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SYLLABUS:

Where a board of county commissioners is proceeding under the authority of and in accordance with Sections 5553.18 to 5553.20, inclusive, Revised Code, to ascertain and establish the true course and boundary of a road, funds received by the county from motor vehicle fuel taxes under Sections 5735.23 and 5735.27, Revised Code, and from motor vehicle license fees under the provisions of Section 4501.04, Revised Code, may not be expended for the purpose of paying the salaries of persons employed to make surveys, research records, and correlate and assemble information obtained or for the purchase of equipment to make such surveys.

Columbus, Ohio, April 3, 1963

Hon. George C. Steinemann
Prosecuting Attorney
of Erie County
Sandusky, Ohio

Dear Sir:

Your request for my opinion reads:

“The early Road Records for county and township

roads in Erie County are in many instances incomplete and in these situations there is little or no documentation from which it can be determined exactly where the centerline of a road should lie. In other instances it has been discovered that the actually occupied area of county and township roads does not coincide with the records which are in existence in the Office of the Erie County Engineer.

“With the increased emphasis on road improvement and maintenance, it becomes extremely important that these highway records be put in a correct condition so that there can be no question as to the location of a particular highway and of the right of the township or county to improve the particular area.

“It is contemplated to bring a series of proceedings under Section 5553.20 of the Ohio Revised Code which provides in part as follows:

“ ‘When the county engineer is unable to ascertain with certainty the true course and boundary lines of a road, the board of county commissioners may prosecute a civil action against the owners of the land abutting upon such road to ascertain and have the boundaries of such road judicially established in one action. Any road, the true course of which is surveyed and fixed as provided in this section and sections 5553.18 and 5553.19 of the Revised Code, shall to the limits of such boundaries be a public highway.’

“Before these proceedings can be started it will be necessary for the County Engineer to employ a survey party and to purchase equipment in order to determine the presently existing centerline of the township and county roads in question. This can involve the employment of approximately five to seven new employees in the survey party, in research of the records, and in correlating the notes and assembling the information which is gathered. It is estimated that these parties would be employed for at least a five year period in order to bring all of the roads up to date.

“Can Erie County and the Erie County Engineer finance this proposed project in whole or in part with the so-called gasoline tax and auto license tax monies which are provided Erie County for highway construction and maintenance?”

You have inquired only as to whether certain funds may be used to pay employees hired to make surveys, to research records, and to correlate information obtained, and to purchase equipment necessary to make the proposed surveys. I shall confine my reply

to the question asked, but this answer must be based upon the assumption that the entire plan you have mentioned is such as is authorized by and is to be carried out pursuant to Sections 5553.18 to 5553.20, inclusive, of the Revised Code. The language of your letter suggests to me that the procedure under consideration may be broader in scope than that authorized by the sections mentioned.

Section 5a of Article XII of the Constitution of Ohio reads:

“No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, re-construction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.”

This section became effective January 1, 1948.

We shall next examine the pertinent statutory provisions concerning the funds received from taxes on motor vehicle fuel and distributed to the various counties. Section 5735.23, Revised Code, provides for the distribution of that portion of the tax imposed by Section 5735.05, Revised Code, which is credited by the Treasurer of State to the gasoline excise tax fund. Section 5735.23, Revised Code, reads in pertinent part:

* * * * *

“Twenty-five per cent of such gasoline excise tax fund shall be paid in equal proportions on vouchers and warrants drawn by the auditor of state 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 county, the construction and repair of walks or paths along county roads in congested areas, the construction and maintenance of suitable buildings for the housing of county road machinery, the payment of costs apportioned to the county under the provisions of section 4907.47 of the Revised Code, and the purchase, installation, and maintenance of traffic signal lights.”

* * * * *

Section 5735.25, Revised Code, provides for an additional tax on motor vehicle fuel. Section 5735.27, Revised Code, directs the manner in which this fund shall be distributed when it has been appropriated by the General Assembly. Paragraph B, which refers to the distribution to be made to counties, reads:

“(B) Seven and one-half percent of said highway construction fund shall be paid in equal portions on vouchers and warrants drawn by the auditor of state 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 and paying costs apportioned to the county under the provisions of section 4907.47 of the Revised Code.”

Section 4907.47, Revised Code, refers to the installation of protective devices at railroad crossings and is not pertinent to your question.

Section 4501.04, Revised Code, provides for the distribution to and the use by the counties of the funds obtained from the licensing of motor vehicles in accordance with Chapter 4503., Revised Code. By Paragraph A, Section 4501.04, Revised Code, as amended effective January 1, 1962, directs that thirty-four per cent of the amount to be distributed shall be for the use of the municipal corporation or county which constitutes the district of registration. The said section then provides as follows:

“* * *

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* * *

“The county portion of such funds shall be retained in the county treasury and shall be used for the maintenance, repair, construction, and repaving of public streets, and maintaining and repairing bridges and viaducts and for no other purpose.”

Section 4501.04, Revised Code, also directs that additional portions of the amount to be distributed shall be paid to the counties and by Paragraph C directs that such sums shall be used as follows:

“* * * for the construction, reconstruction, improvement, maintenance, and repair of roads and highways, and maintaining and repairing bridges and viaducts.”

It seems clear that at present no construction, reconstruction, repair, improvement, widening, or repaving of the county highway system is contemplated; the plan, rather, seems to be one of

determining the true line and boundaries of the roads and highways and assembling this information for permanent record purposes. The words "maintaining" and "maintenance" are in my opinion the only ones occurring in the sections mentioned which require further examination. There can be no doubt that such sections limit specifically the use which may be made of funds from the gasoline taxes and motor vehicle licensing receipts.

Webster's Third New International Dictionary shows among the definitions that "maintain" means to keep in a state of repair, efficiency, or validity, or to preserve from failure or decline and that "maintenance" means the labor of keeping something in a state of repair or efficiency. I am in agreement with the following statement which appears in Opinion 6128, Opinions of the Attorney General for 1936, page 1471, at page 1473:

"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."

I am not unaware that Section 315.12, Revised Code, provides for payment of two-thirds of the cost of the operation of the office of a county engineer from the fund derived from the receipts from motor vehicle license distributed in accordance with Section 4501.04, Revised Code, and from the motor vehicle fuel tax distributed as directed in Section 5735.27, Revised Code; this section also states that the cost of operation of this office includes the salaries of all employees and the cost of maintenance of the office as provided by the annual appropriation made by the board of county commissioners. That section was amended effective November 9, 1959, but there was no change in the provision mentioned here.

This section does not in my opinion, however, authorize the employment of additional employees to perform a service not related to construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes within the meaning of the constitutional provision mentioned hereinbefore and payment of such employees from the motor vehicle and second

gasoline tax fund. In Opinion No. 1171, Opinions of the Attorney General for 1952, page 134, it was held that no part of the salaries of assistant tax map draftsmen could be paid from the county's share of such funds. The writer of that opinion, after discussing Section 5a of Article XII, *supra*, said this at page 140:

“The conclusion is irresistible that the intent and effect of this amendment was not merely to prohibit future legislation, but to stop the spending of moneys derived from these sources for any other purposes except the construction, reconstruction, maintenance and repair of public highways and bridges, etc.’ ”

It is, therefore, my opinion and you are advised that where a board of county commissioners is proceeding under the authority of and in accordance with Sections 5553.18 to 5553.20, inclusive, Revised Code, to ascertain and establish the true course and boundary of a road, funds received by the county from motor vehicle fuel taxes under Sections 5735.23 and 5735.27, Revised Code, and from motor vehicle license fees under the provisions of Section 4501.04, Revised Code, may not be expended for the purpose of paying the salaries of persons employed to make surveys, research records, and correlate and assemble information obtained or for the purchase of equipment to make such surveys.

Respectfully,
WILLIAM B. SAXBE
Attorney General