

3886.

GASOLINE TAX—AUTHORITY TO USE FOR PURCHASE OF MACHINERY TO REMOVE WEEDS GROWING ON MUNICIPAL STREET OUTSIDE OF TRAVELED PORTION.

SYLLABUS:

A municipality's portion of the gasoline excise tax arising under the provisions of Section 5541-1, General Code, and expended for the purposes authorized by Section 5541-8, General Code, may be used for the purchase of machinery for mowing grass and weeds growing in that part of a municipal street or road outside of the traveled portion.

COLUMBUS, OHIO, December 22, 1931.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent request for my opinion which reads:

“Section 5541-8 G. C., pertaining to the last two cents of the gasoline excise tax, as amended in 114 O. L., page 507, reads in part as follows:

“Seven and one-half percent of said highway construction fund shall be paid on vouchers and warrants drawn by the Auditor of State to the municipal corporations * * * and 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.”

Question. May a municipality use the gasoline excise tax funds received under the provisions of Section 5541-8 G. C., (114 O. L. 507), for the purpose of purchasing a power mower to be used in mowing weeds growing in that part of the street outside the traveled portion?”

I assume for the purposes of this opinion that this equipment is to be used on the unimproved portion of an established street or public way in a municipality.

That machinery, to effectuate the purposes of the act mentioned in your inquiry, may be purchased under the provisions set forth in your communication was held in Opinion No. 3397 of this office, directed to your department under date of July 3rd, 1931, the syllabus of which reads:

“Funds distributed to municipalities under the provisions of Section 5541-8, General Code, as amended by the 89th General Assembly, may be used for the purpose of street sweeping and street cleaning equipment.”

See also 1930 Opinions of the Attorney General, 289.

The principal question presented by your inquiry is whether or not the removal of weeds growing in a part of a street outside of the traveled portion is included within the purposes set forth in Section 5541-8, General Code, for which

a municipality's portion of the gasoline excise tax authorized to be levied under the provisions of Section 5541-1, General Code, may be expended, namely:

"constructing, maintaining, widening, reconstructing, cleaning and clearing the public streets and roads within such corporation."

Before its amendment by the last General Assembly, Section 5541-8, General Code, provided that a municipality's share of the proceeds arising under the provisions of Section 5541-1, General Code, known as the second gasoline tax, could only be expended for "constructing, maintaining, widening and reconstructing public streets and roads in such municipal corporation."

This latter section has been held by this office to authorize the expenditure of gasoline tax moneys for metal disks to be inserted in municipal streets for the purpose of marking safety zones (1930 O. A. G. 790); to cover the cost of posts and wire mesh for repairing safety fences along the sides of streets and roadways and the cost of repairing loading platforms constructed in the streets for the use of street car passengers (1929 O. A. G. 452); and for purchasing additional right of way necessary in connection with the widening of a street (1929 O. A. G. 1891).

It would seem that the new purposes added by the recent enactment of the General Assembly (Section 5541-8 G. C.), namely: "cleaning and clearing public streets and roads" would authorize, if conditions require, the clearing of that portion of the established street adjacent to the traveled portion of such highway.

It would seem that the general utility and safety of public streets and roads necessitates the removal of weeds and grass adjacent to the traveled portion of a highway in order that the various obstructions, declivities and intersections obscured by such weeds and grass be apparent to those using such street or road.

The clearing of that portion of a street adjacent to the traveled portion of weeds and grass would also tend to facilitate drainage with resultant benefit to the traveled portion of the road.

Construing the act as a whole there is no doubt that the term "public streets and roads" as used in Section 5541-8, above quoted, includes not only that portion of the public street or highway actually traveled by the public but also that portion or portions of land included within the boundaries of the established street or road and, therefore, from the language of such section, gasoline tax moneys payable to a municipality under Section 5541-1, General Code, may be expended for cleaning and clearing such public streets or roads.

However, it should be borne in mind that if no useful purpose would be served by, or if circumstances did not warrant the purchase of, such machinery, to do so might constitute an abuse of discretion on the part of the purchasing authority. This question, however, is one of fact to be decided in each particular instance.

In view of the foregoing and in specific answer to your inquiry, I am of the opinion that a municipality's portion of the gasoline excise tax arising under the provisions of Section 5541-1, General Code, and expended for the purposes authorized by Section 5541-8, General Code, may be used for the purchase of machinery for mowing grass and weeds growing in that part of a municipal street or road outside of the traveled portion.

Respectfully,

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Attorney General.