

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

1926 Op. Att'y Gen. No. 26-3092 was overruled by  
2013 Op. Att'y Gen. No. 2013-035.

General Code is necessary to be obtained in connection with the pledging or assigning of interest bearing obligations of building and loan associations as collateral security.

Respectfully,  
C. C. CRABBE,  
*Attorney General.*

3092.

THE PROCEEDS DERIVED FROM THE GASOLINE TAX MAY NOT BE USED BY THE COUNTY FOR THE PURCHASE OF ROAD MACHINERY AND EQUIPMENT.

*SYLLABUS:*

*The proceeds derived from the gasoline tax may not be used by the county for the purchase of road machinery and equipment.*

COLUMBUS, OHIO, January 25, 1926.

HON. G. WALTER BOOTH, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—This will acknowledge receipt of a recent communication from Mr. Harold W. Slabaugh, an assistant prosecuting attorney in your office, requesting an opinion on the two following questions:

1. May the proceeds of the annual license tax, levied upon the operation of motor vehicles, be used for the purchase of road machinery and equipment?
2. Same question as to proceeds derived from the gasoline tax.

A negative answer to the first question will be found in an opinion of my predecessor, found in the Opinions of the Attorney General for the year 1920, Vol. 1, page 802, where it was held, as shown by the syllabus, 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, etc., which opinion is approved and followed.

The gasoline tax, referred to in the second question, is collected by virtue of the provisions of Enacted House Bill No. 44 of the Eighty-sixth General Assembly, which is found in 111 Ohio Laws, 295. According to the title thereof, the purpose of this act is, among other things, to provide for the adequate maintenance of the public highways and streets of the state.

The purpose of levying the tax is set out in Section 5527 of the General Code, the pertinent part of which reads:

“For the purpose of providing revenue for maintaining the main market roads and inter-county highways of this state in passable condition for travel, for repairing the damage caused to such highway system by motor vehicles used on the same, for widening existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon, for resurfacing such highways where existing surfaces have become worn or rutted, for enabling the several counties and municipal corporations of the state to properly maintain and repair their roads and

streets, and supplement revenue already available for such purposes and arising from direct taxation and from registration fees of motor vehicles, and for distributing equitably upon those persons using the privilege of driving such motor vehicles upon such highways and streets a fair share of the cost of maintaining and repairing the same, there is hereby levied and imposed on the sale and use of each gallon of motor vehicle fuel sold or used by any dealer, as herein defined, within the state of Ohio, an excise tax of two cents, subject, however, to the following specific exemptions: \* \* \*

That part of the tax going to the county treasuries is to be used for the purposes as set out in section 5537 of the General Code, the pertinent part of which reads:

“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.”

The above quotations disclose that the purpose for which the tax is levied is to provide a fund for the maintenance and repair of roads and streets in the state, and that proportion of the tax going to the counties is to be used for the sole purpose of maintaining and repairing the county system of public roads and highways within the respective counties. Nowhere in the act is the phrase “maintenance and repair” defined and, unlike the act providing for the motor vehicle license tax, this act does not provide of what maintenance and repair shall consist. The fund created in the county treasury is a maintenance and repair fund, without statutory definition or limitation.

In the opinion referred to in answer to your first question, found in Opinions of the Attorney General for 1920, Vol. 1, page 802, with reference to funds coming into the hands of the county commissioners by reason of the motor vehicle license tax, it was held that the same could not be used for the purpose of purchasing road repair equipment, such as trucks, rollers, etc. This opinion is based partially on the proposition that section 7200 of the General Code provides that the county commissioners may purchase such machinery, tools and other equipment for the construction, improvement, maintenance or repair of highways, bridges and culverts out of the road funds of the county. In the above opinion may be found the following:

“It is believed that the only provision authorizing the county to purchase equipment of the character you mention specifies the purposes for which it is to be used, among other things, ‘construction’ of highways. It will be observed that under the provisions of section 6309-2, supra, maintenance and repair funds cannot be expended for new construction. This section strengthens the position that it was the intent of the legislature to limit the expenditure of this fund for materials and labor in the maintenance and repair of roads and streets, the foundations of which are already in existence.”

Further, on page 804 of the same opinion, may be found the following:

“From a practical standpoint, it seems inconceivable that a county or municipality would use such equipment as you describe exclusively in con-

nection with the maintenance or repair of highways and other purposes. Therefore, it will be seen that if by the most liberal construction the position were taken that by implication such equipment could be purchased, its use would necessarily be limited strictly to the maintenance and repair of highways. Such a construction does not seem tenable."

Section 5537 of the General Code, which relates to the gasoline tax excise fund payable to the county, provides as follows:

"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."

While this section is somewhat different in wording from the section relating to funds from the motor vehicle license tax, it will be noted that the section uses the words "shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such county."

It is believed that the use of the words "for the sole purpose of" must be given great weight in interpreting this section. This would lead to the question of whether the purchase of machinery is a maintenance of the public roads and highways.

It might be contended, and with a strong argument, that machinery and equipment will provide a better and faster method of applying material, and to that extent the legislature has intended that such machinery and equipment may be purchased as will facilitate the maintenance and repair designated in the statute. It might even be contended that purchase of materials would be useless without machinery and equipment to apply the same. It may also be admitted that a construction should not be given to a statute which would make it impossible of operation or would make it operate in an absurd manner if another construction which would make it operative be possible.

In 36 Cyc., 1106, relating to the construction of statutes, may be found the following:

"The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority. But where the language of the statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, to absurdity, or to contradictory provisions, the duty devolves upon the court of ascertaining the true meaning. If the intention of the legislature cannot be discovered, it is the duty of the court to give the statute a reasonable construction, consistent with the general principles of law."

Section 5537 provides:

"and shall be used for the *sole purpose* of maintaining and repairing the county system of public roads and highways within such county."

These words can have but one meaning, that is, that these funds can be used for no purpose except for maintaining and repairing the county system of roads.

Upon the matter of construction, reference may be made to paragraph 4 of section 1221 of the General Code, which is as follows:

"The funds derived by the state highway department from the registration of automobiles shall be used for the maintenance and repair of the inter-county highways and main market roads of the state. The state highway commissioner may use part of said funds as may be necessary in establishing a system of patrol or gang maintenance on the inter-county highways and main market roads, and for that purpose may employ such patrolmen, laborers and other persons and teams and purchase or lease such oilers, trucks, machinery, tools, material and other equipment and supplies as may be necessary."

In the latter section the legislature has deemed it necessary to expressly provide for the uses to which the fund may be applied. After providing for maintenance and repair, then further provision is made for the purchase of machinery, equipment and other items of expense.

Reference may also be had to section 6948-1, which authorizes the county commissioners, in lieu of constructing road improvements by contract to construct the same by force account. However, the legislature, in making such provision, did not leave to the implied power the purchase of machinery and tools for such purpose, but by section 7200 expressly provided for the purchase of machinery, tools, trucks and equipment for the purpose of constructing, maintaining and repairing roads.

If the legislature had intended to give authority to purchase machinery and equipment from the gasoline tax funds, we believe that express authority so to do would have been expressly granted.

There is a general rule of statutory construction that when an express power is granted there follows incidental thereto the implied power to carry out the purpose of the express power.

In the case of *Schneider vs. Menasha*, 95 N. W., 94, the following rule was laid down:

"A municipal corporation possesses, as incidental to its express powers and the object to its existence, implied authority to do these things essential to efficiently accomplish the latter, and all those powers germane and reasonable necessary or convenient to the efficient exercise of the former."

In the above case they further held as follows:

"A city having express authority to grade and pave streets and to purchase and hold real estate necessary or convenient for its use, has, by implication therefrom, authority to use all reasonable methods of executing the same, including that of purchasing a stone quarry within or without its corporate limits for the purpose of obtaining therefrom raw material from which to manufacture crushed rock."

The above case lays down a general rule on the implied powers necessary to efficiently exercise the express powers, but does not refer to the use of any particular fund which is for a certain specific purpose, nor does it appear that, as in the case before us, express power had been given by other legislative enactment.

As far as the counties are concerned, the legislature has not seen fit to leave the purchase of machinery and tools and such equipment as may be necessary in the maintenance, construction and repair of roads, to the implied power of the

county. It has made express provision for the purchase of such machinery, tools and equipment and therefore the right to purchase under the implied power of the county is impliedly negated.

It must also be remembered that no moneys can be paid from the treasury of the county except there be provision of law therefor. Also, that in the limitation of tax rates, the legislature has provided for the maintenance of the county and its particular functions within certain limitations. To permit the purchase of such machinery and tools from the proceeds of the gasoline tax fund would be in disregard of the limitations so provided.

While the question is not free from doubt, it is the conclusion that since the legislature has (1) expressly limited the use of these moneys to "the sole purpose of maintaining and repairing the county system of public roads and highways," (2) has given the county express power to purchase machinery, equipment and tools under section 7200, which power excludes any reliance upon the implied power, and (3) has in other cases made express provision for the purchase of machinery, equipment and tools as, in section 1221, it did not intend to permit the purchase of such equipment, machinery and tools from the proceeds of the gasoline tax.

I am considering your question as to whether or not the proceeds of the gasoline tax fund, to which the county is entitled under section 5537, may be expended by the county for the purchase of road machinery and equipment, and I do not mean to hold that such funds may not be properly expended in proceeding with such improvement by contract rather than by force account.

Respectfully,

C. C. CRABBE,  
*Attorney General.*

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3093.

TAXES AND TAXATION—PAYMENT OF TAX DURING PENDENCY OF  
APPEAL ON THE VALUATION OF PROPERTY ABATES THE AP-  
PEAL—SECTION 5609 G. C. CONSTRUED.

*SYLLABUS:*

1. *Sections 5609, et seq., make definite provision for tender by a complaining tax payer of the amount he concedes due as tax upon the property complained of, whether as to personal property or real estate, and payment of the tax during the pendency of appeal on the valuations subject to such complaint abates the appeal.*
2. *In view of the provisions of sections 5609, et seq., protest, whether oral or written, has no effect whatsoever upon the rights of the complaining taxpayer, the procedure necessary to be followed being prescribed by said sections.*

COLUMBUS, OHIO, January 25, 1926.

*The Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—Your recent communication is as follows:

"I. X. filed a complaint with the board of revision of C. County against the assessment of his *personal* property and then appealed from the decision of said board to this commission. On the hearing before us it developed that pending his appeal he had paid his full tax for the year on the basis of the assessment as made.