

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 39

OPINION NO. 55

MUNICIPAL CORPORATIONS - Authority to exceed maximum mill levy;  
MUNICIPAL CORPORATIONS - Taxes paid under protest, authority to exceed maximum mill levy to compensate;  
MUNICIPAL CORPORATIONS - Taxes paid under protest, use of funds when received;  
TAXATION AND REVENUE - Authority of municipality to exceed maximum mill levy;  
TAXATION AND REVENUE - Payment under protest, authority to exceed maximum mill levy to compensate;

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TAXATION AND REVENUE - Payment under protest, use of funds when received;

MONTANA CODE ANNOTATED - Sections 7-6-4229 to 7-6-4232, 7-6-4235, 7-6-4251 to 7-6-4255, 7-6-4431 to 7-6-4437, 7-6-4451, 7-6-4452, 7-6-4502, 15-1-402, 15-7-122;

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 155 (1978).

- HELD: 1. A municipality may not adopt a levy that is higher than the statutory maximum in order to compensate for the anticipated loss of expendable revenue due to payment of taxes under protest unless the voters approve under sections 7-6-4431 to 4437, MCA.
2. A municipality that receives back taxes that had previously been paid under protest shall deposit them to the credit of the fund or funds to which they would have been credited had they been timely received. If money remains in any fund at the end of the fiscal year in which it was received, that sum is part of the "cash balance," which is included in the calculations to determine the levy in the next year under sections 7-6-4229 to 4232, MCA.

19 March 1982

Robert L. Jovick, Esq.  
City Attorney  
P.O. Box 1245  
Livingston, Montana 59047

Dear Mr. Jovick:

You have asked for my opinion on two questions, which I have stated as follows:

1. If a municipality anticipates that it will not collect a certain amount of taxes in the next fiscal year because the taxes are being paid under protest, may the municipality adopt a levy that is higher than the statutory maximum in order to compensate for the anticipated loss of expendable revenue?

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2. If protested taxes are paid to the municipality in a future year, must the municipality use those funds to lower the levy in the year after their receipt?

Your letter indicates that the municipality uses an all-purpose annual mill levy in lieu of multiple levies, as authorized by section 7-6-4451, MCA. Section 7-6-4452, MCA, provides that "[t]he total of the all-purpose levy may not exceed 65 mills on the dollar." In the past, the municipality has fixed the all-purpose levy at 65 mills. Now, however, the municipality is faced with the prospect that such a levy will not raise sufficient funds to cover the budget because a significant portion of the taxes levied will be paid under protest.

In your situation, a taxpayer obtained a court injunction prior to the payment of any of the contested taxes, and the taxes are being paid to the court. Under Montana's protest payment statute, § 15-1-402, MCA, a taxpayer who wishes to challenge a tax may make payment to the municipal treasurer under written protest, and subsequently pursue its legal remedies. The treasurer must deposit the money in a special protest fund. The effect of either procedure for payment of protested taxes is the same: the money is not available for municipal expenditures until the litigation has been resolved. This lack of funds may pose a serious problem if the litigation continues for many years. However, under Montana's present statutes, the problem does not relieve the municipality of its obligation to observe the strict statutory limitations on the mill levy.

Your letter suggests that section 15-7-122, MCA, allows a municipality to exceed the statutory limitations to compensate for the problem of taxes paid under protest. I cannot agree. Section 15-7-122, MCA, states:

Taxing jurisdictions may adopt and levy for a budget equal to 105% of the preceding year's budget, statutory mill levy limitations notwithstanding, unless the taxable valuation therein has increased to a level which would allow statutory mill levies to produce a budget equal to 105% of the preceding year's budget.

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This provision allows a municipality some discretion to exceed the mill levy maximum if the total taxable valuation of property has failed to increase. It plainly does not authorize the municipality to discount the taxable valuation of property for which taxes are being paid under protest. Section 15-7-122, MCA, was clearly intended to permit a waiver of the maximum mill levy for one purpose only: to compensate for a decline in taxable valuation. See 37 Op. Att'y Gen. No. 155, at 639 (1978). It does not address and therefore does not authorize such a waiver to compensate for a decline in expendable revenue due to tax protests. See Dunphy v. Anaconda Co., 151 Mont. 76, 79-81, 438 P.2d 660, 662 (1968).

However, section 7-6-4431, MCA, allows the voters of a municipality to authorize the governing body to exceed the statutory mill levy maximum. This authority is not confined to "certain cases," as is the authority in section 15-7-122, MCA, and may be granted by the voters for whatever reasons they find persuasive. In answer to your first question, it is my opinion that the municipality may not exceed the statutory mill levy maximum under the situation you have described unless the voters approve.

Your second question concerns the use of the protested taxes in the event the municipality is successful in the litigation and the taxes are finally made available for its use. Section 15-1-402(8)(a), MCA, provides that "the amount of the protested portions of the tax or license fee shall be taken from the protest fund and deposited to the credit of the fund or funds to which the same property belongs." The money is then available to use for payment of outstanding warrants, see § 7-6-4502, MCA, expenditures for that fiscal year that have been appropriated as part of the budget, see § 7-6-4235, MCA, or emergency expenditures, see §§ 7-6-4251 to 4255, MCA. If money remains at the end of the fiscal year in which it is received, the sum remaining is considered part of the "cash balance," which is included in the calculations to determine the levy in the next year. Section 7-6-4230(1), MCA, states in part:

[T]he council shall determine the amount to be raised for each fund for which a tax levy is to be made by adding the cash balance in

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excess of outstanding unpaid warrants at the close of the preceding fiscal year and the amount of the estimated revenues, if any, to accrue to the fund during the current fiscal year. It shall then deduct the total amount so obtained from the total amount of the appropriations and authorized expenditures from the fund as determined by the council in the budget adopted and approved. The amount remaining is the amount necessary to be raised for any fund by tax levy during the current fiscal year.

The effect of a high cash balance on the levy itself depends on the other factors in the calculation, including the size of the budget and the taxable valuation for that fiscal year. See § 7-6-4232(1), MCA.

THEREFORE, IT IS MY OPINION:

1. A municipality may not adopt a levy that is higher than the statutory maximum in order to compensate for the anticipated loss of expendable revenue due to payment of taxes under protest unless the voters approve under sections 7-6-4431 to 4437, MCA.
2. A municipality that receives back taxes that had previously been paid under protest shall deposit them to the credit of the fund or funds to which they would have been credited had they been timely received. If money remains in any fund at the end of the fiscal year in which it was received, that sum is part of the "cash balance," which is included in the calculations to determine the levy in the next year under sections 7-6-4229 to 4232, MCA.

Very truly yours,

MIKE GREELY  
Attorney General