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1. MOTOR VEHICLE LICENSE TAX—GASOLINE TAXES—FUNDS ALLOCATED TO MUNICIPALITY—MAY BE USED TO DEFRAY EXPENSE TO PREPARE MASTER STREET PLAN—SECTIONS 4501.04, 5735.23, 5735.27 RC.

2. FUNDS ALLOCATED TO MUNICIPALITY UNDER THESE SECTIONS MAY NOT LAWFULLY BE USED TO PAY EXPENSE OF ZONING OR REZONING MUNICIPALITY.

SYLLABUS:

1. Funds allocated to a municipality from the motor vehicle license tax pursuant to Section 4501.04, Revised Code, and from gasoline taxes pursuant to Sections 5735.23 and 5735.27, Revised Code, may be used to defray the expense of preparing a master street plan for such municipality.

2. Funds allocated to a municipality pursuant to Sections 4501.04, 5735.23 and 5735.27, Revised Code, may not lawfully be used to pay the expense of zoning or rezoning such municipality.

Columbus, Ohio, July 14, 1954

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

I have before me your communication, in which you request my opinion in answer to the following questions:

"(1) Can funds received from the Motor Vehicle License and the Gasoline Tax be used to employ an engineer to make an exhaustive study and report for a Master Street Plan for the City of Norwalk?

"(2) Can a portion of the Motor Vehicle License moneys and the Gasoline Tax be used to defray the expense of re-zoning the city and setting up the various uses and fixing the boundaries of the various zones, with the thought in mind that all this is rather closely tied together, because a re-zoning would undoubtedly provide for proper and more adequate off street parking, which would relieve the traffic congestion on all the streets?"

Accompanying your letter is a communication from the Solicitor of Norwalk, from which I quote certain paragraphs:

"At present there is a little over $121,000.00 in these two funds, some of which will be used on the Norwalk streets currently, but there will still remain a substantial balance.

"There are substantial rumors that when the turnpike is completed and in operation, the entrance to the turnpike north of Norwalk as presently planned will provide for a 'truck headquarters,' or truck transfer point, which probably would increase the truck traffic near Norwalk, to and from the turnpike.

"The City would like to use some of this money to provide necessary truck routes near the city; that is, through the city; and also to extend some of the secondary streets, and perhaps widen and improve them, to help carry some of the traffic to relieve the congestion on Main Street.

"Also, could $8000.00 or $9000.00 of this money be used to defray the expense of a rezoning of the city, and setting up the various uses and fixing the boundaries of the various zones. The thought being that all this is rather closely tied together, for a re-zoning would undoubtedly provide for proper and more adequate off street parking, to relieve the traffic congestion on all the streets."

As a background for the discussion of these questions I call attention to certain provisions of the Ohio Constitution which I believe underlie the questions as to the uses to which funds realized from these taxes may be put. Section 5, of Article XII reads as follows:

"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."

This provision is a part of the Constitution of 1851.

Section 5a, of Article XII was adopted November 4, 1947, and became effective January 1, 1948. It reads 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."

Section 5 above quoted, is not only a mandate to the legislature to state distinctly the object of the law, but it is also a prohibition against the expenditure of the proceeds of the tax for any purpose not so stated. It will thus be observed that no use can be made of the proceeds of either of the taxes in question except for the objects that are stated "distinctly" in the legislation providing for their imposition. We will therefore undertake to determine precisely what the General Assembly has in its legislation "distinctly" authorized by way of expenditure.

Section 5a above quoted, is a direct limitation on the power of the legislature to authorize any use of moneys arising from motor vehicle licenses or motor vehicle fuel. Briefly summarized, such uses are limited to highway purposes. We turn, therefore, to the language of the statutes authorizing and limiting the objects and purposes to which these taxes may be devoted.

The motor vehicle license tax is levied under Section 4503.02, Revised Code, which in pertinent part, reads as follows:

> "An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of such vehicles, constructing, maintaining, and repairing public roads, highways, and streets, maintaining and repairing bridges and viaducts, * * *"

Section 4501.04, Revised Code, relates to the purposes for which the motor vehicle license tax may be expended, and the provision dealing with the portion of the tax allocated to municipalities, reads as follows:

> "Such funds 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.*"
> (Emphasis added.)

What is commonly referred to as the "first gasoline tax" is authorized by Section 5735.05, Revised Code, which, so far as pertinent, reads as follows:

> "To provide revenue for maintaining the state highway system, to widen existing surfaces on such highways, to resurface such highways, to enable the counties of the state properly to maintain and repair their roads, to enable the municipal corporations of the state properly to maintain, repair, construct, clean, and clear the public streets and roads and purchase and maintain traffic lights and repave their streets, * * *"

Section 5735.23, Revised Code, provides for the distribution of this tax, and as to the use by a municipality of the portion allocated to it, provides:

> "The amount received by each municipal corporation shall be used *only* for maintaining, repaving, constructing and repaving the public streets and roads, and erecting and maintaining street and traffic signs and markers within such corporation, provided that not more than one fourth of such receipts may be used for cleaning and clearing public streets and roads and for the purchase and maintenance of traffic lights."

The so-called "second gasoline tax" is levied by Section 5735.25, Revised Code, which reads:

> "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, * * *"

Section 5735.27, Revised Code, governs the expenditure of the municipality's share of this tax in the following words:

> "* * * 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." (Emphasis added.)

I do not consider that we have here any question as to the conformity of these statutes to the provisions of Section 5a supra. Clearly, the legislature is well within its bounds, so far as this constitutional provision is concerned, in enacting and retaining the provisions which I have quoted.

These statutes have been under consideration in a considerable number of opinions of the Attorney General and while the language of the statutes has been changed from time to time, I do not consider that there have been any changes which would affect the interpretations given by my predecessors, as applying to the questions here under consideration.

In opinion 1453, Opinions of the Attorney General for 1924, page 254, it was held:

> "1. A part of the general expenses of the engineering department of a city, whose functions include maintenance and repair of streets, as that phrase is defined in section 6309-2 of the General Code, may not be legally paid from the municipality's share of the motor vehicle license tax.
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> "2. Expenses of providing engineering for the special purpose of such maintenance and repair may legally be paid out of such maintenance and repair fund."

Section 6309-2, General Code, there under consideration, which is substantially the same as Section 4501.04, Revised Code, provided that the proceeds of the motor vehicle license tax, "shall be used for the maintenance and repair of public roads and highways and streets, and for no other purpose." In later amendments "construction" was added. The then Attorney General, in the course of the opinion used this language:

> "It will be noted that said section 6309-2 of the General Code limits the use of the funds provided for therein, and going to the municipality, to the 'maintenance and repair' of streets. All items of expense of engineering and supervision, and other items of expense specially created on account of such 'maintenance and repair' are properly payable out of such 'maintenance and repair fund.'"

Reference was made to the case of Longworth v. Cincinnati, 34 Ohio St., 101, which related to the costs which might properly enter into an assessment for street improvement, and where it was held:

> "Where the surveying and engineering of such improvement were performed by the chief engineer of the city and his assist-

ants, who were officers appointed for a definite period, at a fixed salary, which the law required to be paid out of the general fund of the city, the reasonable cost to the city, of such surveying and engineering, cannot be ascertained and assessed upon the abutting property, as a necessary expenditure for the improvement.

"If a superintendent of such an improvement is necessary, and one is employed by the city for that particular improvement, the amount paid by the city, for his services may properly be included in the assessment."

Here, the court made a distinction between engineering expense of a general character and engineering expense relating directly to a particular improvement.

The 1924 opinion was quoted with approval in Opinion 865, Opinions of the Attorney General for 1929, page 1343:

"The salary of a city superintendent of streets, who performs general duties with reference to streets and sewers, may not legally be paid from the motor vehicle license and gasoline tax receipts, in whole or in part."

To like effect, see Opinion No. 1491, Opinions of the Attorney General for 1930, page 211; No. 2851, Opinions of the Attorney General for 1931, page 55; No. 5750, Opinions of the Attorney General for 1936, page 55.

In the 1931 opinion above noted, the then Attorney General made this general comment:

"* * * It is the general trend of the holdings with reference to this subject that any expenses directly incident to maintenance, repair, construction, reconstruction, widening or repaving of streets and roads in a municipality may be paid from the municipality's share of these taxes. Unless, however, such expense is directly and solely concerned with the purposes mentioned, the funds may not properly bear the expense."

All of the opinions above referred to indicate that the writers felt the necessity of confining the use of these funds rather strictly to the purposes stated in the statutes and to specific improvements, with only such incidental uses as were plainly required in carrying out the purposes expressly authorized, and necessitated by the particular improvements contemplated.

However, our Supreme Court appears to have taken a more liberal attitude in construing these same statutes in so far as they relate to the

expenditure of the State's share of the several taxes hereinabove referred to. In the case of State, ex rel, Kauer v. Defenbacher, 153 Ohio St., 268, the relator, the Director of the Department of Highways, brought the action against the defendant, Director of Finance for a writ of mandamus requiring the issuance of an encumbrance certificate in the sum of $600,000 on moneys appropriated by Amended House Bill 654, from the highway improvement fund, such appropriation having been made to enable the Ohio Turnpike Commission to make a "study of any turnpike project or projects," and to employ the necessary engineering and other forces for such purpose.

It appears from the statement of facts in the opinion that a large portion of the fund from which the appropriation was made consisted of moneys derived from what has been referred to as the "second gasoline tax," levied by authority of Section 5541 of the General Code, and distributed under the provisions of Section 5541-8 of the General Code, now Section 5735.27, Revised Code. The court granted the writ. The holding of the court as expressed in the syllabus, in so far as it relates to the gasoline tax fund is found in paragraphs 2, 5 and 6 of the syllabus, reading as follows:

> "2. Money expended for the study of a turnpike project represents a capital outlay for additions and betterments for highway improvement.
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> "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 money to expended would, as contemplated by Section 5 of Article XII of the Constitution, be used for the state object to the tax imposed by Section 5541, General Code.
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> "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 course of the opinion, the court, after quoting Section 5 and 5a of Article XII said:

> "The portions of Amended House Bill No. 654 hereinbefore quoted disclose that the highway improvement fund, sought to be encumbered by relator in the instant case, consists of moneys appropriated from the highway construction fund. The prin-

cipal source of moneys in the highway construction fund is the gasoline tax levied by Section 5541, General Code. That section provides in part:

'For the purpose of providing revenue for supplying the state's share of the cost of constructing, widening and reconstructing the state highways of this state * * * an excise tax is hereby imposed * * *,'

"In our opinion, moneys to be expended for the study of a turnpike project, pursuant to Section 1220, General Code, come within the definition 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 moneys so used would be used for the stated object of the tax imposed by Section 5541, General Code.

"We are further of the opinion that moneys 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, Article XII of the Constitution."

In view of the rather liberal construction given to the language of the statutes as to the use by the State of its share of the tax in question, I am impelled to the conclusion that the same liberality of construction must apply as to the authority conferred upon municipalities. In other words, we must conclude that "construction" of highways involves not only the planning for and building of definite improvements but also embraces a comprehensive study of the location of new highways and the possible relocation of existing highways, with a view to an improved plan for the future development of a municipality. Such a conclusion certainly is founded on good reason if we observe the fact that cities, in the past, have been allowed to grow up without any planning, and that they have in many cases acquired a hodge-podge of highways that are badly located, crooked, without proper outlets, and much too narrow for modern traffic; and that it is highly desirable, in so far as it is possible by careful planning, to avoid such conditions in the future.

In the light of the Defenbacher decision, I can see no reason why the cost of a survey and master street plan made by that commission should not be paid for out of the motor vehicle and gasoline tax funds.

As to the proposal to use the funds in question to defray the expense of re-zoning the city, that appears to me to be so remotely related to the

construction and maintenance of streets, if at all related, that the proposal must be rejected without extended consideration. The theory underlying zoning is that it is conducive to the health, safety and morals of the people. Euclid v. Ambler Realty Company, 272 U. S., 365; Pritz v. Messer, 112 Ohio St., 628; Wondrak v. Kelly, 129 Ohio St., 268. Zoning regulations generally take the form of dividing the municipality into districts and prohibiting in certain districts any buildings except residences, and limiting mercantile and industrial buildings to certain areas. They also usually regulate the location, height, and bulk of buildings, and the set back distance from streets.

It may be conceded that some regulation as to streets could enter into a zoning plan but it would only be incidental, and would certainly not justify the inclusion of the expense of a zoning plan in the stated objects of the tax laws which we are considering and the funds which they produce.

Accordingly, in specific answer to your questions, it is my opinion:

1. Funds allocated to a municipality from the motor vehicle license tax pursuant to Section 4501.04, Revised Code, and from gasoline taxes pursuant to Sections 5735.23 and 5735.27, Revised Code, may be used to defray the expense of preparing a master street plan for such municipality.

2. Funds allocated to a municipality pursuant to Sections 4501.04, 5735.23 and 5735.27, Revised Code, may not lawfully be used to pay the expense of zoning or re-zoning such municipality.

Respectfully,
C. WILLIAM O'NEILL
Attorney General