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PARKING LOT, UNDERGROUND—HIGHWAY IMPROVEMENT FUND—FUNDS APPROPRIATED, HB 929, 101 GA, MAY LAWFULLY BE EXPENDED BY DIRECTOR OF HIGHWAYS "FOR THE STUDY OF ANY UNDERGROUND PARKING LOT—SECTION 5538.17 RC.

SYLLABUS:

Funds appropriated in House Bill No. 929, 101st General Assembly, to the department of highways from the Highway Improvement Fund may lawfully be expended by the director of highways "for the study of any underground parking lot" as provided in Section 5538.17, Revised Code.

Columbus, Ohio, May 11, 1956

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"With reference to Revised Code, Section 5538, 'Parking Lot Commissions', and specifically to Revised Code Section 5538.17, the following language appears:

"'5538.17. Director of Highways to provide engineering assistance.

"'*With the approval and the consent of the commission, the director of highways shall expend, out of any funds available for the purpose, such moneys as are necessary for the study of any underground parking lot, and may use its engineering and other*

*forces, including consulting engineers and traffic engineers, for the purpose of effecting such study.* All such expenses incurred by the director prior to the issuance of underground parking lot revenue bonds under sections 5538.10 to 5538.21, inclusive, of the Revised Code, shall be paid by the director and charged to the underground parking lot, and the director shall keep proper records and accounts showing the amounts so charged. Upon the sale of underground parking lot bonds, the funds so expended by the director, with the approval of the commission, in connection with the parking lot, shall be reimbursed to the department from the proceeds of such bonds. (126 v S 17. Eff. 10-13-55).

(Underscoring for emphasis only)

"Inasmuch as the Underground Parking Commission has been appointed and is functioning, may the Auditor of State, without liability, honor any vouchers submitted by the Director of Highways or the Department of Highways, drawn against available highway funds, for the purpose indicated in the above quoted section.

"Your opinion on this matter, at the earliest date possible, will be very much appreciated."

Section 5538.17, Revised Code, quoted above in your inquiry, was enacted in Senate Bill No. 17, 101st General Assembly. This bill was passed on June 21, 1955 and repassed over the governor's veto on July 13, 1955.

The use in this section of the expression "out of any funds available for the purpose" is a clear indication of the legislative notion that at the time of such passage there was included in an appropriation act then enacted or under consideration one or more appropriations to the department of highways which would be so available.

It will be noted that substantial appropriations to the department of highways are included in Sections 2 and 3 of House Bill No. 189, passed March 17, 1955, and approved by the governor on March 25, 1955. These appropriations, however, were made in furtherance of certain major thoroughfare highway construction projects approved by the highway construction council. Although I do not suggest that a construction project of the sort here under study could not in any circumstances be classed as such a major thoroughfare project, or a necessary adjunct thereto, it does not appear from the provisions of Chapter 5538., Revised Code, that such was the legislative intent. The appropriations in this act may not, therefore, be regarded as "available" within the meaning of Section 5538.17, supra.

The only other act of the 101st General Assembly in which I note any appropriations to the highway department for highway purposes, either planning, construction, or maintenance, is House Bill No. 929, the general appropriations act. Such appropriations consist of three main items, i.e., (1) $66,521,000.00 for highway improvement, "Appropriated from (the) Highway Improvement Fund," (2) $55,945,000.00 for maintenance and repair, "Appropriated from (the) Highway Maintenance and Repair Fund," and (3) $30,830,000.00 for "main thoroughfare" projects (as described in Chapter 5512., Revised Code), such appropriation being made from the "Highway Construction and Bond Retirement Fund" created under the provisions of Section 5728.17, Revised Code.

For reasons stated above I do not regard the funds thus appropriated *for main thoroughfare projects* to be "available" for the purposes here under consideration, and it would seem necessary to find such "available" funds, if at all, either in the highway improvement items or in the maintenance and repair items in House Bill No. 929, supra.

It is noted, in the underground parking commission's resolution No. 6 relative to the employment by the director of highways of an engineering firm to make certain preliminary surveys, that the commission indicates an intention to repay the sums expended by the director in connection therewith "to the Highway Improvement Fund of the Department of Highways." Moreover, the controlling board recently acted, presumably under authority of 4(f) of House Bill No. 929, 101st General Assembly, to "earmark" a portion of the item of $100,000.00 designated therein as "Maintenance—F 9 Other" for use by the director in procuring preliminary surveys for the purposes stated in Section 5538.17, Revised Code.

I find no reference in the permanent statutes to the "Highway Improvement Fund" but I am informed that it has long been the legislative practice, in appropriation measures, thus to refer to the "Highway Construction Fund" established under the terms of Section 5735.26, Revised Code. The revenues credited to this fund as provided in that section are the revenues collected as proceeds of the motor vehicle fuel excise levied under the provisions of Section 5735.25, Revised Code. It thus appears to be assumed by the several state agencies concerned that the expenditure of the funds here involved will be made under the limitations of Sections 5735.25 and 5735.27, Revised Code, and of Section 5a, Article XII, Ohio Constitution. This opinion is, therefore, likewise based on that assumption.

In thus limiting the scope of this opinion I do not mean to express any view as to the availability for the purposes at hand of funds appropriated from the "maintenance and repair fund," for I recognize that the courts have been quite liberal in construing the term "maintenance" as applied to highway projects, and I am aware also of the fact that much of the revenues which are credited to this fund are from sources to which the limitations of Section 5a, Article XII, Ohio Constitution, do not apply. See, for example, Section 5503.04, Revised Code, as to fines collected from persons arrested by the State Highway Patrol in traffic cases. The conclusions which I have reached, however, on the constitutional question and on the scope of the statutes relating to the revenues credited to the highway improvement fund make it unnecessary to consider the availability of appropriations from the maintenance and repair fund to which these special revenues are credited.

In Section 5a, Article XII, Ohio Constitution, it is provided:

> "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."
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> (Emphasis added.)

As I have suggested above it does not seem likely that the General Assembly would have enacted Chapter 5538., Revised Code, unless it considered that it had made funds "available" to the department of highways for the studies directed in Section 5538.17, Revised Code. Because the funds available to that department are so largely derived from revenues subject to the constitutional limitation noted above, and because it was the *director of highways,* rather than the director of public works, for example, who was directed to make the surveys in question, it may reasonably be inferred that the legislature thereby constituted the project in question one in furtherance of a "statutory highway purpose."

With such a legislative view I should not deem it proper for me as an officer in the executive department to take issue, since it is beyond the scope of my office to declare invalid a legislative act. It is my view,

however, that by reason of the limitations of Section 5, Article XII, Ohio Constitution, consideration must be given to the limited purposes set out in Section 5735.25, Revised Code, for which the highway improvement fund appropriations may be expended; and for this reason it becomes necessary to consider whether the project here in question amounts to "constructing * * * state highways." Such consideration will necessarily include the broader question of whether such project is in furtherance of a "statutory highway purpose."

As I have already noted the "Highway Construction Fund," commonly referred to in the biennial appropriation acts over a long period as the "highway improvement fund," is created by the provisions of Section 5735.26, Revised Code. This section reads in part:

> "* * * The balance of taxes collected under section 5735.25 of the Revised Code, after the credits to said rotary fund, and after deduction of the cost of administration of the motor vehicle fuel laws, and after receipt by the treasurer of state of a certification from the commissioners of the sinking fund certifying there are sufficient moneys to the credit of the state highway bond retirement fund created by section 5528.02 of the Revised Code to meet in full all payments of interest, principal, and charges for the retirement of bonds issued pursuant to section 5528.01 of the Revised Code due and payable during the current calendar year, *shall be credited to a fund to be known as the highway construction fund which shall be used solely for the purposes enumerated in Section 5735.25 of the Revised Code.* No disbursements shall be made from said highway construction fund except in pursuance of specific appropriations made by the general assembly."
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> (Emphasis added.)

The "purposes enumerated in section 5735.25 of the Revised Code" are disclosed by the following provisions in that section:

> "To provide revenue for supplying the state's share of the cost of *constructing, widening, and reconstructing the state highways, for supplying the state's share of the cost of eliminating railway grade crossings upon such highways,* to enable the counties, townships and municipal corporations of the state to properly construct, widen, reconstruct, and maintain their public highways, roads, and streets, to pay the expenses of the department of taxation incident to the administration of the motor vehicle fuel laws, to supplement revenue already available for such purposes, and to pay the interest, principal, and charges on bonds issued pursuant to section 5528.01 of the Revised Code, an excise tax is hereby imposed * * *." (Emphasis added.)

Such limitations are of course effective by reason of the limitations in Section 5, Article XII, Ohio Constitution, even though the legislature should attempt, otherwise than by amendment of such "levying language," to divert such revenues to other purposes, as for example in an appropriation signifying such intent. In this connection Section 5, Article XII, provides:

> "No 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."

The question presented at this point is what is included in the term "the state highways." In Section 5511.01, Revised Code, we find this language:

> "All state highways established by law shall continue to be known as state highways, and the state highway system established by law shall continue to be known as the state highway system.
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> "The director of highways may establish and designate additional state highways or change existing highways after notice and hearing.
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> "* * * The state highway routes into or through municipal corporations, as designated or indicated by state highway route markers erected thereon on October 11, 1945, *are state highways* and a part of the state highway system. * * *" (Emphasis added.)

Here we may note that although it was held in Perrysburg v. Ridgeway, 108 Ohio St., 245, that municipalities may control the use of its streets under their "powers of local self-government" by virtue of Section 3, Article XVIII, Ohio Constitution, I know of no decision which would deny the power of the General Assembly to designate any of such streets as state highways and to assume such control thereof as is necessary to provide an effective *state* highway system. The establishment of such a *state* system of highways is, in my opinion, a matter of statewide concern with respect to which the General Assembly may properly legislate. Hence, the fact that the project contemplated in Chapter 5538., Revised Code, is located in a city is a matter of no moment, especially since it is located at the intersection of two principal streets, one of which has been designated as a "state highway" as defined in Section 5511.01, Revised Code.

There can be no doubt that prior to the advent of the wide use of the motor vehicle as a means of highway transportation the terms "high-

ways" or "roads" were commonly thought of as embracing only those areas within the boundaries of the public easement acquired for highway purposes. Indeed in some respects the notion appears to have prevailed that these terms were limited to the improved, or paved, portion of such easement. An indication of this concept still lingers in the statutes, it seems, for it will be seen that in Sections 5735.05 and 5735.25, Revised Code, (originally enacted in 1925 and 1927, respectively), reference is made to "widening existing surfaces on such highways" and "widening * * * the state highways."

Such a concept of "highways" is no longer tenable, in my opinion, when regard is had to the tremendous demands made on the state highway system by a motorized traffic of such magnitude as to require so many numerous, varied, and extensive adjuncts and facilities to the traveled road itself in order that actual travel thereon may be both expeditious and safe, or, in many cases, even possible.

Nor have the courts hesitated in the recognition of this view. In State ex rel. Gordon v. Rhodes, 156 Ohio St., 81, the Supreme Court of Ohio held:

> 1. Under the home-rule amendments to the Constitution of Ohio (Section 3 et seq. of Article XVIII), an Ohio municipality, which has not adopted a charter provision to the contrary, has the power to acquire, maintain, and operate off-street facilities for the sole purpose of parking motor vehicles *if the traffic conditions in such municipality are such as to warrant a determination by the legislative body of the municipality that the operation of such off-street parking facilities is necessary* and that they will serve a public municipal purpose. * * *" (Emphasis added.)

Judge Middleton remarked, in the opinion in this case, that:

> "In *Wayne Village President v. Wayne Village Clerk,* 323 Mich., 592, 36 N.W.(2d), 157, 8 A.L.R.(2d), 357, the court decided a case in which mandamus was sought to compel the defendant to countersign revenue bonds to be issued to finance a combined off-street and on-street village parking system. In the course of its opinion the court said:
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> " '*Parking facilities* designed to relieve congested street conditions resulting from the use of motor vehicles in streets which obviously were not originally laid out to cope with present-day motor vehicle traffic *have a definite bearing on public safety in the use of public streets.*'

"After construing the Constitution and statutes of Michigan, the court directed the execution of the bonds, saying:

"'* * * we conclude that a municipal parking system combining parking facilities both on public streets and on off-street property of a municipality, for which a charge for use is made, is a public use, and a public improvement within the meaning of the revenue bond act * * *.'" (Emphasis added.)

Although the court in the Rhodes case, supra, was ultimately concerned with the question of a "public purpose," it will be seen that the conclusion was reached therein that a public purpose *was* served by a parking facility because it could be validly determined (by the legislative authority) that such facility would promote motor vehicle traffic safety *on the streets.*

Such a determination by the General Assembly of a relationship to traffic safety on the *traveled* portions of the state highways can reasonably be inferred from Chapter 5538., Revised Code, as a whole, and more especially from the circumstance that the director of highways and the Columbus director of public safety are required to collaborate in the matter of accommodating entrances and exits to the lines and grades of streets and highways. See Section 5538.04, Revised Code.

Does this relationship to highway traffic safety make this project one within the scope of the term "the state highways" as used in Section 5735.25, Revised Code?

In State ex rel. Kauer v. Defenbacher, 153 Ohio St., 268, the court held:

"* * * 5. Expenditures for the study of a turnpike project, pursuant to Section 1220, General Code, are part of 'the state's share of the cost of constructing * * * the state highways of this state,' within the meaning of those words as found in Section 5541, General Code; and the money so expended would, as contemplated by Section 5 of Article XII of the Constitution, be used for the stated object of the tax imposed by Section 5541, General Code.

"6. Money so expended would be 'expended for * * * costs for construction * * * of public highways and bridges and other statutory highway purposes,' within the meaning of Section 5a of Article XII of the Constitution. * * *"

In the opinion in that case Judge Taft noted the statutory definition of a turnpike "project," as set out in former Section 1204(b), General Code, and commented thereon, as follows, p. 274:

"* * * 'The word "project" or the words "turnpike project" shall mean any express highway, super-highway or motor way constructed under the provisions of this act, at such location as shall be approved by the Governor, including all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, toll houses, *service stations, and administration, storage and other buildings and facilities which the commission may deem necessary for the operation of the project,* together with all property, rights easements and interests which may be acquired by the commission for the construction or the operation of the project. Each project or turnpike project shall be separately designated by name or number and may be constructed or extended in such sections as the commission may from time to time determine.'

"From the foregoing definition, it would seem obvious that a capital outlay for a turnpike project is *a capital outlay for additions and betterments for highway improvement.* * * *"

(Emphasis added.)

Here it will be seen that the court regarded various and sundry areas and facilities, entirely apart from the traveled portion of the highway, devoted to service, administrative, and storage purposes, to be a part of the highway itself, and expenditures therefor to be "a capital outlay for additions and betterments for highway improvement."

This is a modern, common sense, and realistic concept of what the present day motor traffic pressures require in the way of highway improvements. This is a recognition that travel on the roadways proper may be *facilitated and made safe* by numerous facilities to serve the needs of motor vehicles at times other than when actually in motion on such roadways.

Nor does it matter, in my view, that in the turnpike case such facilities were being constructed as part of an integrated project which included the roadway proper. The plain fact is that if they had *not* been so constructed it would have been necessary to construct them separately, after construction of the roadway proper, in order to make travel thereon safe and expeditious.

Moreover, as was seen in the Rhodes case, supra, a facility thus afterward constructed may still be regarded as necessary to "relieve congested street conditions," and as having "a definite bearing on public safety."

I conclude, therefore, that expenditures for studies for the purposes described in Section 5538.17, Revised Code, would be part of "the state's share of the cost of constructing * * * the state highways" within the

meaning of these words as found in Section 5735.25, Revised Code, and that money so expended would be "expended for * * * costs for construction * * * of public highways and bridges and other statutory highway purposes" within the meaning of Section 5a of Article XII of the Constitution.

Because you inquire whether you may honor vouchers for expenditures for the purposes stated in Section 5538.17, Revised Code, "without liability," it is appropriate to point out the usual rule relative to the recovery of public funds paid out under a mistake of law. On this point it was said in an opinion "By the Court" in State ex rel. Dickman v. Defenbacher, 151 Ohio St., 391, 395:

> "* * * In the absence of fraud, duress, compulsion or mistake of fact, money, voluntarily paid by one person to another on a claim of right to such payment, cannot be recovered merely because the person who made the payment mistook the law as to his liability to pay. 31 Ohio Jurisprudence, 233 et seq., Section 162 et seq., and cases cited in the notes.
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> "This rule is applicable to the payment of public funds to private persons by governmental authorities. *City of Cincinnati* v. *Cincinnati Gas, Light & Coke Co.,* 53 Ohio St. 278, 41 N.E., 239; *Vindicator Printing Co.* v. *State,* 68 Ohio St., 362, 67 N. E., 733; 63 A.L.R., 1354, annotation.
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> "In the instant case, there is no claim of fraud, duress, compulsion or mistake of fact as to the payments made; there is merely the claim that the law forbade such payments. Under the circumstances described no recovery of the amounts disbursed may be had. * * *"

Under this rule, even though it should ever be judicially determined that expenditures by the director of highways for these purposes, from appropriations from the highway improvement fund, are not authorized by law, I am unable to see any basis on which any pecuniary liability with respect thereto could be asserted against the Auditor of State.

For these reasons, in specific answer to your inquiry it is my opinion that funds appropriated in House Bill No. 929, 101st General Assembly, to the department of highways from the Highway Improvement Fund may lawfully be expended by the director of highways "for the study of any underground parking lot" as provided in Section 5538.17, Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General