

noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

JOHN W. BRICKER,
Attorney General.

6128.

TOWNSHIP TRUSTEES—NOT AUTHORIZED TO SPEND
GASOLINE TAX FUNDS FOR MONUMENTING HIGHWAY
RIGHT OF WAY LINES.

SYLLABUS:

A board of township trustees may not legally expend the proceeds of the gasoline tax arising under the provisions of Section 5541-8, General Code, for the purpose of monumenting the right of way lines of roads under their jurisdiction.

COLUMBUS, OHIO, September 29, 1936.

HON. CLIFTON L. CARYL, *Prosecuting Attorney, Marysville, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion which reads as follows:

“This office desires an opinion on the following inquiry:

Whether or not a board of township trustees may lawfully expend funds derived from gasoline tax, and which fund is designated as a gasoline fund, for the purpose of monumenting county and township highways?”

The gasoline tax is an excise tax provided for by legislative enactment for definite purposes and is limited in its use by both constitutional and express legislative provisions, strictly to the purposes for which the tax was levied. Section 5541-8, General Code, is pertinent to your inquiry and in so far as it is material, reads as follows:

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Seventeen and one-half per cent of said highway construction fund shall be appropriated for and divided in equal proportions among the several townships within the state, and shall be paid on vouchers and warrants drawn by the auditor of state to the county treasurer of each county for the total amount payable to

the townships within each of the several counties. Upon receipt of said vouchers and warrants each county treasurer shall pay to each township within the county its equal proportional share of said funds which shall be expended by each township for *the sole purpose of constructing, maintaining, widening and reconstructing the public roads and highways within such township*. Provided, however, that no part of said funds shall be used for any purpose except to pay in whole or part the contract price of any such work done by contract or to pay the cost of labor in constructing, widening and reconstructing such roads and highways and the cost of materials forming a part of said improvement; provided further that no portion of such funds shall be used for the purchase of road machinery or equipment; and, provided further that all such improvement of roads shall be under the supervision and direction of the county surveyor as provided in Section 3298-15k of the General Code; and provided further that no obligation against such funds shall be incurred unless and until plans and specifications for such improvement, approved by the county surveyor, shall be on file in the office of the township clerk; and provided further that all contracts for material and for work done by contract shall be approved by the county surveyor before being signed by the township trustees and all disbursements of such funds shall be upon vouchers of the township trustees approved by the county surveyor. The trustees of any township are hereby authorized at their discretion to pass a resolution permitting the county commissioners to expend such township's share of said funds, or any portion thereof, for the improvement of such roads within said township as may be designated in said resolution."

By monumenting the highways is meant to place markers on the right of way lines. This serves as a guide in determining the exact boundary lines of the right of way and very often may prevent a dispute or litigation concerning the title to the property adjacent to the right of way. The only word in Section 5541-8 supra which might authorize such use of the gasoline funds, is the word "maintaining". In the case of Missouri K. & T. R. R. Co. v. Bryan (Texas) 107 S. W. 572, 576 it is said:

"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 to be found in the Opinions of the Attorney General for 1928, Volume I, Page 84, it was held, as disclosed by the syllabus:

“Monies 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.”

The following language appears at Page 86:

“It seems quite clear that in view of the foregoing discussion, and the authorities, that ‘cleaning and sweeping’ streets is not ‘maintenance and repair’ within the meaning of these terms as the same are used in Sections 6309-2 and 5537, supra. The terms as used in said statute contemplate some definite repair or improvement of a street or road such as a resurfacing, or repairing of holes and other depressions, where the existing foundations are used in whole or substantial part as a subsurface for the repair or improvement. * * *”

It would seem that while it might be argued with some force that anything that would tend to preserve the title to a right of way would be considered as maintaining a highway, nevertheless, it would seem that the Legislature intended by the use of the word “maintaining” something bordering on a physical maintenance of the right of way. Force is given to this conclusion by the fact that the Legislature thought it necessary to expressly legislate on this subject in order to have the state highways monumented. Section 1192, General Code, reads in part as follows:

“It shall be the duty of the director, when he acquires property for highway purposes, either by purchase or appropriation, to promptly monument or cause to be monumented the right of way lines of the property so acquired.

It shall also be the duty of the director, as soon as practicable in view of the availability of the funds and forces of his department, to definitely and accurately ascertain and monument the right of way lines of the roads and highways on the state highway system.

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Likewise Section 5541-8 supra contains a proviso with reference to the use of the township's portion of the gasoline tax. A reading of the proviso clearly indicates that the Legislature intended that a township should only expend gasoline tax monies for the purposes expressly enumerated in Section 5541-8, General Code. The uses of such money should therefore not be extended in the absence of express legislative authority.

It is therefore my opinion, in specific answer to your inquiry, that a board of township trustees may not legally expend the proceeds of the gasoline tax arising under the provisions of Section 5541-8, General Code, for the purpose of monumenting the right of way lines of roads under their jurisdiction.

Respectfully,

JOHN W. BRICKER,
Attorney General.

6129.

APPROVAL—PAPERS IN CONNECTION WITH THE CONVERSION OF THE MIDLAND SAVINGS AND LOAN COMPANY, INTO MIDLAND FEDERAL SAVINGS AND LOAN ASSOCIATION.

COLUMBUS, OHIO, September 29, 1936.

HON. WILLIAM H. KROEGER, *Superintendent of Building and Loan Associations of Ohio, Columbus, Ohio.*

DEAR SIR: I have examined the various papers submitted by you in connection with the conversion of The Midland Savings and Loan Company, into Midland Federal Savings and Loan Association, and find the papers submitted and the proceedings of said The Midland Savings and Loan Company, as disclosed thereby, to be regular and in conformity with the provisions of Section 9660-2 of the General Code of Ohio.

All papers, including two copies of the charter issued to the said Midland Federal Savings and Loan Association, are returned herewith to be filed by you as a part of the permanent records of your department, except one copy of the charter which the law provides shall be filed by you with the Secretary of State. The law further provides that such filing with the Secretary of State shall be within ten days after the requirements of said Section 9660-2 have been complied with by The Midland Savings and Loan Company, and that your approval shall be en-