December 20, 1993

OPINION NO. 93-057

The Honorable R. Larry Schneider
Union County Prosecuting Attorney
111 West Sixth Street
Marysville, Ohio 43040-0231

Dear Prosecutor Schneider:

You have requested an opinion regarding the purposes for which a township may expend motor vehicle fuel excise tax revenues. Your specific questions are as follow:

1. May funds allocated to a township pursuant to R.C. 5735.27 ("gasoline tax") be used by the township to finance, all or in part, the construction, maintenance and/or improvement of a driveway and parking lot for the township hall?
2. If the gasoline tax funds may not be used, without limitation, for the construction, maintenance, and/or improvement of the driveway and parking lot, may said funds be used if the township acquires road equipment and stores the equipment in a building, structure, or shed located at such a place that the driveway and parking lot constitute necessary access to the equipment? If the gasoline tax may not be used to totally fund the driveway and parking lot, may it be apportioned in some way between the gasoline tax and other funds?

Constitutional and Statutory Limitations Upon the Expenditure of Motor Vehicle Fuel Excise Tax Revenues

Ohio Const. art. XII, §5 provides that "[n]o tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied." Ohio Const. art. XII, §5a in turn provides as follows with respect to revenues derived specifically from motor vehicle license taxes and motor vehicle fuel excise taxes:

> No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

Syllabus paragraph one of *Grandle v. Rhodes*, 169 Ohio St. 77, 157 N.E.2d 336 (1959) thus declares, in part, as follows: "Section 5*a*, Article XII of the Constitution of Ohio, closely restricts the expenditure of the fees and taxes received in relation to vehicles using the public highways to purposes *directly connected* with the construction, maintenance and repair of highways and the enforcement of traffic laws." (Emphasis added.) Accordingly, "[i]n keeping with this constitutional restriction, the General Assembly has enacted statutes levying motor vehicle fuel ... taxes, carefully specifying the purposes for which such moneys may be used." 1991 Op. Att'y Gen. No. 91-043 at 2-229 to 2-230. *See* R.C. 5735.05 (imposing an excise tax upon the use, distribution, or sale within the state of motor vehicle fuel, and declaring the purposes for which the revenues generated from that tax may be used); R.C. 5735.05(B) ("[t]he two cent excise tax levied by this section is also for the purpose of paying the expenses of administering and enforcing the state law relating to the registration and operation of motor vehicles"); R.C. 5735.23(B)(2)(a), (b) and (C)(2)(a)-(c) (designating the various funds to which receipts from the tax levied by R.C. 5735.05 are to be paid, and specifying that certain percentages are to be paid to the gasoline excise tax fund, R.C. 5735.27(A), for distribution among and to the municipal corporations, counties, and townships pursuant to R.C. 5735.27(A)(1), (A)(3), and (A)(5)); R.C. 5735.25 (imposing an additional excise tax upon the use, distribution, or sale within the state of motor vehicle fuel); R.C. 5735.26(B)-(D) (designating the funds to which receipts from the tax levied by R.C. 5735.25 are to be paid, and specifying that certain percentages are to be paid to the gasoline excise tax fund for distribution among and to the municipal corporations, counties, and townships pursuant to R.C. 5735.27(A)(2), (A)(4), and (A)(5)). *See also* 1992 Op. Att'y Gen. No. 92-049 at 2-201 ("revenues derived from motor vehicle fuel excise taxes may be used only for the purposes described in the statutes governing the levying, collection and distribution of those taxes").

Purposes for Which a Township May Expend Motor Vehicle Fuel Excise Tax Revenues

R.C. 5735.27 creates the gasoline excise tax fund in the state treasury. R.C. 5735.27(A). The gasoline excise tax fund is comprised of revenues derived from the motor vehicle fuel excise taxes levied pursuant to R.C. 5735.05 and R.C. 5735.25, which are credited to that fund in accordance with R.C. 5735.23 and R.C. 5735.26. R.C. 5735.27 further describes the manner in which the motor vehicle fuel excise tax revenues credited to the gasoline excise tax fund are to be distributed among and to the municipal corporations, counties, and townships within the state, and specifies the purposes for which those revenues may be expended. R.C. 5735.27(A)(1)-(5). In the case of townships, R.C. 5735.27(A)(5) states, in pertinent part, as follows:

> The amount [of motor vehicle fuel excise tax revenues] credited pursuant to division (D) of section 5735.26 and division (C)(2)(b) of section 5735.23 of the Revised Code shall be divided in equal proportions among the townships within the state and shall be paid to the county treasurer of each county for the total amount payable to the townships within each of the counties. The county treasurer shall pay to each township within the county its equal proportional share of the funds, which shall be expended by each township for the sole purpose of planning, constructing, maintaining, widening, and reconstructing the public roads and highways within such township, and paying costs apportioned to the township under section 4907.47 of the Revised Code.[1]
>
> No part of the funds shall be used for any purpose except to pay in whole or part the contract price of any such work done by contract, or to pay the cost of labor in planning, constructing, widening, and reconstructing such roads and highways, and the cost of materials forming a part of the improvement; provided, that such funds may be used for the purchase of road machinery and equipment and for the planning, construction, and maintenance of suitable buildings for housing road machinery and equipment, and that all such improvement of roads shall be under supervision and direction of the county engineer as provided in section 5575.07 of the Revised Code.[2] (Footnotes added.)

See also R.C. 5549.21.

R.C. 5735.27(A)(5) thus limits a township's expenditure of motor vehicle fuel excise tax revenues to the purposes therein enumerated. In particular, R.C. 5735.27(A)(5) states that a township may expend such tax revenues to construct and maintain the public roads and highways within the township; pay the contract price of any such work done by contract or the cost of labor and materials in constructing those roads and highways; and construct and maintain suitable buildings for housing road machinery and equipment. These are the only construction and maintenance activities enumerated in R.C. 5735.27(A)(5) for which a township may expend motor vehicle fuel excise tax revenues; there is no express provision in R.C. 5735.27(A)(5) that permits a township to use motor vehicle fuel excise tax revenues to construct, improve, or maintain a driveway and parking lot for the township hall.

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[1] R.C. 4907.47 addresses the installation of protective devices at public railroad highway grade crossings pursuant to order of the Public Utilities Commission of Ohio. *See* R.C. 4907.47(A). Division (B) of R.C. 4907.47 provides for allocating the cost of any such device and its installation, and states, in part, that "[i]f any part of the cost is assigned to the public, it shall be apportioned to the state agency or political subdivision having jurisdiction over such crossing, and may be paid from any funds levied and made available for highway or street purposes."

[2] R.C. 5575.07 provides, in pertinent part, that the work of road improvement in the case of a township "shall be done under the general supervision and direction of the county engineer."

A.Establishment of a Driveway and Parking Lot as a Public Road or Highway

In your letter you suggest that the anticipated public use of the driveway and parking lot may constitute the driveway and parking lot a public road or highway for purposes of R.C. 5735.27(A)(5). In that regard, the driveway and parking lot will facilitate access to the township hall by township officials, employees, and residents.

Whether a tract of land is a public road or highway depends, in large measure, upon whether it has been properly established as a road or highway for use by the public at large. *See Kitchens v. Duffield*, 83 Ohio App. 41, 48, 76 N.E.2d 101, 105 (Franklin County 1947) ("a public road, highway or driveway may be defined as a way open to the public at large without distinction, discrimination or restriction, except such as is incident to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof"); *State ex rel. Copeland v. City of Toledo*, 75 Ohio App. 378, 381, 62 N.E.2d 256, 258 (Lucas County 1944) ("[s]treets, highways and similar public ways are established for the use of the general public and for the benefit of adjoining and abutting land owners who, by virtue of such ownership have the legal right to ingress and egress thereto and therefrom"); *State v. Bundy*, 79 Ohio Law Abs. 253, 256, 154 N.E.2d 924, 927 (Findlay M. Ct. 1956) (in determining whether driveways are public highways, "[t]he usual test is a dedication by the owners, or those holding title, to the use of the public at large, for the purpose of travel or the transportation of persons or property"). Consequently, if a proposed driveway and parking lot for a township hall are lawfully established as a public road or highway, then a township may expend motor vehicle fuel excise tax revenues upon their construction and maintenance. *See, e.g.*, 1940 Op. Att'y Gen. No. 2148, vol. I, p. 334 (syllabus) ("[c]ounty road funds may not properly be used to improve or maintain driveways located upon the grounds owned by the county, unless such driveways have been established or dedicated as public highways"). *Cf. State v. Root*, 132 Ohio St. 229, 6 N.E.2d 979 (1937) (syllabus) (where a driveway, leading into and located wholly upon state hospital grounds, was built, maintained, and controlled by such hospital for its own use and the public having business at the hospital, and where such driveway was never dedicated or legally accepted as a public thoroughfare, such driveway did not come within the purview of "roads or highways," as those terms were used in G.C. 12404-1 (defining manslaughter in the second degree)).

The law recognizes the following methods by which a tract of land may be established as a road or highway for public travel: statutory appropriation; statutory dedication; common law dedication; and prescription. In the case of a tract of land within a township, 1987 Op. Att'y Gen. No. 87-046 reviewed and discussed the application of each of those methods:

> A board of county commissioners may, pursuant to R.C. 5553.03-.16, appropriate land for road purposes, and, by following the procedures enumerated therein, formally establish such land as a public road or highway. *See, e.g., State ex rel. Kerr v. Neitz*, 58 Ohio App. 135, 16 N.E.2d 236 (Lucas County 1937); Op. No. 84-016 at 2-51. A tract of land may also be established as a public road or highway by way of dedication. Dedication occurs when a landowner, having determined that certain lands should be used for road purposes, makes a gift of the land to the state or one of

its political subdivisions for such purposes. *See, e.g., Railroad Co. v. Village of Roseville*, 76 Ohio St. 108, 81 N.E. 178 (1907); *Oberhelman v. Allen*, 7 Ohio App. 251 (Hamilton County 1915). R.C. 5553.31, which sets forth the procedure by which land may be statutorily dedicated for use as a public road, provides that, "[a]ny person may, with the approval of the board of county commissioners, dedicate land for road purposes." R.C. 5553.31 further provides that, in order to accomplish such dedication, a definite description of the lands to be dedicated with a plat of the lands attached and signed by the landowner, and with the approval and acceptance of the board endorsed thereon, shall be placed upon the proper road records of the county in which the prospective road is situated. Thereafter, "the proposal to dedicate lands for road purposes, together with the acceptance of the grant by the board, constitutes the lands so dedicated a public road." *Id. See* Op. No. 86-094 at 2-533 ("[u]nder R.C. 5553.31, the board of county commissioners must indorse its approval and acceptance of the dedication on the plat showing the lands to be dedicated" before the dedication will be effective to establish the land in question as a public road or highway)....

A common law dedication of land to public use results in the establishment of a public road or highway when there is a demonstrated "intention to dedicate, and an actual dedication on the part of the owner, and an acceptance [of such dedication] on the part of the public, which may be proved by the circumstances of the case." *Lessee of Village of Fulton v. Mehrenfeld*, 8 Ohio St. 440, 446 (1858). *See also In Re Application of Loose*, 107 Ohio App. 47, 153 N.E.2d 146 (Franklin County 1958) (syllabus, paragraph two) (an intention by the owner of land to dedicate such land for county road purposes and the acceptance thereof by the board of county commissioners on behalf of the public, where such approval and acceptance is signed by the county commissioners, are sufficient to establish a common law dedication); *Oberhelman v. Allen*, 7 Ohio App. at 255. The acceptance of the dedication by a public authority may be express or implied, but in order to imply acceptance by the public, a public authority must take some positive action to indicate that it has taken control of the property, such as improving the street or road that has been dedicated. *See, e.g., State ex rel. Fitzthum v. Turinsky*, 172 Ohio St. at 153, 174 N.E.2d at 243; *Lessee of Village of Fulton v. Mehrenfeld*, 8 Ohio St. at 447-48. Further, the dedication of land by the owner may also be express or implied. *State ex rel. Litterst v. Smith*. As the court stated in *Litterst*, the dedication "is express when the *animus dedicandi* is expressly declared; it is implied when it arises by operation of law from the acts of the owner....Anything which fully demonstrates the intention of the donor, or the acceptance by the public, is effectual." 87 Ohio App. at 517, 94 N.E.2d at 804-05.

Finally, a tract of land may be established as a public road or highway by way of prescription. *Railroad Co. v. Village of Roseville*, 76 Ohio St. at 117, 81 N.E. at 180; *Oberhelman v. Allen*, 7 Ohio App. at 259. *See also Smith v. Krites*, 90 Ohio App. 38, 102 N.E.2d 903 (Allen County 1950) (discussing the principles of law that apply to the establishment of public roads by prescription); Op. No. 82-028 at 2-83. As a general matter, a public road may be established by prescription where it is shown

> that the general public has used a tract of land in a way adverse to the claim thereto of the title holder of record under some claim of right for an uninterrupted period of at least twenty-one years. *Smith v. Krites* (syllabus, paragraph two).

Id. at 2-304 to 2-306. *See also* 1990 Op. Att'y Gen. No. 90-024. In this instance, therefore, if the proposed driveway and parking lot are first established as a road or highway for use by the general public, then the township may expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27(A)(5) to construct, improve, or maintain such driveway and parking lot.

B.Construction of a Driveway and Parking Lot to Serve a Building That Houses Road Machinery and Equipment

In your second question you ask whether a township may expend motor vehicle fuel excise tax revenues to construct, improve, or maintain a driveway and parking lot for the township hall if the driveway and parking lot also provide access to a building or other structure in which the township stores road equipment. For the purpose of this question, it is assumed that no action has been or will be taken to establish the proposed driveway and parking lot as a public road or highway before construction commences, which would suffice, as described above, to permit the expenditure of such revenues.

As noted previously, R.C. 5735.27(A)(5) permits a township to expend motor vehicle fuel excise tax revenues "for the planning, construction, and maintenance of suitable buildings for housing road machinery and equipment." One issue presented by your inquiry, therefore, is whether the foregoing language of R.C. 5735.27(A)(5) permits a township, by necessary implication, to plan, construct, and maintain a driveway and parking lot that are to be used in connection with a building in which the township houses road machinery and equipment.

The express language of R.C. 5735.27(A)(5) that grants a township the power to expend motor vehicle fuel excise tax revenues to plan, construct, and maintain suitable buildings for housing road machinery and equipment may also be read as implying authority to expend those revenues to plan, construct, and maintain a driveway or parking lot that provides access to, or otherwise serves the use of, those buildings. *Webster's New World Dictionary* 428 (2d college ed. 1978) defines a "driveway" as "a path for cars, leading from a street or road to a garage, house, etc." A "parking lot" is defined as "an area for parking motor vehicles." *Id.* at 1033. In the case of a building in which a township houses road machinery and equipment, some form of driveway will, in most instances, have to be provided if the township is to have proper and ready access to that machinery or equipment whenever it is needed for the construction, improvement, maintenance, or reconstruction of roads and highways within the township. Such a driveway will enhance the utility of a building in which a township houses road machinery and equipment by enabling that machinery and equipment to travel to and from that building in a safe and efficient manner. Certainly a variety of difficulties might reasonably be anticipated (particularly in inclement weather) if large road machinery or equipment must make its way to and from that building absent a driveway designed and constructed for that purpose. Similarly, a parking lot that is adjacent or proximate to such a building may serve as a parking or turnaround area for both the township's road machinery and equipment and the motor

vehicles of township employees who operate or service that machinery and equipment. It is, therefore, reasonable to conclude that the authority conferred upon a township by R.C. 5735.27(A)(5) to expend motor vehicle fuel excise tax revenues to plan, construct, and maintain suitable buildings for housing road machinery and equipment also permits a township to expend those revenues to plan, construct, and maintain a driveway and parking lot that will serve those buildings and the machinery and equipment housed therein. *But cf.* 1964 Op. Att'y Gen. No. 1499, p. 2-388 (syllabus, paragraph three) ("[t]he express grant of authority [under R.C. 5735.27(D), now R.C. 5735.27(A)(5)] to township trustees to use gas tax funds for the purpose of constructing and maintaining a suitable building for housing road machinery and equipment does not imply the authority to purchase real estate with gas tax funds even though such real estate is to be used to store road machinery and equipment").

A driveway and parking lot that are constructed by a township with motor vehicle fuel excise tax revenues in order to provide access to a building in which the township houses road machinery and equipment may also be used to provide access to the township hall, if their location is such as to make that use possible. There is nothing in the language of R.C. 5735.27(A)(5) to suggest that a driveway and parking lot constructed by a township with motor vehicle fuel excise tax revenues cannot serve a secondary purpose, so long as the primary purpose of that construction is to provide access to a building in which the township houses road machinery and equipment. *Cf., e.g., State ex rel. McClure v. Hagerman*, 155 Ohio St. 320, 324, 98 N.E.2d 835, 837 (1951) (private interests of individuals may be advanced "incidentally" by an expenditure of public funds provided the primary object of that expenditure is to subserve a public purpose). In that circumstance, therefore, it appears appropriate to permit use of the driveway and parking lot for other public purposes, such as providing access to the township hall or other township facilities.

With respect to your second question, you have also asked whether a township may, in some way, apportion the cost of constructing, improving, or maintaining a driveway and parking lot for the township hall among motor vehicle fuel excise tax revenues available to the township and other funds in the township treasury, if motor vehicle fuel excise tax revenues may not be used to fund the entire cost of that construction, improvement, or maintenance. For example, a driveway and parking lot constructed with motor vehicle fuel excise tax revenues to serve the needs of a building in which a township houses road machinery and equipment may be insufficient to provide full and adequate access to the township hall. In that situation, however, motor vehicle fuel excise tax revenues may not be used by the township to make further modifications to the driveway and parking lot for the purpose of ensuring proper access to the township hall. R.C. 5735.27(A)(5). Thus, the question is whether the township may allocate the cost of such modifications or additional construction among other funds of the township that are not comprised of motor vehicle fuel excise tax revenues.

The logical conclusion is that a township may make such an allocation. Specifically, a township may allocate costs incurred in constructing or improving a driveway for the purpose of providing sufficient access to the township hall among those funds of the township that are comprised of revenues that lawfully may be expended for that purpose, and that have not been appropriated or encumbered for other purposes. *See generally* R.C. 5705.09 (enumerating the specific funds that each subdivision is required to establish). *See also* R.C. 5705.01(A) (as used in

R.C. Chapter 5705, "[s]ubdivision" means, *inter alia*, a "township").

Conclusion

It is, therefore, my opinion, and you are advised that:

1. A township may expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27(A)(5) to plan, construct, and maintain a driveway and parking lot for the township hall, provided the driveway and parking lot are first established as a road or highway for the use of the general public.

2. A township may expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27(A)(5) to plan, construct, and maintain suitable buildings for housing road machinery and equipment.

3. A township may expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27(A)(5) to plan, construct, and maintain a driveway and parking lot that serve a building in which the township houses road machinery and equipment. The township may also use that driveway and parking lot to provide access to the township hall, if their location is such as to make that use possible. Motor vehicle fuel excise tax revenues may not be used by a township to make additional modifications to the driveway and parking lot for the purpose of ensuring proper access to the township hall, but the cost of such modifications may be allocated among other funds of the township that are comprised of revenues that lawfully may be expended for that purpose, and that have not been appropriated or encumbered for other purposes.

Respectfully,

LEE FISHER
Attorney General

December 20, 1993

The Honorable R. Larry Schneider
Union County Prosecuting Attorney
111 West Sixth Street
Marysville, Ohio 43040-0231

SYLLABUS: 93-057

1. A township may expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27(A)(5) to plan, construct, and maintain a driveway and parking lot for the township hall, provided the driveway and parking lot are first established as a road or highway for the use of the general public.

2. A township may expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27(A)(5) to plan, construct, and maintain suitable buildings for housing road machinery and equipment.

3. A township may expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27(A)(5) to plan, construct, and maintain a driveway and parking lot that serve a building in which the township houses road machinery and equipment. The township may also use that driveway and parking lot to provide access to the township hall, if their location is such as to make that use possible. Motor vehicle fuel excise tax revenues may not be used by a township to make additional modifications to the driveway and parking lot for the purpose of ensuring proper access to the township hall, but the cost of such modifications may be allocated among other funds of the township that are comprised of revenues that lawfully may be expended for that purpose, and that have not been appropriated or encumbered for other purposes.