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1. STREETS AND HIGHWAYS — GOOD AND SAFE CONDITION FOR PUBLIC TRAVEL — “MAINTENANCE” — USE OF MATERIALS AND PROCESSES REASONABLY NECESSARY — SECTIONS 5537, 5541-8, 6309-2 G.C.
2. MUNICIPALITY — MAY EXPEND PROCEEDS, GASOLINE TAXES AND MOTOR VEHICLE LICENSE FEES TO PURCHASE SALT TO USE ON STREETS TO ALLAY ICY CONDITIONS AND PREVENT SKIDDING OF MOTOR VEHICLES — SECTIONS 5537, 5541-8, 6309-2 G. C.

SYLLABUS:

1. The term “maintenance” as used in Sections 5537, 5541-8 and 6309-2, General Code, will include the use of such materials and processes as are reasonably necessary to keep the streets and highways in good and safe condition for public travel.

2. A municipality may expend the proceeds of the gasoline taxes allocated to it under the provisions of Sections 5537 and 5541-8, General Code, and also the motor vehicle license fees distributed to it under the provisions of Section 6309-2, General Code, for the purchase of salt to be used on streets to allay icy conditions and to prevent skidding of motor vehicles.

Columbus, Ohio, December 3, 1942.

Bureau of Inspection and
Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

I have your request for an opinion, reading as follows:

We are enclosing herewith a letter from our City of Cincinnati Examiner, together with an opinion of the Assistant Director of Law, of said city, concerning the purchase of salt for use on the streets to aid in furnishing traction for vehicles in winter.

In view of the ruling contained in Attorney General's Opinion No. 294 of 1929, the State Examiner and Assistant Director of Law, are not in agreement as to the authority to use the proceeds of the motor vehicle license fees and gasoline taxes distributed to the city under sections 6309-2, 5537 and 5541-8 of the General Code, for the purchase of salt for said purpose.

Accordingly, may we request° that you examine the inclosures and give us your opinion in answer to the following question:

May a city expend the proceeds of the motor vehicle license fees or gasoline taxes distributed to it for purchasing salt to be used in conjunction with other materials on streets, to allay icy conditions and help preventing skidding of motor vehicles?"

Attached thereto is a memorandum by the Assistant City Solicitor of Cincinnati, discussing the question submitted with particular reference to the taxes distributed pursuant to Sections 5537 and 6309-2 of the General Code.

Section 5537 relates to the distribution of taxes levied under Section 5527, and commonly referred to as the "first gasoline tax". The pertinent portion of Section 5537 reads as follows:

"Thirty per cent. of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be used by such municipal corporations for the sole purpose of maintaining, repairing, constructing and repaving the public streets and roads within such corporation."

Section 5541-8 relates to the distribution of what is frequently referred to as the "second gasoline tax" levied pursuant to Section 5541 et seq. The pertinent portion of Section 5541-8 reads as follows:

"Seven and one-half per cent of said highway construction fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be expended by each municipal corporation for the sole purpose of constructing, maintaining, widening, reconstructing, cleaning and clearing the public streets and roads within such corporation, and for the purchase and maintenance of traffic lights."

Section 6309-2 is a part of Chapter 21 of Title II of the General Code and relates generally to motor vehicles, and this section provides for the distribution of a portion of the funds arising from the levy of an

annual license tax on motor vehicles provided by Section 6291 et seq. The pertinent portion of Section 6309-2 is as follows:

“ * * * Twenty-five percentum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district of registration as provided in this chapter. * * * ‘Maintenance and repair’ as used in this section, includes all work done upon any public road or highway in which the existing foundations are used as a subsurface of the improvement thereof, in whole or in substantial part; and in the treasuries of such municipal corporations such moneys shall constitute a fund which shall be used for the maintenance, repair, construction and repaving of public streets, and maintaining and repairing bridges and viaducts, and for no other purpose, excepting as provided in this paragraph * * * .”

As to the purposes to which these funds may be used, it will be noted that the Legislature has used slightly different language in reference to the three funds above mentioned. The provision as to the first gasoline tax is that it may be used “for the sole purpose of maintaining, repairing, constructing and repaving the public streets and roads within such corporation.”

As to the motor vehicle license funds they are to be used “for the maintenance, repair, construction and repaving of public streets, and maintaining and repairing bridges and viaducts, and for no other purpose, excepting as provided in this paragraph”, the exception being the right to use a portion thereof during the years 1939 and 1940 for payment of salaries of traffic police officers. It is further to be noted that the Legislature defines “maintenance and repair” as including “all work done upon any public road or highway upon which the existing foundations thereof are used as a subsurface of the improvement thereof in whole or in substantial part.”

As to the use of funds derived from the additional gasoline tax, a more liberal provision is made. These funds may be used “for the sole purpose of constructing, maintaining, widening, reconstructing, *cleaning and clearing* public streets and roads within such corporation and for the purchase and maintenance of traffic lights.”

These several provisions were under consideration in an opinion by my predecessor found in Opinions of Attorney General, 1935, p. 71. In that opinion it was pointed out that Section 5541-8 had been amended

by the Legislature so as to specifically allow the use of funds to be distributed under that section for the purpose of cleaning and clearing streets as well as for constructing, maintaining, widening and reconstructing such streets. But it was further pointed out that the provisions of Sections 5537 and 6309-2 are more restricted and that the funds referred to in those sections could not be used for the purchase of a service truck for the purpose of cleaning and clearing city streets.

It seems very clear that funds distributed to a municipality under the provisions of Section 5541-8 could properly be used for the purchase of salt to be applied to icy streets for the purpose of clearing the streets of ice or for the purpose of assisting in the cleaning of the streets, if that were the purpose and effect of the application of salt. As pointed out later on, however, that assumption is denied.

There remains the question whether or not the language of Sections 5537 and 6309-2 is sufficiently liberal to permit the use of the funds referred to in said sections for the purchase of salt to be used to allay icy conditions and prevent skidding of motor vehicles. If such use is to be regarded as a process of clearing or cleaning streets, it would seem clear that it would not be permissible to use these funds for the purchase of salt. If, however, the use of salt on an icy street may be considered as a means of *maintenance of the street* for the use for which it is intended, then such expenditure would be legal.

Your letter refers to Opinion No. 294, 1929 Opinions Attorney General, p. 452. That opinion involves a construction of Sections 6309-2 and 5537, and it was held that "the proceeds of such taxes may not be used for the purposes of cleaning streets or removing ice and snow", and the opinion was based largely on the ruling of a former Attorney General, found in 1928 Opinions Attorney General, p. 84, in which it was held:

"Moneys allotted to municipal corporations from the 'motor vehicle license tax' or the 'gasoline excise tax funds' may not be lawfully expended for the purpose of sweeping or cleaning streets since the sweeping and cleaning of streets is not included in the term 'maintenance and repair', as that term is defined in Section 6309-2, General Code, and used in Section 5537, General Code."

In the course of that opinion the Attorney General said at page 86

that "the word 'maintain' is practically synonymous with 'repair'", and cited *Fergus v. Rochford*, 84 Conn. 202, and *Missouri K. & T.R.R.Co. v. Bryan*, 107 S.W. 572, 576; and quoting from the latter case:

"The word 'maintain' is practically the same thing as repair, which means to restore to a sound or good state after decay, injury, dilapidation or partial construction and when used in reference to railroad right of way includes the idea of keeping the right of way in such a condition that it can be used for the purpose for which it was intended."

In an opinion which I rendered December 2, 1939, *Opinions Attorney General*, 1939, p. 2208, I had occasion to discuss the meaning of the terms "maintenance" and "repair" as applied to highways, and held:

"The term 'maintenance', as applied to highways, means such acts as will preserve the improvement in its completed condition against wear and deterioration, as distinguished from the restoration of their original state after having been damaged by wear or deterioration — which is usually referred to as 'repair'."

That opinion dealt with a construction of Sections 17-3 to 17-5 of the General Code, which required the payment of the "prevailing wage" to laborers engaged in "construction * * * or repair of any public improvement fairly estimated to cost more than three hundred dollars". The definition there stated was by way of distinguishing "maintenance" from "repair" and eliminating "maintenance" from the scope of the act. It does not follow that the definition of "maintenance", as adopted in the opinion above referred to, is all inclusive. I said at page 2210 of that opinion:

"The term 'maintenance' when used in its broad sense might well include reconstruction, enlargement, improvement, alteration, repair of highways, *and all other types of duties with reference to highways other than original construction.*"

My immediate predecessor had Sections 17-3 to 17-5 under consideration in an opinion found in 1938 *Opinions Attorney General*, p. 648, and held:

"Ordinary maintenance operations performed by municipalities which do not include repair work do not come under the regulatory provisions of Section 17-3, et seq., General Code. Common examples of such types of maintenance operations are

street cleaning and sprinkling, snow removal and cleaning of public buildings.”

One of my predecessors in an opinion found in Opinions Attorney General for 1921, p. 1180, held:

“The process of treatment with oil of municipal streets and public roads, authorized by sections 3751, 3752, 3753 and 3754 G.C., is such a street or road improvement as to come within the meaning of the words ‘maintenance’ and ‘repair’ as used in section 6309-2 of the General Code.”

Referring in the opinion to Section 6309-2 of the General Code, he said:

“Thus it would seem that the process of street or road oiling might be considered as having the tendency and effect of making more compact, by reason of its cohesive qualities, the surface of the roadbed so treated, and of evening up the same in such a manner as to reasonably come within the meaning of the words ‘maintenance’ and ‘repair’ as used in the considered section.”

It appears to me that all operations designed to keep a road or street in good and safe condition for the purpose for which it is constructed, may properly be included within the term “maintenance”. In some cases maintenance may amount to repair; in others it may be of a purely temporary or emergency character. If a portion of a concrete road or street should cave in and a planking should be substituted for a few days or a few months so as to permit traffic to go on safely until the road could be repaired, would there be any question that that is maintenance? And it would seem to follow that if the surface becomes impassable or dangerous from any other cause, such as a coat of ice, the placing thereon of material that would make a safe and usable roadway, even though temporary, would with equal reason be maintenance.

It is but ascribing to the Legislature reasonable intelligence and foresight, in view of the customary use of highways, to assume that in allocating all of the funds under consideration to the repair and maintenance of such highways, after their construction, it intended those funds to be used for all the means reasonably adapted to keeping the roads and streets in fit shape and safe condition for their intended use.

I am informed that the purpose of using salt as well as cinders or

sand on icy streets is not in any way to be classed under street cleaning or clearing; that on the contrary it produces a condition which necessitates cleaning later; that its sole purpose is to assist in rougning the roadway so as to reduce the danger from skidding. Assuming that to be the fact, if we should adopt the narrower definition of "maintenance" that would exclude the purchase and application of salt and cinders, we would be forced to the conclusion that a municipality could not pay for those materials or their application out of any of the funds raised under either the first or second gasoline tax laws or the motor vehicle license act, for if their use is not "cleaning and clearing" and is not "maintenance", it does not fall within the purview of any of those acts.

That the Legislature itself intended to give the broader meaning to the term "maintenance" is strongly indicated by reference to House Bill No. 665, being General Appropriation Act for the years 1941 and 1942. There we find that the entire appropriation for highway repair and maintenance, including whatever amounts are customarily used for keeping state highways "in passable condition" for travel, as authorized in Section 5537, was carried simply under the designations "personal service" and "maintenance". The total of this appropriation amounted to something over thirty million dollars for the biennium. The conclusion seems irresistible that the Legislature has thus given to "maintenance" the broad interpretation which I have hereinabove indicated.

It is my opinion that a municipality has the power to expend the proceeds of the motor vehicle license fees, and also the first and second gasoline taxes allocated and distributed to it, for the purchase of salt and other materials to be used on its streets to allay icy conditions and help prevent skidding of vehicles.

Respectfully,

THOMAS J. HERBERT
Attorney General.