

Opinion No. 70-34

April 1, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Harry Wugalter, Chief Public School Finance Division Department of Finance and Administration Legislative-Executive Building Santa Fe, New Mexico 87501

QUESTIONS

QUESTIONS

1. As used in Section 72-4-9, N.M.S.A., 1953 Comp., does the statement "produce on the face of the tax roll" mean the total production for the county as a whole or the total production of each separate political sub-division?
2. If your answer to question 1 is "county as a whole", then how does the statement "produce on the face of the tax roll" relate to that portion of the school district that is in a county other than the one in which the district is headquartered?
3. In what manner will the 5% limitation on school districts be implemented in connection with the county school tax in view of Section 77-6-38, N.M.S.A., Paragraph A that directs such production to be distributed after the first 40 days of school in the proportion that each district's ADM (within the county) bears to the total?
4. Should the first year's distribution of the 1 7/10 mills to a school district and the 1/2 of one mill to a county, as provided in 72-2-21.7, N.M.S.A., 1953 Compilation, be excluded when estimating the increase in production?
5. If a city cedes its 2 1/4 mills, or a portion thereof, to a school district which it did not cede the prior year, should the production in the school district from the levy be excluded when estimating the increase in production?
6. If the city did cede its millage the preceding year and does not cede it the following year, should the production in the city from the levy be excluded when estimating the increase in production?
7. Do Sections 72-4-9 and 72-4-10 apply only to production from those tax levies within the twenty-mill limit?
8. May the written request for a hearing for a public school district be submitted by the local board of education instead of the request being submitted by the county commissioners?

9. May the written request for a hearing for a public school district be submitted to the Chief of the Public School Finance Division of the Department of Finance and Administration instead of the State Tax Commission?

10. Does Section 11-2-62 provide the written request for a hearing for a county, city, town or village be submitted to the Chief of the Local Government Division of the Department of Finance and Administration instead of the State Tax Commission?

11. May the public budget hearing be considered as the "hearing" required in 72-4-10?

12. If the average daily membership of a school district increases in excess of 5%, may the production be increased to the same extent?

13. On basing the 5% increase, what effect does the 1/4 mill relinquished by the state from the court have on the budget?

CONCLUSIONS

1. See Analysis.

2. See Analysis.

3. See Analysis.

4. Yes.

5. See Analysis.

6. No.

7. Yes.

8. See Analysis.

9. See Analysis.

10. Yes.

11. See Analysis.

12. See Analysis.

13. See Analysis.

OPINION

{*56} INTRODUCTION

A general discussion of the statutory and constitutional provisions relating to the imposition and distribution of ad {*}57} valorem taxes will help to point out the problem presented by a number of the questions. In addition, a chart with explanatory footnotes has been prepared and attached as an appendix to help follow the discussion relating to the imposition and distribution of property taxes.

The basic limitations relating to the imposition and distribution of ad valorem taxes are found in Article VIII, Section 2 of the New Mexico Constitution which provides that, with certain exceptions, taxes levied upon real or personal tangible property shall not exceed twenty mills annually. For purposes of this discussion, it will be assumed that the full twenty mill limit has been reached.

Section 72-4-11, N.M.S.A., 1953 Compilation, enacted in 1921, sets the maximum rates of taxation for state, county, municipal and school district purposes. As shown in column 3 of the chart attached as an appendix to this opinion, the total authorized levies for purposes within the twenty mill limitation adds up to 33.50 mills. Thus, it is clear that the maximum rate of taxation may not be utilized by all of the governmental units authorized to levy taxes. It should be noted that in 1967 the legislature amended by implication the portion of Section 72-4-11 which relates to school districts. See Section 77-6-38, N.M.S.A., 1953 Compilation and column 4 of the chart attached as an appendix.

STATE LEVY

Article VIII, Section 2 of the New Mexico Constitution authorizes the state to levy taxes not to exceed 4 mills annually. Levies for the support of educational, penal and charitable institutions are not included within this 4 mills. Section 72-4-11, supra, provides that the maximum rate to be levied for all state purposes, including educational, penal and charitable purposes, is 5 1/2 mills on the dollar of assessed valuation. Presently, pursuant to Section 72-4-3, N.M.S.A., 1953 Compilation, the Property Appraisal Department (formerly the State Tax Commission) levies 5.55 mills for the following purposes:

5.00 mills for general appropriation fund

.50 mills for current school fund

.05 mills for health

It is to be noted that 2.2 mills of the 5 mills collected by the state is returned to counties and school districts within the counties that have completed reappraisal. See Section 72-2-21.7, N.M.S.A., 1953 Compilation. Thus the state does not necessarily net the 5 mills levied by the Property Appraisal Department.

As pointed out above, 1/2 mill is levied by the Property Appraisal Department for the current school fund. Article XII, Section 4 of the New Mexico Constitution provides that the legislature shall provide for the levy and collection of an annual tax for the maintenance of the public schools. The proceeds of this tax are to be deposited in the current school fund under this constitutional provision. In 1967 the legislature, by the enactment of the Public School Code, provided that the county commissioners shall levy 1/2 mill for deposit in the current school fund. This levy, however, is still made by the Property Appraisal Department.

The Property Appraisal Department also levies 1/20th of a mill for health pursuant to Section 12-1-8, N.M.S.A., 1953 Compilation. Section 12-1-8, supra, provides that the county commissioners shall make this levy as certified by the State Tax Commission (now the Property Appraisal Department).

COUNTY LEVY

Section 72-4-11, supra, authorizes the county to levy up to 5 mills for all county purposes and uses. The counties now levy the full 5 mills authorized, however, until January 1, 1971, 1/4 mill must be sent to the state for district court purposes. See Section 16-3-21, N.M.S.A., 1953 Compilation, as amended by Chapter 66, Laws of 1970.

Counties receive 1/2 mill from the state after completion of reappraisal pursuant to Section 72-2-21.7, supra, and therefore counties which have completed reappraisal will net 5.25 mills including the 5 mill levy and the 1/2 mill received from the state.

{*58} County levies must conform to and be within budgets or estimates as approved by the Local Government Division of the Department of Finance and Administration. See Section 72-4-4, N.M.S.A., 1953 Compilation and Section 11-2-62, N.M.S.A., 1953 Compilation.

MUNICIPAL LEVY

Municipalities are authorized to levy up to 5 mills for municipal purposes, (See Section 72-4-11, supra). This levy, however, is subject to taxation for state and county purposes. See Section 72-4-1, N.M.S.A., 1953 Compilation.

In practice municipalities are allowed to levy 2.225 mills for municipal purposes. Many municipalities, however, have waived their levy in its entirety and have allowed their levy to be made by the school district in which the municipality is located. This practice evidently began a number of years before 1955 when it was recognized by an attorney general opinion. See Attorney General Opinion 6265, issued August 26, 1955; Attorney General Opinion 65-17, issued February 2, 1965. It was also recognized by the legislature in 1969. See Section 72-4-12, N.M.S.A., 1953 Compilation. It is now necessary for a political subdivision or school district to get prior written approval from the Department of Finance and Administration before it may cede any portion of its

authorized property tax millage to any other political subdivision or school district. See Section 72-4-12, *supra*. We assume that this means the traditionally authorized levy rather than the levy authorized by statute since the authorized levies far exceed the 20 mill constitutional limitation. See Section 72-4-11, *supra*.

SCHOOL DISTRICTS

School districts were originally authorized a levy of 18 mills under Section 72-4-11, *supra*. However, in 1967 the legislature enacted the Public School Code which authorizes up to 10 mills for a general county school tax levy and up to 5 mills for a special school tax levy. See Section 77-6-38, N.M.S.A., 1953 Compilation. This levy is actually made by the county commissioners of the county in which the school district is located.

In practice a five mill levy is made for the general county school levy. An additional 1.7 mills is received by the county for the use of the schools upon completion of reappraisal. This 1.7 mills comes from the state levy discussed above. See Section 72-2-21.7, *supra*. The general county school tax levy is distributed to school districts in the county according to the proportion that the 40 day average daily membership of the school district bears to the 40 day average daily membership of the county.

County commissions also levy 2.225 mills for the special school district tax levy pursuant to Section 77-6-38 B, *supra*, which is credited to the school district in which the tax levy was made. If the municipal 2.225 tax levy is ceded to the school district this 2.225 is levied as a special school district tax levy making the total levy pursuant to Section 77-6-38 B, 4.450 mills. A part of this millage, of course, is paid back to the ceding municipality under its agreement with the school district.

Section 77-6-38 C, *supra*, also calls for a tax levy by the county commissioners of 1/2 mill which is to be deposited monthly in the current school fund. This levy is not made at this time by the county commissioners, but rather is made by the Property Appraisal Department.

SUMMARY OF INTRODUCTION

From the foregoing, it must be concluded that the amount and distribution of our property tax levies are largely a matter of administrative practice. Levies made by the state eventually end up as revenues for our counties or our school districts. Levies made by the counties are forwarded to the state. With this in mind, we will next turn to the questions asked.

ANALYSIS

First of all we are asked to interpret the 5% increase limitation found in Section 72-4-9, N.M.S.A., 1953 Compilation. Section 72-4-9, provides as follows:

"No county, city, town, [or] village shall in any year make tax levies which will in any such county, {*59} city, town, [or] village produce on the face of the tax roll, an amount more than five percent [5%] in excess of the amount produced on the face of the tax roll by tax levies therein during the year preceding, except as hereinafter provided."

It is our interpretation of the above quoted section that a county, city, town or village may not make a tax levy which would result in an increase for the county, city, town or village in excess of 5% of the amount produced on the face of the tax roll for all levies in the county during the preceding year. We note that this provision does not apply to the state.

Questions 2 and 3 relate to the effect of Section 72-4-9, supra, on school districts increases. In Attorney General Opinion 69-15, issued February 26, 1969, this office noted that when Section 72-4-9, supra, was originally enacted as Section 310, Chapter 133, Laws of 1921, it included school districts within those subdivisions limited to 5% increases. In 1923, however, the mention of school districts was deleted from 72-4-9, supra, by Section 1431, Chapter 148, Laws of 1923. In Attorney General Opinion 69-15, supra, this office concluded that the repealing clause of Chapter 148, Laws of 1923 was unconstitutional insofar as it attempted to repeal the language relating to school districts in Section 72-4-9, supra.

Chapter 148, Laws of 1923 is a comprehensive law providing for the administration and financial government of elementary and secondary schools. Section 611, Chapter 148, Laws of 1923 provides as follows:

"The total budget allowance of any district shall not be approved for more than five (5) per cent in excess of the allowance for the district for the last preceding year unless the State Tax Commission shall enter an order that the increase is essentially necessary."

Section 611 was evidently overlooked when Attorney General Opinion 69-15 was issued. In view of Section 611, Chapter 148, Laws of 1923, we must review the conclusion reached in Attorney General Opinion 69-15, supra, that Section 1431, Chapter 148, Laws 1923 violates Article IV, Section 18 of the Constitution of New Mexico.

Article IV, Section 18 of the New Mexico Constitution provides in pertinent part as follows:

"No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full."

It is well settled in New Mexico that Article IV, Section 18 of the New Mexico Constitution, as set forth above, is not offended by repeals by implication. See **State v. Mirabal**, 33 N.M. 553, 273 P. 482 (1928) and **Ellis v. N.M. Const. Co.**, 27 N.M. 312, 201 P. 487 (1921). Furthermore, it is clear that a repeal by implication may occur even

in the absence of repugnancy and inconsistency. See **Ellis v. N.M. Const. Co.**, supra, where the New Mexico Court said:

"The act of 1903 by reason of the fact that it occupies completely all the matter on the topic of paving in municipalities and the levying of special assessments to pay the expenses thereof, dealt with in prior legislation, that it expressly repeals section 3 of Chapter 43, Laws 1891, in which was incorporated the law of 1884, that it is repugnant to and irreconcilable with the law of 1884, manifests a clear intent on the part of the legislature to supersede and therefore to repeal the law. A statute is repealed by implication, though such repeal is not favored, where the legislative intent is manifest that the latter statute should supersede the former, and such intent is manifest where the Legislature enacts a new and comprehensive body of law which is so inconsistent with and repugnant to the former law on the same subject as to be irreconcilable with it, and especially does this result follow where the latter act expressly notices the former in such a way as to indicate an intention to abrogate . . . The latter act (chapter 42, Laws 1903, sections 3665 to 3671, Code 1915) **covering the entire subject, embracing all the law pertinent thereto and furnishing a new {*60} and comprehensive system of procedure, makes it clear that the Legislature intended to supersede prior acts relating to the same subject, and this result is to be derived even in the absence of repugnancy and inconsistency.**" (Emphasis added.)

In **Stokes v. New Mexico State Board of Education**, 55 N.M. 213, 217, 230 P.2d 243 (1951), the New Mexico Supreme Court again recognized that the enactment of a comprehensive statute in a repeal by implication even in the absence of repugnancy and inconsistency if it is clear that the legislature intended the latter enactment to supersede the prior act. See also **Posadas v. National City Bank of New York, Phil. Islands**, 296 U.S. 497, 56 S. Ct. 349, 352, 80 L. Ed. 351 (1936), where it was recognized that repeals by implication occur where a later enactment covers the entire subject of an earlier act and is clearly intended as a substitute.

Reviewing Chapter 148, Laws of 1923, it is clear that the Laws of 1923, it is clear that the legislature intended that Section 611 thereof repeal Section 310, Chapter 133, Laws of 1921 insofar as Section 310 relates to school districts. This was accomplished by the enactment of a comprehensive statute covering the same subject matter which was clearly intended to supersede the 1921 enactment. See Section 1431, Chapter 148, Laws of 1923 where this intention was made clear. We must therefore conclude that Section 72-4-9, supra, does not apply to school districts and therefore it is unnecessary to answer questions 2, 3, 5 and 12.

It is interesting to note that in 1939 our legislature repealed Section 611, Chapter 148, Laws of 1923. Thus school districts have not been limited to the 5% increase for thirty years.

Turning to question four, we need not answer the portion relating to the 1.7 mills distributed by the state to school districts situated in counties which have completed reappraisal. As for the 1/2 mill given to counties which have completed reappraisal, this

is a part of the state levy which is not included within the provisions of Section 72-4-9, supra, and therefore should be excluded when considering the 5% limitation of this section.

Turning to question 6, we are asked if a city, which ceded its millage the preceding year, wishes to levy the millage authorized the following year, could do so without violating the 5% limitation set forth in Section 72-4-9, supra. We cannot say that Section 72-4-9 prohibits a municipality district from henceforth making an ad valorem tax levy since it has ceded its millage to a school district. This would be an absurd result. We must therefore conclude that a municipality that has ceded its millage one year to a school district may levy the millage the following year without regard to the 5% limitation of Section 72-4-9, supra.

Next we are asked if the provisions of Sections 72-4-9 and 72-4-10 apply only to production from those tax levies within the twenty mill limit of Article VIII, Section 2 of the New Mexico Constitution. It is the opinion of this office that Sections 72-4-9 and 72-4-10 do not apply to tax levies outside the twenty mill limitation. Such levies must either be approved by the people or they are made for "public debt". In such cases the county commissioners have a duty to make the proper levy. See **State v. Harris**, 45 N.M. 335, 115 P.2d 80 (1941).

It is assumed that questions 8, 9 and 11 relate to the hearing required by Section 72-4-10 and that they therefore need not be answered.

In question 10 we are asked if Section 11-2-62 transferred the power of hearings pursuant to Section 72-4-10 from the State Tax Commission (Property Appraisal Department) to the Local Government Division of the Department of Finance and Administration. Section 11-2-62, supra, provides as follows:

"All the powers of and functions of the state tax commission relating to budgets of local public bodies, when not inconsistent with the provisions of this act [11-2-56 to 11-2-62], are transferred to and imposed upon the local government division of the department of finance and administration."

{*61} In answer to the last question asked, the money "relinquished by the state from the court" is money levied by the county as a part of its 5 mill levy. Thus the return of this money by the state in no way increases the county levy. This money should not be considered as an increase when computing the 5% limitation found in Section 72-4-9, supra. See also Section 72-4-1, supra.

The functions of the State Tax Commission set forth in Section 72-4-9 relate to budgets of local governments and are not inconsistent with any of the provisions of Sections 11-2-56 to 11-2-62. We must therefore conclude that the power to hold hearings pursuant to Section 72-4-9 now rests with the Local Government Division of the Department of Finance and Administration.

BREAKDOWN OF TWENTY
MILLS LEVIED
AUTHOR- AUTHOR-
IZED BY IZED BY
MILLS SECTION SECTION
STATE LEVY¹ MILLS LEVIED 72-4-11 77-6-38
Appropriation
General P Fund 5.00 5.00¹²
5.50
Less: Reappraisal Dist.
²
County Schools 1.7
County .5
Total 2.20 2.80
Current School Fund³ .50 .50
Health Levy⁴ .05 .05
Net to State, 3.35
Total levied by Property
Appraisal Dept. 5.55(A)

COUNTY LEVY

Less: District Court⁵ 5.00 5.00
To State 1/4 mill .25
4.75
Plus: Reappraisal .50
Net to county 5.25
Total Levied by county 5.00(B)
MUNICIPAL LEVY⁶ 2.225 2.225(C) 5.00

SCHOOL LEVY

General County School⁷ 5.00 18.00 10.00
Plus: Reappraisal Dist.
⁸ 1.7
School District Tax⁹ 2.225 5.00
Current School Fund¹⁰ .50
Net School Levies¹¹ 8.925

Total Levied By County For
School District 7.225(D)

TOTAL 20 mills¹³ 33.50
¹⁴ 15.50

By: Gary O'Dowd

Deputy Attorney General

[n1](#) State levy is levied by State Tax Commission (now Property Appraisal Department) pursuant to Section 72-4-3.

[n2](#) Reappraisal distribution is made to counties that have completed reappraisal pursuant to Section 72-2-21.7; 1.7 mills to General County Schools; 0.5 mills to county.

[n3](#) Levied by State Tax Commission (now P.A.D.) pursuant to Article XII, § 4 of New Mexico Const. But see § 77-6-38(C).

[n4](#) Levied by state. However, see Section 12-1-8, N.M.S.A., 1953 Comp., which provides county commissioners shall make levy not in excess of 1/20 of mill, as certified by state commission.

[n5](#) Section 16-3-21, as amended Ch. 66, Laws of 1970 provides 1/4 mill to state for Dist. Ct. purposes. Repealed as of January 1, 1971.

[n6](#) Unless ceded by municipality to school district. See Attorney General Opinion 65-17, issued February 2, 1965 and Attorney General Opinion 69-36 issued April 25, 1969 as well as § 72-4-12, N.M.S.A., 1953 Comp. If ceded zero mills.

[n7](#) Levied by county commissioners pursuant to Section 77-6-38(A) and distributed to school districts in the county according to the proportion that the 40 day average daily membership of the school district bears to the 40 day average daily membership of the county.

[n8](#) See Footnote 2.

[n9](#) Levied by county commissioners pursuant to Section 77-6-38(B). Placed in fund to credit of school district in which tax levy was made. 4.450 mills to school district if ceded by municipality. See Footnote 6.

[n10](#) Supposed to be levied by county commissioners pursuant to Section 77-6-38(C), but see Footnote 3.

[n11](#) If village ceded by municipality total levy for school purposes, other than current school fund, is 11.15 mills.

[n12](#) See Article VIII, § 2 of New Mexico Const., for purposes.

[n13](#) Note 20-mill limitation of Art. VIII, § 2.

[n14](#) Supersedes § 72-4-11 distribution.

(A) Note all that is levied is not kept by the state nor does statute necessarily require levy to be made.

(B) County should levy current school fund levy and health levy. See footnotes 3 and 4.

(C) Unless ceded to school district in which municipality is located in which case no levy is made. Levy must be subject to levy for state and county purposes § 72-4-1.

(D) Unless municipality has ceded its millage. Total if ceded 9.450.