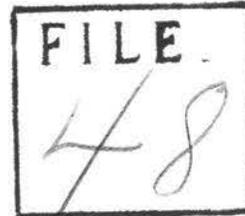


MUNICIPAL CORPORATIONS
AND TAXATION:

City cannot increase limitation
of tax levy for band purposes
by vote of majority of two-thirds
voting on the proposition.

May 16, 1942

Honorable H. A. Kelso
Prosecuting Attorney
Vernon County
Nevada, Missouri



Dear Sir:

We are in receipt of your letter of May 12, 1942,
in which you request an official opinion, as follows:

"In my official capacity as prosecuting attorney I wish to respectfully request an opinion on the construction of Sections 7431, 7432, 7433 and 7434 R. S. Missouri, 1939, with particular emphasis on Section 7432. I would like your construction on this section with reference to the following set of facts.

"The City of Nevada, Missouri at the last regular city election voted on the proposition of levying a tax to support a municipal band. This proposition was initiated by a petition signed by ten per cent of the qualified voters. A count of the votes on the proposition revealed that it had failed to carry by a two-thirds majority by only seventeen votes. The mayor of the city and the city

counselor, both lawyers, had informed the proponents of the plan that such a majority was necessary under the law.

"It will be noted that the Section 7432 previously referred to provides that 'a majority of the voters thereat (the election) shall be sufficient to carry the provisions of the law into effect.' However the latter part of the statutes says, 'Provided, however, that such levy made under either of the options of section 7431 to 7434, inclusive, shall not increase the tax levy of any such political subdivision to exceed the limitations of article 10 of the Constitution of Missouri, except upon a vote as required by said article 10 of the Constitution of Missouri.

"Turning to the Constitution of Missouri, Art. 10 the only section which seems to obtain is section 11. There it is provided, 'Provided, the afore-said annual rates for school purposes may be increased..... on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rate of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such counties, cities or school districts, voting at such election, shall vote therefore.....'

"The question therefore is what was meant by the latter portion of Section 7432.

"One further question is this; if an election is held as in the above set of facts and the proposition voted down, how long must be allowed before another election, i.e. a special election, could be called to submit the proposition to the voters?"

Section 7431 R. S. Missouri, 1939, reads as follows:

"Any city, village or town having a population of less than 25,000, howsoever organized, and irrespective of its form of government, may, by one of the two methods hereinafter authorized, levy a tax for use in providing free band concerts, or equivalent musical service by the band upon occasions of public importance."

This section authorizes a levy of a tax if submitted and approved under the procedure as set out in Section 7432 R. S. Missouri, 1939.

Section 7432, supra, reads as follows:

"The mayor and council board of aldermen or board of trustees may levy a tax of not more than one-half mill on each one dollar assessed valuation on all property in such city, village or town, or,

when initiated by a petition signed by at least ten per cent of the qualified electors, the proposition shall be submitted to the electors at a special or general municipal election, and a majority of the voters thereat shall be sufficient to carry the provisions of this law into effect, and it shall become the duty of the mayor and council, board of aldermen or board of trustees to levy each year on all the property in such city, village or town, a tax of not to exceed two mills, or such part thereof as shall be petitioned for, on each one dollar assessed valuation. The question on the ballot shall be in the following form: 'Shall _____ levy a tax of _____ mills for the creation of a band fund?' and shall be voted 'yes' or 'no' as is provided by law in such cases: Provided, however, that such levy made under either of the options of sections 7431 to 7434, inclusive, shall not increase the tax levy of any such political subdivision to exceed the limitations of article 10 of the Constitution of Missouri, except upon a vote as required by said article 10 of the Constitution of Missouri."

Under the procedure in this section an election may be held under two different sets of procedure. The first procedure is that the mayor and council, board of aldermen or board of trustees may levy a tax of not more than one-half mill on each one dollar assessed valuation on all the property in such city, or, it may be initiated

by a petition signed by at least ten per cent of the qualified electors calling for a vote on the question of levying a tax not to exceed two mills upon each one dollar assessed valuation for the creation of a band fund.

That a majority of the votes cast is all that is necessary to carry the proposition, was held in the case of State ex rel Rose et al v. Webb City, 64 S. W. (2d) 597, where the court said:

"The plaintiffs, property owning, taxpaying citizens of Webb City, which contains less than 25,000 inhabitants, seek by this proceeding to enjoin the defendants, Webb City, the mayor and councilmen thereof, from levying, extending, or collecting any taxes under a certain ordinance of said city purporting to authorize such taxation for the support of free public band concerts to be given in said city. The defendants prevailed in the trial below, and the plaintiffs appealed from the decree dismissing plaintiffs' bill.

"The assailed ordinance, No. 2583, was enacted June 25, 1930, under purported authority of Session Acts of 1927, page 137, to be found in sections 7278-7281 of the Revised Statutes of 1929 (Mo. St. Ann. secs. 7278-7281, pp. 5866, 5867), and of a municipal election held pursuant thereto. The Act of 1927 purports to authorize any city, village, or town having a population of less than 25,000 inhabitants 'to levy a

tax for use in providing a fund for free band concerts, or equivalent musical service, upon occasions of public importance,' by one of the two methods specified in the act. Under one of the methods such tax may be levied when initiated by a petition signed by 10 per cent. of the qualified electors; the proposition so initiated is required to be submitted at a general or special municipal election, and a majority of the votes thereat is sufficient to carry the proposition, and it thereupon becomes the duty of the mayor and council to levy the tax so petitioned for and voted." (Under-scoring ours.)

The provision in Section 7432, supra, does not apply or come within the exceptions as set out in Section 12, Article X of the Constitution of Missouri, which partially reads as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and

county purposes, previous to the incurring of such indebtedness, except that cities having a population of seventy-five thousand inhabitants or more may, with the assent of two-thirds of the voters thereof voting on such proposition at an election to be held for that purpose, incur an indebtedness not exceeding ten per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes previous to the incurring of such indebtedness; such proposition may be submitted at any election, general or special: * * * ."

Section 7431, supra, only applies to cities having a population of less than 25,000. Section 12 of Article X of the Constitution of Missouri, which is an exception to the general law of limitations of tax levies, does not contain a proviso for a city of less than 25,000 to increase the tax levy for musical services of a band on public occasions. The exceptions set out in Section 12 of Article X of the Constitution of Missouri provides for bonded indebtedness, and the erection of public works, such as waterworks, electric light systems, etc., but does not specifically set out an increase for the purpose of levying a tax for use in providing free band concerts.

In the case of Brooks v. Schultz, 178 Mo. 222, l.c. 227, which is an analogous case, referring to a city library, the court, in discussing tax levy limitations said:

"It is contended on behalf of respondent that section 11 of article 10, just quoted, is not a limitation on the power of the General Assembly, but only on that of the county, school district or municipal corporation, and as to them only a limitation on the power of taxation by that section conferred upon them. The proposition is that section 11 of article 10 confers directly on counties, school districts, cities and towns, authority to levy taxes to the limit therein specified; that that authority they may exercise independent of the will of the General Assembly, and that in addition thereto, they may impose such taxes as the General Assembly may authorize.

"That is a misconception of that section. There is no language therein which is susceptible of the meaning that governmental power is conferred on counties, school districts and municipal corporations independent of the Legislature. The first sentence in the section only points out the character of property subject to taxation, and lays a restriction in the matter of assessing its value; all the rest of the section is negative in form and is in effect a declaration that beyond a certain limit, taxation shall not go; the provisos, though in form permissive, are but exceptions to the restrictions which they follow.

"Section 1 of article 10 declares: 'The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes.'

"Section 10 of article 10 is: 'The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.'

"Then follows in immediate connections, section 11 which we have above discussed. The three sections read together mean that the General Assembly may authorize such corporations to levy taxes within the limits specified, but not beyond the limit unless otherwise in the Constitution specified.

"In the case before us, the city had already levied a tax of fifty cents on the hundred dollars valuation of taxable property in its jurisdiction; that was the limit of its taxing power, and therefore this special tax of two mills on the dollar for library purposes is illegal, unless it can be brought, as respondent seeks to bring it, within the exception which authorizes, under given circumstances, an increase in the rate of taxation for school purposes."

Also, in the case of *Strother v. Kansas City*, 283 Mo. 283, 1. c. 294, the court said:

"* * * According to the conceded facts, the city has levied other taxes to the constitutional limit

for the year 1919, and the tax in controversy, if laid by the city in its own capacity, carries the total levy of two mills on the dollar beyond that limit; that is, the special levy is excessive in the entire amount of it. Cities cannot exceed, for any purpose, the limit of taxation fixed by Section 10 of Article XI of the Constitution, because the section says the rates allowed 'shall apply to taxes of every kind and description, whether general or special,' except those levied to pay past indebtedness. In enforcing that declaration of the Constitution, this court decided that a city tax laid in excess of the limitation to maintain a library was void, although the Legislature had authorized it. (Brooks v. Schultz, 178 Mo.222.)

The position taken in that case in favor of the special tax was that it was not levied under the authority of Section 11, Article X, which purports to limit the rate of taxation allowed to municipalities 'for city and town purposes,' but instead, under a power specially granted by the General Assembly, was levied pursuant to Section 10 of said article, which prohibited the Assembly to impose taxes on cities for municipal purposes, but in words immediately following, declared the Assembly 'may, by general law, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.' The

court said Section 11, if interpreted literally, only limited power of cities to tax for city purposes; that is, to raise the general revenues, thereby giving room for the notion that when empowered by the legislature, a municipality might make a special levy for an expense not incidental to carrying on its government. The court then rejected said notion, saying the provision of the Constitution making the rates prescribed apply to taxes of every description, was intended to preclude such an interpretation; said further, that the General Assembly could not, by force of Section 10, Article X, of the Constitution, authorize municipal corporations to levy taxes for local purposes above the rates prescribed in Section 11. That decision is conclusive in favor of the proposition that the levy by Kansas City in excess of ten mills on the dollar, was void if the excess was for local purposes."

Section 11, Article X of the Constitution of Missouri, partially reads as follows:

"Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. * * * For city and town purposes the annual rate on property * * * * in cities.

and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; * * *."

Under this section of the Constitution, in the city of Nevada (the population of which, according to the 1940 decennial census was 8,181) the levy is limited to not more than fifty cents on the one hundred dollar valuation.

Under the holding in the case of Brooks v. Schultz, supra, and Strother v. Kansas City, supra, the levy is limited to fifty cents on the one hundred dollar valuation, and an increase cannot be had by a vote of two thirds of the voters voting on such a proposition, for the reason that such an exception is not included in Section 12, Article X of the Constitution of Missouri.

Under the above authorities, the proviso as set out in Section 7432, supra, is a nullity and void. Section 11, of Article X of the Constitution of Missouri limits the tax levy and the levy cannot be increased by a vote of any kind. The fact that the proviso is a nullity does not invalidate the limitations of the section. The test in determining whether a statute may be sustained in part though void in other parts is whether after separating the invalid parts a law which in all respects is complete and susceptible of constitutional enforcement, and which the Legislature would have enacted if it had known that the deleted portions were invalid, is left. (Poole & Creber Market Co. v. Ereshears, 125 S. W. 2d 23, 343 Mo. 1133.)

In view of the holding in the above case, the proviso which we claim is a nullity does not affect the limitations of the section. Section 7432, supra, which provides that all that is necessary to carry the proposition is a majority and not a two thirds majority, and all that is necessary now is for the

mayor and council to make the additional tax levy, providing the levy does not exceed the limitations as set out in Sections 11 and 12, Article X of the Constitution of Missouri. We find no law limiting the number of times such a proposition may be submitted for the levying of a tax for the use of providing free band concerts, although for other purposes, where an additional tax levy is authorized, such as for city librarians, a limitation is placed upon the number of times within a certain period of time such a proposition can be submitted.

CONCLUSION

In view of the above authorities, it is the opinion of this department, that the proviso as set out in Section 7432 R. S. Missouri, 1939, is a nullity and the only way that a tax levy can be legally levied for the use of bands for free concerts is that the levy after the adoption by election of a majority of the voters and not two thirds of the voters can be valid is in a case where the additional levy does not increase the limitation of tax levies as set out in Sections 11 and 12, Article X of the Constitution of Missouri.

It is further the opinion of this department that the increase of fifty cents on the one hundred dollar valuation, as set out in Section 11 of Article X of the Constitution of Missouri cannot be increased by a majority of two thirds of the voters voting on such a proposition, for the reason that it is not one of the exceptions as set out in Section 12 of Article X of the Constitution of Missouri.

It is further the opinion of this department that the levy adopted at the last regular city election by a majority of the voters, and not a two thirds majority can be levied by the mayor and council provided it does not raise the tax levy above fifty cents on each one hundred dollar valuation.

Honorable H. A. Kelso

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May 16, 1942

It is further the opinion of this department
that the proposition may be submitted or resubmitted
at any time.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW