

**Note from the Attorney General's Office:**

1930 Op. Att'y Gen. No. 30-1540 was overruled in part by 2013 Op. Att'y Gen. No. 2013-035.

1540.

MOTOR VEHICLE LICENSE AND FIRST GASOLINE TAX MONEYS APPLICABLE FOR PURCHASING MACHINERY FOR MAINTAINING COUNTY ROADS—SECOND GAS TAX FUNDS FOR PURCHASING MACHINERY FOR ROAD CONSTRUCTION ONLY.

*SYLLABUS:*

1. *Moneys distributed to counties under the provisions of Section 6309-2, General Code, which relates to the motor vehicle license tax and moneys distributed to the counties under Section 5537, General Code, which relates to the first gasoline excise tax, may be used to purchase road machinery and equipment which is to be used exclusively for maintenance and repair of the county system of roads and highways.*

2. *The funds distributed to counties under the provisions of Section 5541-8, General Code, may be used for the purpose of purchasing road machinery and equipment which is to be used exclusively for the purpose of constructing, widening and reconstructing the county system of roads and highways in such county.*

COLUMBUS, OHIO, February 19, 1930.

HON. C. E. MOYER, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—Your recent communication reads:

“Will you kindly give me your opinion as to whether or not the board of county commissioners may legally purchase road machinery and equipment out of the moneys derived from the gasoline tax and the motor license fee?”

Section 6309-2 of the General Code, as last amended, 113 O. L. 280, which provides for the distribution and use of the motor vehicle license tax, requires that such fund in the treasury of the counties “ \* \* \* shall be used for the maintenance and repair of such roads and highways and for no other purpose \* \* \* . ”

Section 5537, as last amended, 113 O. L. 279, provides that:

“Twenty-five per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state, and shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such counties. \* \* \* ”

Section 5541-9 of the General Code, as amended by the 88th General Assembly, 113 O. L. 71, and which relates to the distribution and use of the so-called second gasoline tax, requires five per cent of the highway construction fund to be distributed in equal proportion to the county treasurer of each county in the state, and further requires that such fund “ \* \* \* shall be expended by each county for the sole purpose of constructing, widening and reconstructing the county system of public roads and highways within such county.”

There are numerous opinions upon the power of the county commissioners to purchase road machinery and equipment in view of the various provisions relative to the motor vehicle license tax.

Section 7200 of the General Code expressly authorizes the county commissioners to “purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highways, bridges and culverts under their jurisdiction as they may deem necessary.”

It is therefore apparent that the county commissioners are granted the broad power to purchase such equipment as is mentioned in your communication, and the only question remaining, of course, is whether the receipts from the motor vehicle license tax and the gasoline tax may be used.

In an opinion of the Attorney General found in Opinions of the Attorney General for the year 1920, page 802, it was held that political subdivisions constituting districts of registration may not use funds coming into their hands by reason of the motor vehicle license tax for the purpose of purchasing road repair equipment such as trucks, rollers, et cetera. The theory of that opinion was that Section 6309-2, authorized the purchase of materials and not equipment in the language used in the definition relative to maintenance and repair. However, this opinion was overruled by an opinion of my predecessor found in Opinions of the Attorney General for the year 1927, page 475.

The Attorney General in the last opinion referred to, based his conclusion on the case of *State ex rel. Crabbe, Attorney General, vs. City of Columbus*, 21 O. A. 119, the headnote of which reads:

“City held empowered to expend funds allotted under gasoline excise tax law to buy sand dryer to be used in city asphalt plant, operated exclusively to prepare materials for maintaining and repairing streets, since city officials have latitude of discretion in use of such funds so long as money is spent to maintain and repair highways, in view of General Code, Section 5537.”

Also in an opinion by the Attorney General, found in Opinions of the Attorney General for 1927, page 154, it was held as disclosed by the syllabus, that:

“Counties may expend funds apportioned to them under Section 5537 of the General Code, to purchase road drags, which are to be used exclusively in maintaining and repairing roads, which are a part of the county road system.”

In view of the foregoing, the conclusion is compelled that the tax arising under Section 6309-2 of the General Code, and the gasoline tax arising under Section 5537, General Code, may be used in the purchase of road equipment machinery by county commissioners when such machinery is to be used for the sole purpose of maintaining and repairing roads constituting part of the county system of roads and highways.

However, the funds arising under Section 5541-8, General Code, in so far as counties are concerned, may not be used for maintenance and repair but are required to be used for constructing and reconstructing. Obviously the proceeds of such tax may not be used for purchase of machinery which is to be used for maintenance and repair.

On the other hand, if it were practical for the county commissioners to purchase road machinery to be used for construction and reconstruction purposes exclusively, by the same reasoning that has been used in reaching the conclusion that such machinery and equipment may be purchased for maintenance and repair, it would appear that such machinery could be purchased from the so-called second gasoline tax for the purpose of construction and reconstruction.

Without further discussion it is my opinion that:

1. Moneys distributed to counties under the provisions of Section 6309-2, General Code, which relates to the motor vehicle license tax and moneys distributed to the counties under Section 5537, General Code, which relates to the first gasoline excise tax, may be used to purchase road machinery and equipment which is to be used exclusively for maintenance and repair of the county system of roads and highways.
2. The funds distributed to counties under the provisions of Section 5541-8, General Code, may be used for the purpose of purchasing road machinery and equip-

ment which is to be used exclusively for the purpose of constructing, widening and reconstructing the county system of roads and highways in such county.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*

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1541.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND ARTHUR IVONE, CINCINNATI, OHIO, FOR ERECTION OF MEMORIAL ON STATE HOUSE GROUNDS TO OHIO VETERANS OF WORLD WAR AT AN EXPENDITURE OF \$8,500.00.

COLUMBUS, OHIO, February 20, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—There has been submitted for my approval a contract between the State of Ohio, acting by the World War Veterans Memorial Commission, and Arthur Ivone of Cincinnati, Ohio. This contract which is made pursuant to House Bill No. 9 (113 O. L. 14) (Sections 15289-19 to 15289-24, inclusive, General Code) covers the construction and completion of contract for the erection of a memorial on the state house grounds to the Ohio Veterans of the World War, and calls for an expenditure of eight thousand five hundred dollars (\$8,500.00).

There has been submitted the certificate of the Director of Finance to the effect that there are unencumbered legal balances appropriated in a sum sufficient to cover the obligations of the contract. There has been submitted evidence that the consent and approval of the Controlling Board to the release of the ten thousand dollars appropriated by Section 6 of said House Bill No. 9 (G. C. 15289-24) 88th General Assembly, for the purposes of this contract, have been obtained. In addition there has been submitted a contract bond in the amount of eight thousand five hundred dollars upon which three persons, namely Thomas Ivone, Rose Ivone and R. R. Ivone, respectively, appear as sureties.

It is to be noted that the commission, authorized by Section 2 of said House Bill No. 9, 88th General Assembly (G. C. 15289-20) to erect the memorial, has properly carried out all preliminary procedure under Section 3 of the said act (G. C. 15289-21). Moreover, the state architect has properly co-operated as required by the last mentioned section.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you together with all other data submitted in this connection.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*