and the operation of the hospital are raised by countywide tax levies. All of these provisions convince us that, while the board of trustees of the hospital have a certain amount of independence, they are basically subservient to the county board, and, as we previously concluded, ***the operation of the county hospital is a function of county government.***

Id. at 23 (emphasis added). Even more specifically with respect to the current question, in 1975-76 Rep. Att'y Gen. 388 (Opinion No. 265, dated November 17, 1976) we directly considered whether taxes levied for county hospital purposes under the predecessor statute to Section 23-3509 should be included as a part of levies subject to Article VIII, Section 5. In that opinion, we stated, ". . . taxes levied for the maintenance and operation of such a [county] hospital are for a county purpose and come within the purview of Article VIII, Section 5, of the Constitution." *Id.* at 390. Therefore, we have previously concluded that tax levies for county hospitals are generally taxes for county purposes which are subject to the limitations found in Article VIII, Section 5. We continue to believe that such is the case since the statutes dealing with the organization of county hospitals described in our 1971 opinion basically remain unchanged.

Our conclusion that tax levies for county hospitals are generally taxes for county purposes and subject to the limitations contained in Article VIII, Section 5 is supported by language in the *Dwyer* case. In that opinion, the Court discussed the Legislature's authority to create different governmental subdivisions, and stated:

> The Legislature has from time to time entrusted like functions to different governmental subdivisions and agencies and created new governmental subdivisions to exercise these same functions. Flood control and drainage have been entrusted both to counties and to drainage districts. Counties may maintain hospitals, and this also may be done by hospital districts.

188 Neb. at 38, 195 N.W.2d at 242 (citations omitted). This language in *Dwyer* supports the conclusion that county hospitals are functions of county government, while hospitals maintained by separately created hospital districts involve different governmental subdivisions which are not subject to county levy limits.

As we noted in our recent Op. Att'y Gen. No. 93063 (August 11, 1993), that portion of Section 23-3511 which purports to remove tax levies for county hospitals from the application of Article VIII, Section 5 grew out of LB 65 from the 1991 legislative session which was intended to clarify the notion that taxes levied by the county board in a purely ministerial capacity for other entities or subdivisions should not count toward the 50 cent levy limit. We believe that legislation similar to LB 65 would be constitutionally permissible under the rationale of the *Dwyer* decision to the extent that it was directed to tax levies made by the county for governmental subdivisions and other entities actually separate from county government. However, LB 65 was subsequently amended and incorporated into LB 798 in such a way as to include only levies for county hospitals or medical facilities, and, for the reasons stated in our previous opinions noted above, we do not believe that taxes levied by the county board for county hospitals are taxes levied by the county board in a ministerial capacity for another governmental subdivision. Rather, they are county taxes levied for a county purpose.

The Legislature cannot avoid constitutional provisions by statutorily redefining unconstitutional activity, nor can the Legislature use its power of definition to circumvent the state constitution. *State ex rel. Spire v. Strawberries, Inc.*, 239 Neb. 1, 473 N.W.2d 428 (1991). Moreover, where there is a conflict between a statute and the state constitution, the statute must yield to the extent of the repugnancy. *State ex rel. Bottcher v. Bartling*, 149 Neb. 491, 31 N.W.2d 422 (1948). Therefore, for the reasons discussed above, we believe that Section 23-3511 is not effective to remove taxes levied for the county hospital from the total county tax levy for purposes of Article VIII, Section 5 of the Nebraska Constitution. Those taxes for the county hospital are county taxes which should be included in determining the total county tax levy.

We would also point out that mechanisms obviously do exist for creating a separate governmental entity to operate a hospital at the county level. *See Neb. Rev. Stat. §§* 23-3528 to 23-3578 (1991, Cum. Supp. 1992); *Neb. Rev. Stat. §§* 23-3579 to 23-35,120 (1991); *Neb. Rev. Stat. §* 71-2059 (Cum. Supp. 1992). For example, a separate hospital district could be created under Sections 23-3528 to 23-3578. In those instances where hospitals are operated by such separate governmental subdivisions, the tax levy for the hospital would not be included in the county's tax levy for purposes of Article VIII, Section 5 on the basis of the *Dwyer* decision. Alternatively, the Legislature could choose to restructure the statutes dealing with county hospitals so as to give them sufficient autonomy so that they might be legitimately considered separate governmental subdivisions.

Sincerely yours,

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