

OPINION NO. 79-045**Syllabus:**

1. County commissioners may use the proceeds of a county-wide levy for general construction, reconstruction, resurfacing and repair of roads and bridges in counties or townships to make contributions to township trustees, based upon road mileage in each township, for the purpose of repair and maintenance of township roads. County commissioners may not, however, make contributions to assist township trustees in the construction, reconstruction, resurfacing or improvement of township roads. (1972 Op. Att'y Gen. No. 72-080 approved and followed).
2. Absent express statutory authorization, county commissioners may not make contributions to, or share proceeds of a road levy with, township trustees for the purpose of any construction, improvement, or repair, of county roads.

To: Richard E. Bridwell, Muskingum County Pros. Atty., Zanesville, Ohio
By: William J. Brown, Attorney General, July 31, 1979

I have before me your request for my opinion in which you ask the following question:

May county commissioners share the proceeds of a county-wide road and bridge levy with townships by making a direct grant based upon road mileage in each township?

As the material you sent me indicates, the levy for road purposes was couched pursuant to the authority of R.C. 5705.19(G), which permits tax monies to be raised in excess of the ten-mill limitation for the general construction, reconstruction, resurfacing, and repair of roads and bridges in counties and townships.

The resolution of your question must focus on the class of roads which will benefit from the proposed grant. R.C. 5535.01 divides the public highways of the state into three classes: state roads, county roads, and township roads. Subdivisions (B) and (C) of that section state as follows:

(B) County roads include all roads which are or may be established as a part of the county system of roads as provided in sections 5541.01 to 5541.03, inclusive, of the Revised Code, which shall be known as the county highway system. Such roads shall be maintained by the board of county commissioners.

(C) Township roads include all public highways other than state or county roads. The board of township trustees shall maintain all such roads within its township. The board of county commissioners may assist the board of township trustees in maintaining all such roads. This section does not prevent the board of township trustees from improving any road within its township. (Emphasis added)

It is further provided that a township and county may, by agreement, "contribute to the repair and maintenance of the roads under the control of the other." R.C. 5535.08.

It is evident, therefore, that a board of county commissioners is expressly authorized to make a direct cash grant to townships for the purpose of repair and maintenance of township roads as defined in R.C. 5535.01(C). 1936 Op. Att'y Gen. No. 5093, p. 46.

Certain restrictions on this power must, however, be delineated. First, R.C. 5535.08 grants counties the power to contribute only to the repair and maintenance of township roads. In 1972 Op. Att'y Gen. No. 72-080, I examined the extent of this power. Noting that, pursuant to R.C. 5543.01, a county engineer has charge of the construction, reconstruction, resurfacing, or improvement of township roads, but has no authority in connection with the repair or maintenance of such roads, I stated:

. . . county commissioners may make cash grants to assist repair and maintenance of township roads without the county engineer's approval, except when such road program entails construction, reconstruction, resurfacing, or improvement. In these cases, they may not make any cash grant, with or without the engineer's approval. Id., 2-324

Although not stated, the implied rationale for this result is that power over monies can be relinquished where the county has no authority over a project, but where the county must retain direction and supervision over a road program, it cannot relinquish control over the pursestrings.

A second limitation on cash grants to assist in the repair and maintenance of township roads arises from the source of funds from which the grants are to be made. If the source of the grants are levies which have been authorized for the improvement of county roads, county commissioners have no authority to use such funds for township roads unless an excess, not anticipated by bond issue and not directed by popular vote to be put to the use of constructing or maintaining county roads, arises. 1921 Op. Att'y Gen. No. 1929, p. 258. In any event, the proration of aid granted townships must be governed by their needs, and not by an arbitrary percentage applying equally to all townships. 1921 Op. Att'y Gen., supra.

As you have indicated that the source of funds for the proposed grant to townships is R.C. 5705.19(G), which authorizes a levy for construction, resurfacing and repair of county or township roads, and that the grant will be based not upon an arbitrary percentage, but upon road mileage in each township, the county commissioners may make a direct cash grant to township trustees for the purpose of repair and maintenance of township roads.

It must next be determined whether county commissioners have the power to make cash grants to townships to assist in the construction, reconstruction, resurfacing, or repair and maintenance of roads which are part of the county highway system.

Although county commissioners have the primary responsibility for the maintenance of county roads, R.C. 5535.01(B), the Code grants a township the concurrent authority to repair, maintain, resurface, construct or improve any road, including a county road, within its territory. R.C. 5571.01 and R.C. 5571.02. However, no provision of the Code expressly authorizes county commissioners to make grants to, or share levy proceeds with, a township for the purpose of construction or maintenance of county roads. If such power exists, it must be implied from the general authority of a county to construct, maintain, and repair county roads.

This question was raised but not answered in 1949 Op. Att'y Gen. No. 948, p. 587. The power of a county to make contributions for the purpose of township road repair, however, has been strictly construed in opinions of the Attorney General. 1972 Op. Att'y Gen. No. 72-080; 1921 Op. Att'y Gen. No. 1929, p. 258. In the latter opinion, my predecessor stated that the highway laws ". . . do not contemplate any bodily turning over of funds in an arbitrary amount by county commissioners to township trustees." Id., at 261.

The general rule with respect to a county's authority in financial matters was set out in State ex rel. Locher v. Menning, 95 Ohio St. 97, 99 (1916), as follows:

The legal principle is settled in this state that county commissioners in their financial transactions are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized to do so by statute. . . .

Although county commissioners are authorized to levy taxes for the repair, maintenance, construction or improvement of county roads and to assume all costs, or agree with townships for the township to pay its proportionate share of expenses, R.C. 5555.43, there is no express authority for the handing over of monies to townships in the manner you describe. As such, any doubt as to the right of the county to act in such a transaction should be resolved against the exercise of the power. State ex rel. Locher, supra. The fact that the General Assembly has empowered county commissioners to make contributions to townships for township roads, but not county roads, is further indicative of an intent on the part of the legislature that this authority cannot be implied.

Accordingly, it is my opinion, and you are so advised, that:

1. County commissioners may use the proceeds of a county-wide levy for general construction, reconstruction, resurfacing and repair of roads and bridges in counties or townships to make contributions to township trustees, based upon road mileage in each township, for the purpose of repair and maintenance of township roads. County commissioners may not, however, make contributions to assist township trustees in the construction, reconstruction, resurfacing or improvement of township roads. (1972 Op. Att'y Gen. No. 72-080, approved and followed).
2. Absent express statutory authorization, county commissioners may not make contributions to, or share proceeds of a road levy with, township trustees for the purpose of any construction, improvement, or repair, of county roads.