May 20, 1994

OPINION NO. 94-031

The Honorable Charles A. Gerken
Hocking County Prosecuting Attorney
4 1/2 East Main Street
Logan, Ohio 43138

Dear Prosecutor Gerken:

You have requested an opinion regarding a county's use of its share of state motor vehicle license tax and motor vehicle fuel excise tax revenues. Specifically, you wish to know whether any of those revenues may be used by the county to purchase liability insurance for all motor vehicles operated under the authority of the county engineer.

The Use of State Motor Vehicle License Tax and Fuel Excise Tax Revenues Is Limited By Ohio Const. Art. XII, §5a

Ohio Const. art. XII, §5a provides as follows:

> 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.

Consequently, revenues from state motor vehicle license taxes and motor vehicle fuel excise taxes may be expended only for the purposes described in the statutes that govern the levying, collection, and distribution of those taxes. *See* R.C. 4501.03 (the Registrar of Motor Vehicles, with certain exceptions, is to pay money received as motor vehicle license tax revenues to the state treasury auto registration distribution fund for distribution to the counties and districts of registration pursuant to R.C. 4501.04-.043); R.C. 4501.04 (distribution of moneys in the auto registration distribution fund and the purposes for which such moneys may be used by counties and other political subdivisions);

R.C. 4501.044 (distribution to the international registration plan distribution fund of revenues of motor vehicle license tax on apportionable vehicles and apportioned registration tax); R.C. 4501.045 (distribution of revenues of the motor vehicle license tax on nonapportionable vehicles); R.C. 4503.02 (levy of the motor vehicle license tax and enumeration of the expenditures for which the tax may be used); R.C. 5735.05 (imposition of a motor vehicle fuel excise tax and statement of the purposes for which the revenues may be used); R.C. 5735.23 (distribution of the revenues of the tax levied by R.C. 5735.05); R.C. 5735.25 (levy of an additional motor vehicle fuel excise tax and description of the purposes for which the revenues may be used); R.C. 5735.26 (designation of the funds into which receipts from the tax imposed by R.C. 5735.25 are to be paid, including the gasoline excise tax fund from which distributions to the counties are made pursuant to R.C. 5735.27(A)(4)); R.C. 5735.27 (creation of the gasoline excise tax fund in the state treasury and payment of certain amounts therefrom to the counties for the road and highway purposes described in the statute).

R.C. 315.12(A) Authorizes the Use of State Motor Vehicle License Tax and Motor Vehicle Fuel Excise Tax Revenues for a Portion of the Cost of the Operation of the Office of County Engineer

The question of whether state motor vehicle license tax and motor vehicle fuel excise tax revenues could be used to purchase insurance to protect a county against liability imposed with respect to its duty to keep county roads in repair was considered in 1988 Op. Att'y Gen. No. 88-067. The specific question in Op. No. 88-067 was whether R.C. 2744.08(A)(2)(a), which authorizes a county to allocate the costs of a self-insurance program covering the liability of the county and its employees among the funds in the county treasury, permits the county engineer's portion of those costs to be paid with revenues derived from state motor vehicle license or motor vehicle fuel excise taxes. Op. No. 88-067 concluded that those revenues could be used for that purpose on the basis of R.C. 315.12, which provides in relevant part as follows:

> (A) Two thirds of the cost of operation of the office of county engineer, including the salaries of all of the employees and the cost of the maintenance of such office as provided by the annual appropriation made by the board of county commissioners for such purpose, shall be paid out of the county's share of the fund derived from the receipts from motor vehicle licenses, as distributed under section 4501.04 of the Revised Code, and from the county's share of the fund derived from the motor vehicle fuel tax as distributed under section 5735.27 of the Revised Code.

By virtue of the enactment of R.C. 315.12(A), the General Assembly has established two-thirds of the cost of operation of the county engineer's office as one of the "statutory highway purposes" for which motor vehicle license and fuel excise tax revenues may be expended under Ohio Const. art. XII, §5a. *See* 1994 Op. Att'y Gen. No. 94-019 (concluding that the cost of removal of underground fuel storage tanks that had been used to fuel equipment and vehicles of the county engineer's office was a "cost of operation of the office of county engineer"). *See also* 1942 Op. Att'y Gen. No. 4728, p. 32 at 37 (discussing G.C. 2782-2 (now R.C. 315.12(A)) and concluding that "[t]he county engineer's office operating allowance from the motor vehicle license and fuel tax

distributions being general and without restriction, it must be construed as applying to all expenses of his office, including such expenses as might be allocated to ditch improvement work"). Accordingly, state motor vehicle license and motor vehicle fuel excise tax revenues that form a portion of the operating budget of the county engineer pursuant to R.C. 315.12(A) may be used for any cost incurred in the operation of the office of the county engineer.

Op. No. 88-067 determined that the primary responsibility of the office of the county engineer is to supervise, undertake, or inspect the construction, reconstruction, improvement, maintenance, or repair of county roads and highways. Thus, Op. No. 88-067 concluded that self-insurance program payments for the purpose of insuring the county against tort liability under R.C. 2744.02(B)(3) for its "failure to keep the public roads and highways within the county open, in repair, and free from nuisance, which is attributable ultimately to misfeasance or nonfeasance on the part of the county engineer or his employees in the discharge of the various road and highway responsibilities imposed upon them by R.C. Chapters 315 and 5543" were "an expense properly incurred in connection with the operation of the office of county engineer." *Id.* at 2-343-344.[1]

The question you have presented is whether the cost of liability insurance covering all motor vehicles operated under the authority of the county engineer may be paid with state motor vehicle license and fuel excise tax revenues. Under the analysis of Op. No. 88-067, the answer to your question depends upon whether the cost of liability insurance covering all motor vehicles operated under the authority of the county engineer are properly incurred in connection with the operation of the office of county engineer. If those costs are so incurred, then they may be paid out of the portion of the engineer's office operating budget that is funded with state motor vehicle license tax and motor vehicle fuel excise tax revenues, pursuant to R.C. 315.12(A). Op. No. 88-067.

The office of county engineer is created by R.C. Chapter 315. As discussed in detail in Op. No. 88-067, the responsibilities of the county engineer are set forth in that chapter and in R.C. Chapter 5543 (duties of county engineer). These duties include planning and constructing bridges, culverts, roads, drains, ditches and other public improvements, except buildings, constructed under the authority of any board within and for the county. R.C. 315.08. R.C. 5543.01 provides that the county engineer shall have general charge of the following:

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[1] Prior to 1988 Op. Att'y Gen. No. 88-067, several Attorney General opinions examined the question whether state motor vehicle license tax revenues or motor vehicle fuel excise tax revenues, or both, may be used for the purchase of liability insurance covering either motor vehicles operated by county employees. *See, e.g.*, 1980 Op. Att'y Gen. No. 80-016 and 1953 Op. Att'y Gen. No. 53-2819, p. 299 (both determining that there was no authority to use state motor vehicle license tax revenues or motor vehicle fuel excise tax revenues to purchase liability insurance covering county employees operating road equipment). These opinions, however, apparently did not consider whether the cost of the liability insurance at issue in those opinions could be allocated to and paid out of the portion of the county engineer's budget that was funded with state motor vehicle license tax and motor vehicle fuel excise tax revenues, pursuant to either R.C. 315.12(A) or that section's statutory predecessor, G.C. 2782-2.

> (A) Construction, reconstruction, improvement, maintenance, and repair of all bridges and highways within his county, under the jurisdiction of the board of county commissioners;
> (B) Construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees under sections 5571.01, 5571.06, 5571.07, 5571.15, 5573.01 to 5573.15, inclusive, and 5575.02 to 5575.09, inclusive, of the Revised Code;
> (C) Construction, reconstruction, resurfacing, or improvement of the roads of a road district under section 5573.21 of the Revised Code.
> The engineer may not perform any duties in connection with the repair, maintenance, or dragging of roads by boards of township trustees, except that upon the request of any board of township trustees he shall inspect any road designated by it and advise as to the best methods of repairing, maintaining, or dragging such road.

Additionally, R.C. 5543.09 requires the county engineer to "supervise the construction, reconstruction, improvement, maintenance, and repair of the highways, bridges, and culverts under the jurisdiction of the board of county commissioners, and the construction, reconstruction, resurfacing and improvement of public roads by boards of township trustees under [certain sections of the Revised Code]," and to supervise the construction, reconstruction, improvement, and repair of the highways, bridges, and culverts under the control of the state when the county engineer has charge of them. *See also* R.C. 5543.02 (county engineer's duty to annually report to the board of county commissioners on the condition of county roads, bridges, and culverts); R.C. 5543.04 (county engineer's duty to name and number the public roads in the county); R.C. 5543.19(A) (county engineer's authority to construct, reconstruct, maintain or repair roads by force account).

Clearly, the operation of the office of the county engineer requires the use of motor vehicles. A large part of the equipment used to construct, repair, maintain and improve roads, bridges, highways and culverts consists of motor vehicles. The county engineer and county engineer's employees also use motor vehicles to carry out the county engineer's duties of supervision and inspection. In addition to passenger cars, the county engineer uses a variety of motor vehicles such as trucks, road rollers, bulldozers, graders, and pavers.

R.C. Chapter 2744 Specifies the Tort Liability of A County

R.C. Chapter 2744 sets forth the limits of the tort liability of political subdivisions. For purposes of R.C. Chapter 2744, the term "political subdivision" includes a county. R.C. 2744.01(F). Except as provided in R.C. 2744.02(B), a county is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the county or an employee of the county in connection with a governmental or proprietary function. R.C. 2744.02(A)(1). A "governmental function" is defined by R.C. 2744.01(C)(1) as a function of a political subdivision that is specified in R.C. 2744.01(C)(2) or that satisfies any of the following:

> (a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative

> requirement;
> (b) A function that is for the common good of all citizens of the state;
> (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in [R.C. 2744.01(G)(2)] as a proprietary function.

Pursuant to R.C. 2744.01(C)(2)(e), a "governmental function" expressly includes "[t]he regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds." "Governmental function" also includes "[t]he provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system." R.C. 2744.01(C)(2)(l). Pursuant to R.C. 2744.01(G)(1), a "proprietary function" is

> a function of a political subdivision that is specified in [R.C. 2744.01(G)(2)] or that satisfies both of the following:
> (a) The function is not one described in [R.C. 2744.01(C)(1)(a) or (b)] and is not one specified in [R.C. 2744.01(C)(2)];
> (b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

The definition of "governmental function" in R.C. 2744.01(C) expressly includes the construction and maintenance of roads and bridges[2] and the construction or reconstruction of public improvements. Thus, except as provided in R.C. 2744.02(B), a county is not liable for damages in a civil action for injury, death or loss to persons or property allegedly caused by any act or omission of the county or an employee of the county in connection with the construction and maintenance of roads, highways, streets, bridges or the construction or reconstruction of other public improvements.

R.C. 2744.02(B) provides, in relevant part, as follows:

> Subject to [R.C. 2744.03 and 2744.05],[3] a political subdivision is liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by

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[2] The construction and maintenance of roads and bridges has traditionally been considered a governmental function. *See State ex rel. Fejes v. City of Akron*, 5 Ohio St. 2d 47, 213 N.E.2d 353 (1966); *Davis v. Shutrump*, 140 Ohio St. 89, 42 N.E.2d 663 (1942); *Wooster v. Arbenz*, 116 Ohio St. 281, 156 N.E. 210 (1927).

[3] R.C. 2744.03 provides specific defenses or immunities for a political subdivision and its employees. R.C. 2744.05 places a limitation on damages to be awarded against a political subdivision for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function.

> an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:
> (1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority....
> (2) Political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.
> ....
> (5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

With respect to the liability imposed by R.C. 2744.02(B)(1), it is important to note that the term "motor vehicle" for purposes of R.C. Chapter 2744 has the same meaning as in R.C. 4511.01. R.C. 2744.01(E). "Motor vehicle" is defined by R.C. 4511.01(B) in pertinent part as:

> every vehicle propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires, *except* motorized bicycles, *road rollers, traction engines, power shovels, power cranes, and other equipment used in construction work and not designed for or employed in general highway transportation, hole-digging machinery*, well-drilling machinery, [and] *ditch-digging machinery*. (Emphasis added.)

Many of the motor vehicles used by the county engineer in carrying out his statutory duties undoubtedly fit R.C. 4511.01(B)'s definition of motor vehicle as applied to R.C. 2744.02(B)(1). Passenger cars and trucks "designed for or employed in general highway transportation," R.C. 4511.01(B), are motor vehicles for purposes of R.C. 2744.02(B)(1). The county is, therefore, liable for injury, death, or loss to persons or property caused by the negligent operation of such vehicles by county employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. R.C. 2744.02(B)(1). Some of the equipment used by a county engineer, however, may not come within R.C.4511.01(B)'s definition of "motor vehicle." For example, road rollers, graders, and pavers are used in construction work, and may not be designed for or employed in general highway transportation. Thus, the liability imposed by R.C. 2744.02(B)(1) upon the county for the negligent operation of motor vehicles will not apply to those motor vehicles of the county engineer such as road rollers, graders, and pavers that are used in construction work and are not designed for or employed in general highway transportation. Nonetheless, liability in connection with the use of such equipment may exist pursuant to R.C.

2744.02(B)(2), which states that "[p]olitical subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions." To the extent that a county engineer carries out proprietary functions of the county, the county is liable for the negligence of the county engineer and county engineer employees in the performance of their duties relative to such proprietary functions. If equipment of the county engineer is used in carrying out those duties, the county may be liable, pursuant to R.C. 2744.02(B)(2), for the negligent operation of that equipment.

The Purchase of Liability Insurance Covering Motor Vehicles Used By the County Engineer and County Engineer Employees Is a Cost of the Operation of the Office of the County Engineer

A primary responsibility of the office of county engineer is to supervise, undertake, or inspect the construction, reconstruction, improvement, maintenance, or repair of county roads and highways. R.C. 315.08; R.C. 5543.01; R.C. 5543.09. In order to carry out that responsibility, the county engineer and his employees often must use motor vehicles that are designed for or employed in general highway transportation, R.C. 4511.01(B), as well as various kinds of heavy equipment designed and used exclusively for road and highway construction, reconstruction, improvement, maintenance, or repair. As discussed above, liability may be imposed upon a county in connection with the use of such vehicles and equipment by the county engineer and his employees as they carry out the particular road and highway responsibilities of his office. Pursuant to R.C. 2744.02(B)(1), the county may be liable for injury, death, or loss to persons or property caused by the negligent operation of motor vehicles, as defined in R.C. 4511.01(B), by the county engineer or his employees in the course of carrying out those road and highway responsibilities. In addition, a county may be liable under R.C. 2744.02(B)(2) for injury, death, or loss to persons or property caused by the negligent operation of heavy equipment used by the county engineer or his employees in carrying out proprietary functions of the county.

R.C. 2744.08 authorizes a county to secure insurance against such liability. R.C. 2744.08(A)(1) states, in pertinent part, that

> [a] political subdivision may use public funds to secure insurance with respect to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function.

Because the liability imposed upon a county under R.C. 2744.02(B)(1) or R.C. 2744.02(B)(2) that would be covered by this insurance would be attributable ultimately to acts or omissions of the county engineer or his employees while operating motor vehicles or other heavy equipment or machinery in connection with the engineer's statutory responsibilities, the cost of that insurance may reasonably be characterized as a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A). This means that the cost of that insurance may be allocated to and paid out of the portion of the county engineer's budget that is funded with state motor vehicle license tax and motor

vehicle fuel excise tax revenues. *See* R.C. 2744.08(A)(2)(a) (a political subdivision "may allocate the costs of insurance ... among the funds or accounts in the subdivision's treasury on the basis of relative exposure and loss experience").

Conclusion

The cost of insurance covering liability that may be imposed upon a county under R.C. 2744.02(B)(1) or R.C. 2744.02(B)(2) for acts or omissions of the county engineer or his employees while operating motor vehicles or other heavy equipment or machinery in connection with the engineer's statutory responsibilities is a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A). Pursuant to R.C. 2744.08(A)(2)(a), the cost of that insurance may be allocated to and paid out of the portion of the county engineer's budget that is funded with state motor vehicle license tax and motor vehicle fuel excise tax revenues under R.C. 315.12(A).

Respectfully,

LEE FISHER
Attorney General

May 20, 1994

The Honorable Charles A. Gerken
Hocking County Prosecuting Attorney
4 1/2 East Main Street
Logan, Ohio 43138

SYLLABUS: 94-031

The cost of insurance covering liability that may be imposed upon a county under R.C. 2744.02(B)(1) or R.C. 2744.02(B)(2) for acts or omissions of the county engineer or his employees while operating motor vehicles or other heavy equipment or machinery in connection with the engineer's statutory responsibilities is a "cost of operation of the office of county engineer" for purposes of R.C. 315.12(A). Pursuant to R.C. 2744.08(A)(2)(a), the cost of that insurance may be allocated to and paid out of the portion of the county engineer's budget that is funded with state motor vehicle license tax and motor vehicle fuel excise tax revenues under R.C. 315.12.