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ENGINEER, COUNTY—CAN NOT EXPEND MONEY FROM GASOLINE TAX FUND FOR ANY IMPROVEMENT UNLESS BENEFITS OF IMPROVEMENT ACCRUE TO TRAVELING PUBLIC.

SYLLABUS :

A county engineer can not expend money from the gasoline tax fund for any improvement unless the benefits of such improvement accrue to the traveling public.

Columbus, Ohio, January 10, 1950

Hon. Reeder C. Hutchinson, Prosecuting Attorney
Defiance County, Defiance, Ohio

Dear Sir :

Your letter requesting my opinion is as follows :

“I request your opinion on the following question. Can the County Engineer expend money from the gasoline tax fund for the purpose of lengthening the span of a bridge in order to provide a wider passage for a flow of water in order to provide better drainage facilities when the stream underneath the bridge is widened and deepened by petition of land owners?

“In order to clarify the question, the situation is this. A presently existing highway bridge is adequate for traffic purposes on the highway and when built, the span was long enough to satisfactorily carry away the drainage water. A contem-

plated ditch improvement will accelerate the flow of water and the land owners wish to have the bridge lengthened to provide a wider bed for the stream or ditch. They expect this to be done by the County Engineer out of his gasoline tax fund for the purpose of construction, reconstruction, maintenance and repair of highways. The Engineer seriously wonders whether, since this does not benefit the highway travelers, he can legally expend the funds in this manner.

"I can find no statute and no opinion of the Attorney General which will help me in answering his question and so, request your opinion."

Section 5537, General Code, relates to the distribution of taxes levied under Section 5527, General Code, and is commonly referred to as the "first gasoline tax." The pertinent portion of Section 5537, General Code, reads 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 proportion to the county treasurer of each county within the state, and shall be used only for the purpose of maintaining and repairing the county system of public roads and highways within such counties, the construction and repair of walks or paths along county roads in congested areas and the construction and maintenance of a suitable building or buildings for the housing of county road machinery shall be within this purpose. * * *"

Section 5541-8, General Code, relates to the distribution of what is frequently referred to as the "second gasoline tax," and the applicable portion of said section 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 in equal proportions to the county treasurer of each county for the sole purpose of maintaining, constructing, widening and reconstructing the county system of public roads and highways within such county. * * *"

As to the purposes for which these funds may be used, it will be noted that the Legislature has used slightly different language. The provision as to the "first gasoline tax" is that it may be used "only for the purpose of maintaining and repairing the county system of public roads and highways within such counties, the construction and repair of walks or paths along county roads in congested areas and the construction and

maintenance of a suitable building or buildings for the housing of county road machinery.”

As to the use of funds derived from the “second gasoline tax,” said funds are for the “sole purpose of maintaining, constructing, widening and reconstructing the county system of public roads and highways.”

Whether the maintenance and repair of bridges is included within the purposes of the gasoline tax fund is answered in Opinion No. 3918, Opinions of the Attorney General for 1932, page 16, where the second branch of the syllabus reads as follows :

“2. The county’s share of the proceeds of the gasoline tax arising under Sections 5527 and 5541 of the General Code may be used for the maintenance and repair of bridges on public roads and highways in the county system of highways.”

Thus apprised that the gasoline tax fund was established particularly to maintain and repair public roads and highways and that bridges are an integral part of such a system, your attention is invited to Section 5526, General Code, where “public highways” are defined as follows for purposes of the act providing such fund :

“* * * ‘Public highways’ are hereby defined as lands and lots over which the public, either as user or owner generally has a right to pass, * * *.”

This definition, coupled with the purposes of the gasoline tax fund set out in Section 5527, General Code, leads unquestionably to the conclusion that any benefits afforded by gasoline taxes must accrue to the traveling public.

Whether the increased width of the ditch extending to the bridge may necessitate such improvement to prevent deterioration of the structure or whether such increased flow of water due to the widening of the ditch will affect the traveled portion of the road introduce questions of fact which may not be disposed of at this time. I must, therefore, assume, for the purpose of this opinion, that the bridge in its present condition is adequate for purposes of travel.

Therefore, in specific answer to your question, I am of the opinion that the county engineer can not expend money from the gasoline tax fund for any improvement unless the benefits of such improvement accrue to the traveling public.

Very truly yours,

HERBERT S. DUFFY,

Attorney General.