

**OPINION
64-284**

November 30, 1964 (OPINION)

Mr. William C. Kelsch

State's Attorney

Morton County

RE: Schools - Special Reserve Levy - Effective Date

This is in reply to your letter of November 19, 1964 in regard to levy certification, spread and assessment particularly with regard to the termination of a three mill levy for special reserve fund.

You specifically request our opinion on the following matters:

1. Once a levy has been made by a governmental subdivision, and then certified to the County Auditor, can the governmental subdivision thereafter and in the current year either increase or decrease the levy except as may otherwise be specified by statute.
2. When by election of the subdivision on Bond issue or otherwise, a levy is added, increased or decreased, and the statute authorizing the election does not specify when the change in levy shall take effect, and the certificate of election change is received by the Auditor after the statutory time for certifying levies: (a) will the change not take effect until the next year's levy; and (b) must the Auditor accept the change if certified to her before December 31st of the year (being the time when she must deliver the completed tax lists to the Treasurer, Section 57-20-06); and (c) if the Auditor must spread the change in levy, what is the latest date preceding December 31st, of the year it must be in her hands; and (d) must she acknowledge the change if she has not already spread the tax. Is this discretionary with the Auditor, may she either refuse or accept a change in levy after the time for fixing levies has expired?"

You further inform us:

Our specific problem is that in July a School District set its levy which included a three mill levy for special reserve fund. By election on September 8, 1964, this three mill levy was terminated and the Auditor received notice of this by certificate on September 28th. Must she hold the changeover to 1965 levy? Must she acknowledge it for 1964? Or does she have discretion in the matter? She had not spread the tax when she received the certificate of change."

The statutory time schedule on these matters would appear to be as

follows:

Section 57-15-13 of the 1963 Supplement to the North Dakota Century Code provides in part:

SCHOOL DISTRICT TAX LEVIES.- School district taxes shall be levied by the governing body of each school district on or before the last day in July of each year. * * *"

Section 57-15-32 of the North Dakota Century Code provides:

CERTIFICATION of LEVY. - The taxes levied or voted by any city, village, township, school district, park district, or other municipality authorized to levy taxes, shall be certified by the officer acting as clerk of the governing body of such municipality to the county auditor immediately following the action of the governing body or within ten days thereafter."

Section 57-20-01 of the North Dakota Century Code provides:

TAX LIST MADE OUT BY COUNTY AUDITOR. - As soon as practicable after the taxes are levied and after the levies of the several taxing districts within the county have been certified, the county auditor shall make out the tax lists according to the prescribed form to correspond with the assessment districts of the county. The tax rate per cent necessary to raise the required amount of the various taxes shall be calculated on the net assessed valuation of property after equalization by the state board of equalization, but no rate shall be used when results in any fraction of less than one-half of one-tenth of a mill and in extending any tax, if, whenever it amounts to the fractional part of a cent, shall be made one cent."

Pursuant to Section 57-13-02 of the North Dakota Century Code, the State Board of Equalization meets the first Tuesday in August at the office of the State Tax Commissioner to make out the equalization by the State Board of Equalization referred to in Section 57-20-01 of the North Dakota Century Code. While we find no statutory beginning date for the County Auditor to make out his tax list on such basis, we can therefore presume that such list would be made out after the first Tuesday of August. The "deadline" for completing such listing would apparently be the 31st of December insofar as abstract of same is required to be sent to the Tax commissioner (Section 57-20-04 of the North Dakota Century Code) and to the County Treasurer (Section 57-20-06 of the North Dakota Century Code) as of such date. We find no more definite statutory designation as to when the listing shall be considered complete.

While not directly in point, we believe the statements of the Supreme Court of this state in *State ex rel. Strutz v. Huber*, 201 N.W. 126, 69 N.D. 788 (at page 791) are at least of interest herein. In that decision the court says:

Thus the question for determination is as to the duty of the county auditor with respect to the calculation, spreading and extending of real estate taxes under the circumstances shown. On the one hand, the relator contends that it is the duty of

the respondent to comply with the requirements of the Initiated Measure, adopted June 29, 1932 (Session Laws 1933, page 493), Section 21432, Comp. Laws 1913, and Chapter 241, Session Laws 1929, and that he has not done so. On the other hand, the respondent contends that these statutory provisions are in effect so modified or repealed by the provisions of Chapter 225, Session Laws 1939, that he need no longer comply with them under the circumstances in this particular case, but must accept the valuations as redetermined by the board of county commissioners and calculate the rate per cent of the various taxes and extend and spread the same so calculated, together with the state tax against farm lands, upon the valuations as thus fixed.

The duties of the respondent county auditor with respect to the matters here involved are purely ministerial. He has no discretion in the matter. See *Murray v. Mutschelknaus*, 70 N.D. 1, 291 N.W. 118. If he fails to perform them mandamus is the proper remedy to invoke as against him. Comp. Laws 1913, Section 8457. The fact that board of county commissioners has directed him to do otherwise is no excuse. The statute controls. Their action cannot override it. Const. Section 173. So it becomes necessary to consider and construe the provisions of Chapter 225, Session Laws 1939."

More directly in point we find *State ex rel. Board of Education v. Kramer*, 190 N.W. 271, 49 N.D. 108. The court in that decision states in part at page 110 of the North Dakota Reports:

The contention that the levy was not made within proper time for certification to the county auditor is based upon Chapter 144 of the Session Laws of 1915, which provides that the board of education shall on or before the 20th day of July in each year levy a tax for the support of the schools of the corporation for the fiscal year next ensuing. The tax so levied is required to be certified to the county auditor by the clerk of the board. No time is fixed for the holding of the election authorizing the additional tax under the proviso of Section 2, Chapter 122, of the Laws of 1921, and neither is any time fixed in Chapter 144 of the Session Laws of 1915, for the certification of the taxes by the clerk of the board to the county auditor. We are of the opinion that Chapter 144 of the Laws of 1915 has no application to an additional tax under Chapter 122 of the Session Laws of 1921, and, furthermore, that the provisions of Chapter 144 of the Laws of 1915 as to time are directory. It is not contended here that the taxes were not certified within sufficient time to enable the county auditor to extend them in the tax lists, and it appears that they were, in fact, certified before the equalization of the assessment was completed."

To summarize, in answer to your specific questions based on the above quoted authorities, it is our opinion that your first numbered question must be answered in the negative on the basic premise that the authority of the governing body of the political subdivision is based on statute, though on the basis of the last quoted case above, it is obvious that a statute does not in express terms have to

specifically state when a levy change becomes effective, take effect after the initial certification of levy for a current year. Your second numbered question also has to be answered in the negative to the effect that the auditor must accept the change in levy (within practicable limits) where presented prior to December 31st and acts only as a ministerial officer in making the change in the tax list.

Going to your specific problem, it is our opinion that where in July, 1964, a school district sets its levy, including a three mill levy for special reserve fund, which levy was terminated by election on September 8, 1964, and the auditor received due certification of this on September 28th, she must make the change indicated thereby prior to December 31, 1964, and has no discretion therein. The factor of having not spread the levy when she received the certificate of change would add weight to the argument that making the change prior to December 31, 1964, was practicable under all surrounding circumstances.

HELGI JOHANNESON

Attorney General