

## Mill Rate Limits

Question: Question: I was under the understanding that there are no/very few tax levy caps still in place. Do you have a listing of those still in place to make sure we are not doing anything we should not? Also, the commissioners are working on our 2013 budget now and are wanting to do the max on our Nursing Home fund and then also the Hospital Maint. fund. Can you tell me if there are caps on those funds? Thanks so much.

Answer: In 1999 the legislature passed a law that included a section now codified at K.S.A. 79-5040, which reads in full as follows:

In 1999, and in each year thereafter, all existing statutory fund mill levy rate and aggregate levy rate limitations on taxing subdivisions are hereby suspended.

The impact of K.S.A. 79-5040 was to suspend all mill rate and total levy rate limits theretofore imposed on taxing subdivisions. There are, however, a series of Attorney General Opinions interpreting K.S.A. 79-5040, and which hold that despite the suspension of all mill rate limitations, should there be found in such statutes certain procedural requirements or potential limitations to exceeding statutory mill rate limits, the procedural requirements are still valid and must be followed. (See AGO 2002-36, 2002-44, 2004-20, 2007-34.) The result of the suspension of statutory levy limitations is, in effect, one which requires consideration of the authorizing statutes on a case-by-case basis (we do have a listing of statutes reflecting levy limitations, but it is in hard-copy form and somewhat dated).

Looking at your funds, then, your FY 2012 budget certificate page cites K.S.A. 19-2106a as authority for the Home for the Aged fund levy. That statute reads in pertinent part as follows:

The board of county commissioners . . . which has established a home for the aged . . . is hereby authorized to make an annual tax levy . . . for the operation, maintenance and repair of said home . . . . All county home revenues and moneys received . . . except for an amount to pay a portion of the principal and interest on bonds issued under the authority of K.S.A. 12-1774 . . . shall be deposited in the home for the aged operation, maintenance and repair fund which fund is hereby created in the office of the county treasurer . . . . All expenditures from such fund shall be for the operation, maintenance and repair of such home.

As you can see, K.S.A. 19-2106a contains no limitation to the levy so long as the levy purpose is for funding “operation, maintenance and repair” of the home. However, should the commissioners wish to build additional facilities for the aged, or enlarge the existing home, then levy authority for such falls under K.S.A. 19-2106b, a statute which does provide a mill levy limitation and, in addition, provides for an election upon submission of a successful protest petition. In that case, the levy limitation is of no further effect, but we believe that the authority to levy would be subject to a successful protest and election (see AGO 2002-44).

So, as to your Home for the Aged fund, if the purpose of your levy is to generate funds in order to operate, maintain, and repair the home as necessary, you do not have a limit on your ability to levy.

In regard to your Hospital Maintenance Fund, your FY 2012 budget certificate page cites K.S.A. 19-4606 as authority for the fund. In pertinent part this statute provides as follows:

(a) The commission . . . may annually levy a tax for the purpose of operating, maintaining, equipping and improving any hospital managed and controlled under the provisions of this act . . . . The commission . . . may levy such tax in any amount not exceeding six mills in any year without an election as provided in subsection (c) . . . . In the event the commission . . . proposes to levy such tax in an amount which exceeds two mills but is less than six mills in any year, such proposition shall be published once each week for two consecutive weeks in the official county newspaper. If, within 30 days after the last publication of the proposition, a petition signed by not less than 5% of the electors of the county who voted for the office of secretary of state at the last preceding general election requesting an election thereon, no such levy shall be made unless the proposition is submitted to and approved by a majority of the voters of the county voting at an election held thereon. Such election shall be called and held in the manner provided under the general bond law. Any tax levied for the purpose of paying the principal and interest upon any general obligation bonds issued pursuant to this act is not subject to the six-mill limitation imposed under the provisions of this subsection.

(b) After a hospital has been established, the commission may issue additional general obligation bonds . . . .

(c) The commission . . . shall not levy any tax exceeding six mills under authority of subsection (a) . . . until the levy of such tax . . . has been authorized by resolution of the commission and approved by a majority of the qualified electors of the county . . . .

As to your Hospital Maintenance Fund K.S.A. 19-4606 provides that you can levy “in any year” up to and including two mills without limitation. A proposed levy “in any year” which exceeds two mills, “but is less than six mills,” necessitates publication of the proposition in the official county newspaper followed by a protest petition period, possibly resulting in an election to determine whether the levy may be made. Finally, a proposed levy “exceeding six mills” must be authorized by resolution of the county commission and approved by the electors.

Please note that the statute *appears* to allow, without limitation, a levy of *exactly* six mills (i.e. protest petition for levy exceeding two mills but “less than” six mills; resolution and election required for levy “exceeding” six mills). We do not believe the legislature intended to provide a loophole of this nature, and that this anomaly in the statute is merely an oversight in the drafting of such.

At any rate, following the rationale set forth by the Attorney General in AGO 2002-44 we believe that the procedural limitations and requirements for proposed levies in any given year which exceed two mills, but are less than six mills, remain in effect. For a proposed levy

exceeding six mills, a vote in favor by the qualified electors would provide authority for a levy of this amount in the proposed budget year and in all budget years subsequent, except to the extent otherwise limited in the election question (see AGO 2002-36, 2004-20).

We hope that this helps.

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Question: I have a question I hope you can help me. The Commissioners want to increase the levy for our fire district. This year we are something over 2 mills. What is the highest we can go? Thank you

Answer: It appears that your RFD was created pursuant to K.S.A. 19-3601 *et seq.* In that event, and as it relates to levy limitations, K.S.A. 19-3610 provides as follows:

(a) The board of county commissioners each year shall levy an ad valorem tax on the taxable tangible property within each fire district in the county . . . . Except as otherwise authorized by this section, the board of county commissioners shall not make a levy, in any year, in any fire district in excess of five mills . . . .

(b) The board of county commissioners of any county, when authorized by a majority of the electors of any fire district . . . may levy a tax of more than five mills but not more than seven mills in any year . . . . Such election shall be a question submitted election and shall be called and held in the manner provided for the calling and holding of elections upon the question of issuance of bonds under the provisions of K.S.A. 10-120 . . . .

So, it appears that you are OK to levy up to five mills in your fire district without necessity of a vote in favor thereof. To levy in excess of five mills, and up to seven mills, would require authorization of the fire district electors.

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Question: Hi. Got another question. Our hospital in the past has done two budgets, the General Budget and Employee Benefit Budget. Our county clerk says that we no longer need to do the Employee Benefit Budget. So we have opted not to do one for 2013. My question is do we still need to fill in the Fund Page of the budget for the Current Year Estimate for 2012? Also, will any of this be a problem for our auditors? Thanks

Answer: Good morning. As a general rule, the county clerk advice is pretty sound and is in line with current accounting guidance concerning limiting the number of funds used by an entity to

those that are just needed. However, in this particular case, we would recommend keeping the funds separate based on the provisions of K.S.A. 80-2516.

That statute reads in part that no levy in excess of two mills (or amount specified in a previous resolution) shall be made for your general fund unless the board adopts a resolution authorizing a levy in excess thereof. If all the board had to do was a resolution to increase the general fund levy, we would agree that moving the employee benefits into the general fund and increasing the levy for the general fund (by resolution) would be fine. However, the statute goes on to state that such resolution is subject to a protest petition. If 5% of the voters sign the petition, then the increase asked for in the resolution is subject to an election. There are several Attorney General opinions that state that although the mill levy limitations found in statutes are suspended (see K.S.A 79-5040), if there is a procedure requirement in the statute to increase the levy, the requirement is still valid and has to be followed. It is interesting in this case that there is no time period given for the protest period, so we would guess that there is a general statute that covers this requirement.

Our opinion would be that in this case moving the employee benefits expenses to the general fund would likely cause a mill levy increase in the general fund and might subject the hospital district to the resolution/procedural requirement that must be followed to increase the mill levy for the general fund.

However, K.S.A. 80-2516 reads that the tax discussed above (for our purposes, the general fund), is in addition to all other taxes allowed by law. A separate tax levy for employee benefits is allowed under the provision of K.S.A. 12-16,102. Subsection (d) of that statute reads, “[t]he governing body of any taxing subdivision having established employee benefits funds . . . is hereby authorized to levy an annual tax . . . in an amount determined by the governing body to be necessary for the purposes for which the funds were created. . . .” In short, unlike what we find with your particular general fund, there is no levy limitation for the levy which results from a separate, employee benefits fund.

So, although the employee benefit expenses could be moved to the general fund, in your particular circumstance we would recommend that the fund remain separate due to the additional procedures that might need to take place to move the employee benefit expenses to the general fund, and the possibility of having to apply these procedures each time an increase in expenditures to the general fund is needed. As you are probably aware, employee benefit costs can sometimes rise dramatically and, if these costs continue to be in a separate employee benefits fund, your governing body can increase the tax levy in this fund more easily without the procedural requirement of K.S.A. 80-2516.

This is also an issue that the hospital legal counsel should also review.

We hope this information helps. If you have additional questions or comments, please do not hesitate to contact us.

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Question: Hi. I'm pretty sure that some time ago I read a statute that said there is a cap on how many mills we can levy for our fire district. Am I correct in that?

Answer: It looks like K.S.A. 19-3610 is the statute that you recalled reading. It does provide for the five mill levy cap, to be exceeded only upon a vote of a majority of the electors residing within the district. Below is a summary of key language within the statute (please note that the post-election seven mill cap mentioned in subsection (b) is now made null and void by virtue of K.S.A. 79-5040; in short, an election to go above five mills requires a vote, but the vote might allow eight, nine, or any other levy limit in excess of seven mills by virtue of K.S.A. 79-5040).

Also attached is AGO 2007-34 in which the Attorney General states, in summary, that the mandates (election first) of the statute still must be followed despite the levy lid lifting that occurred as a result K.S.A. 79-5040.

K.S.A. 19-3610. (a) The board of county commissioners each year shall levy an ad valorem tax . . . within each fire district in the county . . . . Except as otherwise authorized by this section, the board of county commissioners shall not make a levy, in any year, in any fire district in excess of five mills . . . .

(b) The board of county commissioners of any county, when authorized by a majority of the electors of any fire district voting at an election called and held thereon, may levy a tax of more than five mills but not more than seven mills in any year . . . .

<http://ksag.washburnlaw.edu/opinions/2007/2007-034.htm>

We hope that this helps.

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Question: Our commissioners are reviewing budgets now and we are looking at a RFD budget. Can they go to 6 mills or are limited to only 5 mills? Thanks

Answer: The levy limit statutory language applicable to your multi-county fire district is found in K.S.A. 19-3626, which provides in pertinent part as follows:

The governing body of a fire district established pursuant to K.S.A. 19-3624, shall annually file the budget of the benefit district with the clerk of the county in which the greater portion of the district is located . . . . Thereafter, the county clerk of the county in which the governing body of the district is located shall determine the rate of tax necessary to be levied . . . but such rate shall in no case exceed five mills upon the taxable tangible property in the benefit

district. Upon determination of the rate of levy, the county clerk of the county in which the governing body of the district is located shall certify the same to the county clerk of each of the counties in which some portion of the benefit district lies. It shall be the duty of the board of county commissioners of the counties where any territory of the benefit district lies to levy the tax upon the taxable tangible property in such benefit district. The tax levy authorized by this section shall be in addition to all other tax levies authorized or limited by law.

One might take the position that because the fire district in question is one created pursuant to K.S.A. 19-3624 *et seq.* it does not constitute a “taxing subdivision,” and that its levy limit of five mills is not, therefore, lifted in accordance with K.S.A. 79-5040. In this regard, there are at least two AGOs online that espouse the opinion that fire districts created under K.S.A. 19-3601 *et seq.* are “taxing subdivisions” and, in one case, the fire district’s status as a “taxing subdivision” was made in regard to the term “taxing subdivisions” as used in K.S.A. 79-5040, which provides as follows:

In 1999, and in each year thereafter, all existing statutory fund mill levy rate and aggregate levy rate limitations on *taxing subdivisions* are hereby suspended.

The opinions referenced in the AGOs attached below and referenced herein are in relation to fire districts created under authority of K.S.A. 19-3601 *et seq.*, and not in relation to those created under authority of K.S.A. 19-3624 *et seq.*, as is yours, but after reviewing the corresponding statutes we are unable to come up with anything that would so distinguish the two entities whereby one might be considered a “taxing subdivision,” and the other one not. Therefore, in the absence of analysis more compelling than what we have found it would be our opinion that your particular fire district is a “taxing subdivision” for purposes of K.S.A. 79-5040. In addition, while K.S.A. 19-3626 (last amended in 1981) purports to limit the annual levy of your fire district to no more than five mills, this limit is suspended by virtue of K.S.A. 79-5040.

The links below are to the AGOs referenced above, and in which it is opined that fire districts created under authority of K.S.A. 19-3601 *et seq.* are “taxing subdivisions.”

[http://ksag.washburnlaw.edu/opinions/2007/2007-034.htm#N\\_5](http://ksag.washburnlaw.edu/opinions/2007/2007-034.htm#N_5)

KSA 19-3601 fire district is a “taxing subdivision”; can’t charter out of election requirement

<http://ksag.washburnlaw.edu/opinions/1993/1993-095.htm>

KSA 19-3601 fire district is a “taxing subdivision”

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Question: Good afternoon. I had an attorney tell me that the Recreation Commissions’ mill levy limitation was revoked in an attorney general’s opinion when the tax lid was taken off.

Is this true, and if so how would that work? If they have a charter ordinance, I am supposing that they would have to revoke that and then the Recreation Commission could tell the school or the city what they want levied?

Any insight you have in this would be great. Thank you.

Answer: Good afternoon. The attorney is correct that K.S.A. 79-5040 suspended all statutory mill levy rate limitations. The exact language reads as follows:

In 1999, and in each year thereafter, all existing statutory fund mill levy rate and aggregate levy rate limitation on taxing subdivisions are hereby suspended. (Emphasis added.)

In AGO 2002-44 the Attorney General opined that K.S.A. 79-5040 was applicable to the mill levy rate limitation found in K.S.A. 12-1927 (which only allowed an increase of one mill per year to a total of four mills). It is important to note that while the mill levy limitation found in the statute, as well as the statute's aggregate limit, is covered by K.S.A. 79-5040, the Attorney General has also opined that procedural requirements found in statutes to increase the mill levy and aggregate limit still need to be followed. The following is a link to AGO 2002-44: <http://ksag.washburnlaw.edu/opinions/2002/2002-044.htm>

The attorney may wish to review the following AGO's - 2002-44 (Recreation Commissions) 2002-36 (County Hospitals) and 2007-34 (Fire Districts). Please find attached links to the AGOs:

<http://ksag.washburnlaw.edu/opinions/2002/2002-044.htm>

<http://ksag.washburnlaw.edu/opinions/2002/2002-036.htm>

<http://ksag.washburnlaw.edu/opinions/2007/2007-034.htm>

However, you make an interesting comment when discussing that the city might have a charter ordinance. We would probably wish to learn more about the ordinance, but our guess is that the ordinance – if one is in place - was done by the city under its home rule power, and limits the amount of levy by the recreation commission to a certain mill rate. If our assumption is correct, K.S.A. 79-5040 would only apply to mill levy limitations found in state statute; it would not apply to a limitation at the local level. An additional consideration here: if a charter ordinance is involved we would very much like to see the ordinance inasmuch as the statute concerning recreation commissions does not appear to be non-uniform in its application to cities, calling into question the ability of the city in question to charter out of its provisions.

Finally, assuming that a limit has been imposed by virtue of a legally adopted charter ordinance, in that case the ordinance would likely need to be repealed or another charter ordinance would need to be done to increase the mill levy. In the absence of a legally adopted charter ordinance limiting the amount of levy support to the recreation commission any increase over the existing mill levy would need to follow the procedural requirements found in K.S.A. 12-1927.

Hope this information helps.

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Question: I was approached by an attorney that wants a school district to start a recreation commission and she reads the levy as having been terminated and the procedural limitations are gone as well. Is this true?

Answer: If they are trying to establish a recreation commission under the provisions of K.S.A. 12-1925, we believe that in the petition and ballot question concerning the establishment, the recreation commission can ask for any mill levy they wish instead of the one mill limitation found in statute. However, once established and they wish to increase the mill levy (other than the establishment of a employee benefit fund) over the amount stated in the ballot question, the recreation commission would have to follow the procedure discussed in K.S.A. 12-1927.

Hope this information helps.

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Question: I have a quick question on levy limitations. I know that on most funds there are not limitations, but I was reading KSA 68-518c for the township road fund. It says that they can't exceed five mills without a resolution being published. Is that so?

Answer: Yes, it is correct that the township should, if it desires to increase "the authorized limit existing on the effective date of this act [May 27, 1999]," adopt and publish a resolution authorizing the increased levy limit.

The quoted language was added to the statute when last amended in 1999. The old levy limit was eight mills, which means that there is the possibility your township may already have an existing limit above five mills. So, the first question to answer with this particular township is whether the governing body members know, or can ascertain, the current mill rate limit for their road fund; it may already be above five mills. Otherwise, though, to go above five mills would require adoption of a resolution, coupled with publication and the opportunity for a protest petition.

We hope that this helps.

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