

Note from the Attorney General's Office:

The syllabus paragraph 2 of 1990 Op. Att'y Gen. No. 90-097
was approved and followed by 2017 Op. Att'y Gen. No. 2017-008.

OPINION NO. 90-097**Syllabus:**

1. Pursuant to R.C. 5535.08, a county may agree to contribute to the repair and maintenance of the roads of a township within the county by making a grant of money to the township for such purpose.
2. A county that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may use for such purpose state motor vehicle license tax revenues distributed to the county under R.C. 4501.04 or county motor vehicle license tax revenues distributed to the county under R.C. 4504.05. (1920 Op. Att'y Gen. No. 1579, vol. II, p. 993, overruled.)
3. A county that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may use for such purpose revenues derived from the tax levied under R.C. 5555.48 that are not otherwise appropriated, and are not needed for the payment of bonds issued under R.C. 5555.51 or the satisfaction of deficiencies that occur in the improved county highway maintenance and repair fund under R.C. 5555.92. (1921 Op. Att'y Gen. No. 1929, vol. I, p. 258, approved and followed.)
4. A county that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may use for such purpose revenues derived from a tax levied under R.C. 5705.06(D) for the repair of roads other than state roads or revenues derived from a tax levied under R.C. 5705.19(G) for the repair of roads in the county or townships.
5. A board of county commissioners that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may appropriate therefor moneys from such fund or funds within the county treasury as may lawfully be expended for that purpose. Pursuant to R.C. 5705.39, such appropriation shall not be effective until the county auditor files with the board of county commissioners a certificate that the amount of such appropriation, taken together with all other outstanding appropriations, does not exceed the total of estimated revenue available for expenditure from the fund or funds in question, as certified by the county budget commission. When the amount of the appropriation does not exceed that estimate, the county auditor shall give such certificate forthwith upon receiving from the board of county commissioners a certified copy of the board's appropriation measure.

To: Frank Pierce, Belmont County Prosecuting Attorney, St. Clairsville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 28, 1990

You have requested my opinion regarding the proper interpretation of R.C. 5535.08, which, *inter alia*, permits a county or township, by agreement between

the board of county commissioners and the board of township trustees, to contribute to the repair and maintenance of roads under the control of the other. According to your letter, the board of township trustees of a township within the county has asked the board of county commissioners for a cash grant to assist the township in its repair and maintenance of township roads. You note that you have advised the boards that authority to make such a grant is conferred upon the board of county commissioners by R.C. 5535.08. The county auditor has stated that any such expenditure by the board of county commissioners would be illegal. He has also informed you that he does not know from which fund in the county treasury such moneys would be disbursed were the board of county commissioners to agree to make such a grant.

With respect to the foregoing, you have asked that I address several questions. First, you wish to know whether a board of county commissioners may, pursuant to R.C. 5535.08, make a cash grant to a township to be used for township road repair and maintenance, and if so, which fund within the county treasury is the appropriate one from which to disburse such money. You have also asked whether the county auditor may refuse to honor an appropriation that is made by the board of county commissioners for the purpose of making a cash grant to a township under R.C. 5535.08 for township road repair and maintenance.

R.C. 5535.08 reads as follows:

The state, county, and township shall each maintain its roads, as designated in section 5535.01 of the Revised Code;¹ however, *the county or township may, by agreement between the board of county commissioners and the board of township trustees, contribute to the repair and maintenance of the roads under the control of the other.* The state, county, or township, or any two or more of them, may, by agreement, expend any funds available for road construction, improvement, or repair upon roads inside a village. A village may expend any funds available for street improvement upon roads outside the village and leading thereto. (Emphasis and footnote added.)

The emphasized portion of R.C. 5535.08 quoted above thus provides that a county or township may, by agreement between the board of county commissioners and the board of township trustees, contribute to the repair and maintenance of the roads under the control of the other. Prior Attorney General opinions that have considered the question have concluded that this language of R.C. 5535.08 empowers a board of county commissioners to make cash grants to townships for township road repair and maintenance. 1979 Op. Att'y Gen. No. 79-045 at 2-145 (under R.C. 5535.08 "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"); 1976 Op. Att'y Gen. No. 76-074 at 2-255; 1972 Op. Att'y Gen. No. 72-080 at 2-324. See also 1936 Op. Att'y Gen. No. 5093, vol. I, p. 46, at 47 (G.C. 7467, the statutory predecessor of R.C. 5535.08, "expressly authorizes the county commissioners and township trustees to contribute to the repair and maintenance of roads under the control of the other. 'Contribute' means 'To supply a share or proportional part of money or property toward the prosecution of a common enterprise or the discharge of a joint obligation'" (citation omitted); 1921 Op. Att'y Gen. No. 1929, vol. I, p. 258. Having reviewed the analyses and reasoning of those opinions on this particular point, I am persuaded that the foregoing conclusion reflects a correct and accurate interpretation of the language of R.C. 5535.08. Thus, in response to your specific question, a board of county commissioners may, pursuant to R.C. 5535.08, make a cash grant to a township for township road repair and maintenance.

¹ R.C. 5535.01 states that, "[t]he public highways of the state shall be divided into three classes: state roads, county roads, and township roads," and further provides that the county system of roads shall be maintained by the board of county commissioners, R.C. 5535.01(B), and that all township roads shall be maintained by the board of township trustees, R.C. 5535.01(C).

You have also asked that I specify which fund within the county treasury should be used for such grant. In a conversation with a member of my staff, you have indicated that you would like me to identify tax revenues that may be available to the county from which a cash grant may be made to a township under R.C. 5535.08 for township road repair and maintenance. You have not specified, however, any particular tax revenues that you wish me to focus upon in that regard. Moreover, an analysis and discussion of every statutory enactment in the Revised Code that may, directly or indirectly, furnish a source of revenue to a county for purposes of R.C. 5535.08 is beyond the scope of this opinion. Consequently, the discussion that follows will address the most likely revenue sources available to a county for purposes of contributing to the repair and maintenance of township roads. Generally speaking, such revenues are those that are available to a county for the repair and maintenance of county roads and highways.

The Revised Code enumerates several different sources of tax revenues that a county may use for the repair and maintenance of its roads and highways. Pertinent statutory provisions in that regard appear in R.C. Chapters 4503 (motor vehicle licensing), 4504 (local motor vehicle license tax), 5555 (county road improvement), and 5705 (tax levy law). R.C. Chapter 4503 establishes a comprehensive mechanism for the licensing and registration by the state of motor vehicles that are owned by Ohio residents and operated on Ohio roads, streets, and highways. See generally R.C. 4503.10-.84. In conjunction therewith R.C. 4503.02 levies an annual license tax upon the operation of motor vehicles on public roads and highways, and designates the purposes for which that tax is to be used. Specifically, R.C. 4503.02 states that this tax is to be used for the purpose of paying, *inter alia*, the counties' portion of the cost and expenses of maintaining and repairing roads, and that such tax shall be paid to and collected by the Registrar of Motor Vehicles or his deputy at the time that a vehicle owner applies for his vehicle registration. R.C. 4501.03 further provides that the Registrar of Motor Vehicles shall pay all moneys received by him under R.C. 4503.02 into the state treasury to the credit of the auto registration distribution fund, for eventual distribution pursuant to R.C. 4501.04, R.C. 4501.041, R.C. 4501.042, and R.C. 4501.043.² R.C. 4501.04 addresses the distribution of moneys in the auto registration distribution fund to counties, municipal corporations, and townships, and also sets forth the purposes for which those moneys may be used. With respect to such moneys that are distributed to counties, R.C. 4501.04 states that such funds shall be used, among other purposes, for the maintenance and repair of public streets, roads, and highways. R.C. 4501.04(A), (C). See also R.C. 4501.04(B) and (D) (providing for the distribution of additional moneys from the auto registration distribution fund for use by the counties for the purposes specified in R.C. 4501.04(C), including the repair and maintenance of roads and highways).

The principle is well established that where the expenditure of particular public funds is limited by statute or constitutional provision, such funds may be spent only in accordance with the specific terms of the particular statute or constitutional provision in question. See, e.g., Ohio Const. art. XII, §5 ("[n]o tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied"); *State ex rel. Walton v. Edmondson*, 89 Ohio St. 351, 106 N.E. 41 (1913). See generally *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 115 N.E. 571 (1916) (the authority of a county to act in financial transactions must be clearly and distinctly granted); *Jones v. Commissioners of Lucas County*, 57 Ohio St. 189, 48 N.E. 882 (1897) (in financial affairs the board of county commissioners has only such authority as it is granted by statute). In accordance with the limitation that appears in Ohio Const. art. XIII,

² R.C. 4501.041-.043 variously address the distribution of moneys received from county and municipal motor vehicle license taxes. The use of county motor vehicle license tax revenues is discussed in greater detail below.

§5a,³ the provisions of R.C. 4501.04 and R.C. 4503.02 expressly authorize counties to expend state motor vehicle license tax revenues distributed to them for the repair and maintenance of roads and highways. Accordingly, a county that, pursuant to R.C. 5535.08, decides to contribute monetarily to the repair and maintenance of township roads may use for such purpose state motor vehicle license tax revenues distributed to the county pursuant to R.C. 4501.04.

I am aware that a contrary conclusion on this point was reached in 1920 Op. Att'y Gen. No. 1579, vol. II, p. 993 with respect to the statutory predecessors of R.C. 4501.04 and R.C. 5535.08. 1920 Op. No. 1579 addressed the question whether funds that had been paid into a county treasury pursuant to G.C. 6309-2, now R.C. 4501.04, could be disbursed to a township for township road repair and maintenance, and whether G.C. 7467, now R.C. 5535.08, furnished authority for such a disbursement. The version of G.C. 6309-2 considered in 1920 Op. No. 1579 provided that state motor vehicle license tax revenues distributed to municipal corporations and counties were to constitute a fund to be used for the "maintenance and repair of public roads and highways and streets" and were not to be "subject to transfer to any other fund." The provisions of G.C. 7467 then in effect differed in no material respect from the current R.C. 5535.08. See 1914-1915 Ohio Laws 574, 649 (Am. S.B. 125, passed May 17, 1915). My predecessor expressed the opinion that state motor vehicle license tax revenues paid to a county under G.C. 6309-2 could not be contributed by the county, pursuant to G.C. 7467, to a township for township road repair and maintenance. In support of that conclusion, he reasoned as follows:

[G.C. 6309-2] is clearly intended to provide fully and specifically for the uses which may be made of the funds to which it refers. There is no mention of townships; on the other hand, there is a prohibition in connection with the shares of county and municipality against "transfer to any other fund."

....

The plain import of section 6309-2 is that the subdivision,—county or municipality,—which receives the funds, must itself expend them rather than turn them over in whole or in part to another subdivision for expenditure. This being the case it follows that while under section 7467 G. C. the township might contribute funds to the county to be used *by the county* in conjunction with funds accruing to the latter under section 6309-2, yet the converse does not follow that the county may turn over such 6309-2 funds to the township. The real effect of such last mentioned action by the county would be to bring townships within the terms of section 6309-2 as fully

3 Article XII, §5a of the Ohio Constitution reads as follows:

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, reconstruction, 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.

See *Grandle v. Rhodes*, 169 Ohio St. 77, 157 N.E.2d 336 (1959) (syllabus, paragraph one) (Ohio Const. art. XII, §5a "closely restricts the expenditure of the fees and taxes received in relation to vehicles using the public highways to purposes directly connected with the construction, maintenance and repair of highways and the enforcement of traffic laws").

as if they were designated in said statute as recipients of the funds in question. (Emphasis in original.)

1920 Op. No. 1579 at 994 and 995.

In this instance, I find that I cannot adopt a similar interpretation of the current provisions of R.C. 4501.04 and R.C. 5535.08. As reflected in the language of 1920 Op. No. 1579 set forth above, my predecessor based his conclusion, in large part, upon G.C. 6309-2's express directive that state motor vehicle license tax revenues paid to municipal corporations and counties were not subject to transfer to any other fund. This particular fund transfer restriction was subsequently deleted from the statute, however, and does not presently appear in R.C. 4501.04. Accordingly, such restriction can no longer be cited in support of the proposition that state motor vehicle license tax revenues distributed to a county under R.C. 4501.04 may not be contributed to a township for road repair and maintenance pursuant to R.C. 5535.08.

In addition, I cannot concur in my predecessor's assessment of the nature and scope of the spending authority that was conferred upon a county by G.C. 6309-2, and is now conferred by R.C. 4501.04, with respect to the county's share of state motor vehicle license tax revenues. In that regard, 1920 Op. No. 1579 interpreted the language of G.C. 6309-2 as requiring the expenditure of such funds by the county itself for road repair and maintenance, and indicated that such requirement would not be satisfied were the county to contribute a portion of those funds to a township that would thereafter expend them for road repair and maintenance.

I discern no reasonable basis, however, for reading R.C. 4501.04 in such a narrow and restrictive fashion. The express language of R.C. 4501.04 does not provide that the county's portion of state motor vehicle license tax revenues must be expended by the county itself for road repair and maintenance. Rather, R.C. 4501.04(A) and (C) state, in pertinent part, that such moneys are "for the use of" the county, and, among other purposes, shall be used for the repair and maintenance of public roads, highways, and streets. Certainly, this language of R.C. 4501.04 may be read as conferring authority upon a county to expend state motor vehicle license tax revenues in support of road repair and maintenance that is planned, directed, and undertaken exclusively by the county itself. There is, however, nothing in the statute from which one should further infer that the exercise of that spending authority is confined to those situations in which county agencies or county personnel are responsible for effecting the repair and maintenance in question. Given the fairly general character of the language thus used in R.C. 4501.04, I am inclined to the view that situations may be presented in which a county may use a portion of its state motor vehicle license tax revenues in support of road repair and maintenance that is undertaken by other local governments within the county. It is also my opinion that R.C. 5535.08 provides an example of one such circumstance, as it permits a county to contribute to the repair and maintenance of township roads. As discussed previously, the language of R.C. 5535.08 has been interpreted as empowering a board of county commissioners to make a cash grant to a township for that purpose. Reading R.C. 4501.04 *in pari materia* with R.C. 5535.08, I am persuaded that a county may use state motor vehicle license tax revenues to fund a cash grant made to a township under R.C. 5535.08 for township road repair and maintenance. Accordingly, to the extent that it supports a contrary conclusion, I overrule 1920 Op. No. 1579.

R.C. Chapter 4504 grants counties, municipal corporations, and townships authority to levy local motor vehicle license taxes analogous to the state motor vehicle license taxes that are levied, collected, and distributed pursuant to the foregoing provisions of R.C. Chapters 4501 and 4503. The first such tax that may be levied by a county is authorized by R.C. 4504.02, which provides that for the purpose of paying, *inter alia*, the county's portion of the cost and expenses of maintaining and repairing public roads and highways, any county by resolution adopted by its board of county commissioners may levy an annual license tax upon the operation of motor vehicles on the the public roads or highways. R.C. 4504.15 and R.C. 4504.16 further authorize a county to levy separate annual motor vehicle license taxes in addition to the tax authorized by R.C. 4504.02. The purposes for which such

additional taxes may be levied are those stated in R.C. 4504.02, as well as to supplement revenues that are already available for those purposes. *See* R.C. 4504.15; R.C. 4504.16.

The collection of county motor vehicle license taxes levied pursuant to R.C. 4504.02, R.C. 4504.15, and R.C. 4504.16, the subsequent distribution to the counties of the revenues generated thereby, and the expenditure of those revenues by the counties are addressed in R.C. 4501.03, R.C. 4501.041, R.C. 4504.05, and R.C. 4504.09. R.C. 4504.09 first provides that any county motor vehicle license tax "shall be paid to the registrar of motor vehicles or to a deputy registrar at the time application for registration of a motor vehicle as provided in [R.C. 4503.10] and [R.C. 4503.102] is made." R.C. 4501.03 in turn provides that the Registrar of Motor Vehicles shall pay all moneys received by him under R.C. 4504.09 into the state treasury to the credit of the auto registration distribution fund for distribution in the manner provided for in R.C. 4501.041. R.C. 4501.041 reads as follows:

Except as provided in section 4501.042 of the Revised Code,⁴ all moneys received under section 4504.09 of the Revised Code with respect to counties levying county motor vehicle license taxes pursuant to section 4504.02, 4504.15, or 4504.16 of the Revised Code and paid into the state treasury under section 4501.03 of the Revised Code shall be distributed to the respective counties levying such taxes for allocation and distribution as provided in section 4504.05 of the Revised Code. (Footnote added.)

R.C. 4504.05, to which R.C. 4501.041 refers, addresses the final allocation, distribution, and use of all county motor vehicle license tax revenues generated pursuant to R.C. 4504.02, R.C. 4504.15, and R.C. 4504.16. R.C. 4504.05 reiterates that county motor vehicle license tax revenues received under R.C. 4504.02, and that are allocated to the county in the proportion specified, shall be disbursed only for the purposes specified in R.C. 4504.02. R.C. 4504.05(B)(1).

As in the case of state motor vehicle license tax revenues distributed to a county pursuant to R.C. 4501.04, it is my opinion that county motor vehicle license tax revenues distributed to a county pursuant to R.C. 4504.05 may be used by a county to contribute to township road repair and maintenance. R.C. 4504.02 describes in precise terms the purposes for which a county may use revenues produced by a motor vehicle license tax levied thereunder by the county. Revenues generated from additional county motor vehicle license taxes that are levied under R.C. 4504.15 and R.C. 4504.16 are also to be used for the purposes specified in R.C. 4504.02. *See* R.C. 4504.15; R.C. 4504.16. R.C. 4504.02 includes among those purposes the repair and maintenance of public roads, highways, and streets. It follows, therefore, that, pursuant to R.C. 5535.08, a county may contribute for township road repair and maintenance county motor vehicle license tax revenues distributed to the county under R.C. 4504.05. *See* Op. No. 76-074 at 2-255 ("[i]t should be noted that [R.C. 4504.02's] language is broad in its reference to 'public' roads, highways, and streets," and thus concluding that a county may, pursuant to R.C. 4504.02 and R.C. 5535.08, use the proceeds of a county motor vehicle license tax to help pay the cost of repairing township roads).

Funds may also be available to a county for purposes of R.C. 5535.08 pursuant to certain provisions in R.C. Chapter 5555, which addresses the authority and responsibility of a board of county commissioners to undertake the construction, reconstruction, and improvement of county roads. In that regard, R.C. 5555.02 reads, in part, as follows:

⁴ R.C. 4501.042 addresses the distribution of all revenues received under R.C. 4504.09 from municipal motor vehicle license taxes levied pursuant to R.C. 4504.06, R.C. 4504.17, R.C. 4504.171, and R.C. 4504.172, and any part of the moneys received from county motor vehicle license taxes levied pursuant to R.C. 4504.15 that is to be distributed to municipal corporations.

The board of county commissioners may construct a public road by laying out and building a new road, or by improving, reconstructing, or repairing any existing public road or part thereof by grading, paving, widening, altering, straightening, vacating, changing the direction, draining, dragging, graveling, macadamizing, resurfacing, applying dust preventives, or by otherwise improving the same, and where an established road has been relocated the board may construct and maintain such connecting roads between the old and new locations as will provide reasonable access thereto.⁵ (Footnote added.)

A board of county commissioners may determine to carry out the construction, reconstruction, or improvement of a public road, as described in R.C. 5555.02, either by its own initiative, R.C. 5555.06, or pursuant to petition presented to it by interested landowners within the county, R.C. 5555.03-.05.

The assessment and payment of costs incurred by a county in proceeding with a road improvement project in accordance with the authorizations that appear in R.C. 5555.02 are addressed in R.C. 5555.41-.51. R.C. 5555.48 specifically provides that the board of county commissioners may levy an annual tax on the taxable property of the county "[f]or the purpose of providing by taxation a fund for the payment of the county's proportion of the compensation, damages, and expenses of constructing, reconstructing, improving, *maintaining*, and *repairing* roads under [R.C. 5555.01-.72]." (Emphasis added.) See also R.C. 5555.49 (levy of tax upon the taxable property of a township for the purpose of paying the township's share of the costs of a road improvement).

In 1921 Op. Att'y Gen. No. 1929, vol. I, p. 258 one of my predecessors considered the question whether a board of county commissioners could use revenues derived from a tax levied under G.C. 6926, R.C. 5555.48's statutory predecessor, for the purpose of contributing to the repair and maintenance of several townships' roads pursuant to the authority granted by G.C. 7467, now R.C. 5535.08. G.C. 6926, as it then existed, differed in no significant respect from the current version of R.C. 5555.48.⁶ G.C. 6926-1, the provisions of which have not been incorporated into R.C. Chapter 5555, also permitted the electors of the county to specify by popular vote whether the whole or a part of the levy proceeds under G.C. 6926 should be used exclusively for constructing and improving, or repairing and maintaining, county roads.

⁵ Cognate authority to effect the construction, reconstruction, and improvement of township roads, and county roads, intercounty highways, and state highways within the township, is conferred upon a board of township trustees by R.C. Chapters 5571 and 5573.

⁶ G.C. 6926 stated as follows:

The proportion of the compensation, damages, costs and expenses of such improvement to be paid by the county shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, improving, maintaining, and repairing roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county. Said levy shall be in addition to all other levies authorized by law for county purposes, and subject only to the limitation on the combined maximum rate for all taxes now in force.

1917 Ohio Laws 69, 100 (Am. H.B. 300, passed March 20, 1917).

In resolving this particular question, 1921 Op. No. 1929 relied upon the conclusions set forth in 1920 Op. Att'y Gen. No. 959, vol. I, p. 112, which considered the related question of whether a board of county commissioners could expend G.C. 6926 moneys in conjunction with certain state highway construction and improvement projects. On that point, 1920 Op. No. 959 stated as follows at 117:

Subject to the prior granting of an order of transfer by the common pleas court in accordance with sections 2296 et seq. G.C., county commissioners may devote to state aid improvement projects funds not otherwise appropriated, derived and to be derived from levies under section 6926 G.C. insofar and only insofar as the proceed[s] of such levies are either in the county treasury or are to accrue to the treasury from levies which have been placed on the duplicate and are in process of collection; provided that the use stated may not be made of any part of such funds as may have been (a) anticipated by bond issues; (b) directed by popular vote under section 6926-b 1 G.C. to be put to certain uses; or (c) found necessary for the maintenance and repair fund purposes mentioned in section 6956-1 G.C.

Provisions pertaining to the issuance of bonds to which the foregoing excerpt refers now appear at R.C. 5555.51, formerly G.C. 6929, and the provisions of former G.C. 6956-1 and G.C. 6956-1a are now found at R.C. 5555.91 and R.C. 5555.92 respectively.

1920 Op. No. 959 thus concluded that a board of county commissioners could devote to state highway improvement projects such G.C. 6926 tax revenues as were not (1) otherwise needed to pay and retire previously issued bonds; (2) directed by popular vote to be committed to other uses; or (3) necessary to make up deficiencies in the improved county road repair and maintenance fund. 1921 Op. No. 1929 adopted the same conclusion regarding the use of G.C. 6926 tax revenues for township road repair and maintenance:

[T]he county commissioners and township trustees may by virtue of sections 7464 and 7467 G.C. enter into an agreement whereby the commissioners may contribute to the township trustees of one or more townships making application for aid, a sum proportionate to their respective needs in the maintenance of township highways, which contribution may be made out of funds not otherwise appropriated arising from levy under section 6926 G.C. to the extent that such funds are not subject to the preferred uses pointed out in [1920 Op. No. 959].

Id. at 261. I concur in the reasoning and conclusions set forth in 1921 Op. No. 1929, and am of the opinion that it represents an accurate statement of the law on this point as it then existed. In particular, I am satisfied that my predecessor correctly interpreted the tax statutes discussed therein and drew therefrom the appropriate inference regarding the use of county road improvement moneys by a board of county commissioners for township road repair and maintenance. Further, the essential terms of those General Code sections, with the exception of those provisions of G.C. 6926-1 pertaining to use limitations decreed by popular vote, remained unchanged throughout the years that followed the issuance of 1921 Op. No. 1929, and presently appear within the Revised Code. Accordingly, I find that the conclusions stated in that opinion may also be relied upon with regard to the present matter. Thus, a county that agrees to contribute to the repair and maintenance of township roads pursuant to R.C. 5535.08 may use for that purpose revenues derived from the tax levied under R.C. 5555.48 that are not otherwise appropriated, and are not needed for the payment of bonds issued under R.C. 5555.51 or the satisfaction of deficiencies that occur in the improved county highway maintenance and repair fund under R.C. 5555.92.

Revenues may also be available to a county for purposes of R.C. 5535.08 from certain tax levies permitted by R.C. Chapter 5705, the general property tax law. R.C. 5705.03 states, in pertinent part, that the "taxing authority of each subdivision may levy taxes annually, subject to the limitations of [R.C. 5705.01-.47],...on the real and personal property within the subdivision for the

purpose of paying the current operating expenses of the subdivision and acquiring or constructing permanent improvements," and the "proceeds of any tax levied by or for any subdivision when received by its fiscal officer shall be deposited in its treasury to the credit of the appropriate fund." R.C. 5705.04 further provides that the taxing authority of each subdivision should divide the taxes it levies into the general and special levies, within and in excess of the ten-mill limitation, that are therein specified. R.C. 5705.04(A)-(E). See R.C. 5705.02 (explaining the ten-mill limitation). R.C. 5705.01 states that "[s]ubdivision," as used in R.C. Chapter 5705, means, *inter alia*, "any county," R.C. 5705.01(A), and "[t]axing authority" means, "in the case of any county, the board of county commissioners," R.C. 5705.01(C).

Special levies within the ten-mill limitation and the purposes for which those levies are authorized, without voter approval, are enumerated in R.C. 5705.06. As pertains herein, R.C. 5705.06 authorizes a special levy for the "construction, reconstruction, resurfacing, and repair of roads and bridges, other than state roads and bridges," R.C. 5705.06(D). R.C. 5705.07 also provides that the "taxing authority of any subdivision may make tax levies authorized in excess of the ten-mill limitation by a vote of the people under the law applicable thereto, irrespective of all limitations on the tax rate." Such special levies in excess of the ten-mill limitation and the particular purposes for which they may be authorized by the taxing authority of any subdivision are set forth in R.C. 5705.19-.24. As pertains here, R.C. 5705.19 states that the taxing authority of any subdivision may adopt a resolution declaring that a special levy in excess of the ten-mill limitation is necessary "[f]or the general construction, reconstruction, resurfacing, and repair of streets, roads, and bridges in municipal corporations, counties, or townships," R.C. 5705.19(G).

Thus, revenues raised through a tax that is levied by a board of county commissioners under R.C. 5705.06(D) may be used to support the several activities therein enumerated, including the repair of roads and bridges other than state roads and bridges. I conclude, therefore, that a county that agrees to contribute to the repair and maintenance of township roads pursuant to R.C. 5535.08 may use for that purpose revenues derived from a tax levied under R.C. 5705.06(D) for the repair of roads other than state roads. Similarly, revenues raised through a tax that is levied by a board of county commissioners under R.C. 5705.19(G) may be used to support, *inter alia*, the repair of roads in the county or townships. Accordingly, a county that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may use for that purpose revenues derived from a tax levied under R.C. 5705.19(G) for the repair of roads in the county or townships. Op. No. 79-045 (pursuant to R.C. 5535.08, a board of county commissioners may use the proceeds of a county-wide levy under R.C. 5705.19(G) 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).

In your final question you have asked whether the county auditor may refuse to honor an appropriation made by a board of county commissioners for the purpose of contributing to the repair and maintenance of a township's roads pursuant to R.C. 5535.08. I presume you have in mind a situation in which the board of county commissioners, in accordance with the pertinent procedures set forth in R.C. 5705.38-.41, appropriates such funds within the county tax budget as are properly available for that purpose. See R.C. 5705.28 (adoption of tax budget); R.C. 5705.29 (contents of tax budget); R.C. 5705.30 (submission of adopted tax budget to county auditor); R.C. 5705.31 (submission of tax budget to county budget commission). Such appropriation may occur either as part of the county's annual appropriation measure, or as an amendment or supplement thereto. See R.C. 5705.38(A) ("[o]n or about the first day of each year, the taxing authority of each subdivision or other taxing unit shall pass an appropriation measure, and thereafter during the year it may pass any supplemental appropriation measures as it finds necessary, based on the revised tax budget and the official certificate of estimated resources or amendments of the certificate"); R.C. 5705.40 ("[a]ny appropriation ordinance or measure may be amended or supplemented, provided that such amendment or supplement shall comply with all provisions of law governing the

taxing authority in making an original appropriation"). R.C. 5705.39 further provides that appropriations from each fund within the tax budget shall not exceed the total of estimated revenue available for expenditures therefrom, and also addresses the responsibility of the county auditor when a particular appropriation does not exceed such estimate. Thus, R.C. 5705.39 reads as follows:

The total appropriations from each fund shall not exceed the total of the estimated revenue available for expenditures therefrom, as certified by the budget commission, or in case of appeal, by the board of tax appeals. No appropriation measure shall become effective until the county auditor files with the appropriating authority and in the case of a school district, also files with the superintendent of public instruction, a certificate that the total appropriations from each fund, taken together with all other outstanding appropriations, do not exceed such official estimate or amended official estimate. When the appropriation does not exceed such official estimate, the county auditor shall give such certificate forthwith upon receiving from the appropriating authority a certified copy of the appropriation measure, a copy of which he shall deliver to the superintendent of public instruction in the case of a school district. Appropriations shall be made from each fund only for the purposes for which such fund is established.

Pursuant to R.C. 5705.39, therefore, no appropriation by a board of county commissioners shall become effective until the county auditor files with the board a certificate that the total appropriations from the fund in question, together with all other outstanding appropriations, do not exceed the official estimate or the amended official estimate of revenues available for expenditure therefrom as certified by the county budget commission. R.C. 5705.39 also provides that when an appropriation does not exceed the official estimate, "the county auditor *shall* give such certificate forthwith upon receiving from the appropriating authority a certified copy of the appropriation measure." (Emphasis added.) Absent clear evidence to the contrary, the use of the word "shall" within a statutory provision is to be interpreted as imposing a mandatory duty with respect to the activity or conduct therein described. *State ex rel. City of Niles v. Bernard*, 53 Ohio St. 2d 31, 34, 372 N.E.2d 339, 341 (1978) ("[t]he term 'shall' usually is interpreted to render mandatory the provision containing it"); *Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage"); *Dennison v. Dennison*, 165 Ohio St. 146, 149, 134 N.E.2d 574, 576 (1956) (same); 1988 Op. Att'y Gen. No. 88-013 at 2-51; 1987 Op. Att'y Gen. No. 87-093 at 2-607. In this instance, I discern nothing in R.C. 5705.39 to indicate that the word "shall" as used with respect to the foregoing responsibility of the county auditor is to be interpreted in a permissive or discretionary sense. It follows, therefore, that the duty imposed upon a county auditor by R.C. 5705.39 with respect to the issuance of the certification described therein is mandatory. Accordingly, when an appropriation of moneys from a particular fund within the county treasury, taken together with all other outstanding appropriations, does not exceed the total of the estimated revenue available for expenditures therefrom, as certified by the county budget commission, R.C. 5705.39 requires the county auditor to file with the appropriating authority a certificate to that effect.

Thus, a board of county commissioners that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may appropriate therefor moneys from such funds within the county treasury as may lawfully be expended for that purpose. Pursuant to R.C. 5705.39, such appropriation shall not be effective until the county auditor files with the board of county commissioners a certificate that the amount of such appropriation, taken together with all other outstanding appropriations, does not exceed the total of estimated revenue available for expenditure from the fund or funds in question, as certified by the county budget commission. When the amount of the appropriation does not exceed that estimate, the county auditor shall give such certificate

forthwith upon receiving from the board of county commissioners a certified copy of the board's appropriation measure.

It is, therefore, my opinion, and you are advised that:

1. Pursuant to R.C. 5535.08, a county may agree to contribute to the repair and maintenance of the roads of a township within the county by making a grant of money to the township for such purpose.
2. A county that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may use for such purpose state motor vehicle license tax revenues distributed to the county under R.C. 4501.04 or county motor vehicle license tax revenues distributed to the county under R.C. 4504.05. (1920 Op. Att'y Gen. No. 1579, vol. II, p. 993, overruled.)
3. A county that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may use for such purpose revenues derived from the tax levied under R.C. 5555.48 that are not otherwise appropriated, and are not needed for the payment of bonds issued under R.C. 5555.51 or the satisfaction of deficiencies that occur in the improved county highway maintenance and repair fund under R.C. 5555.92. (1921 Op. Att'y Gen. No. 1929, vol. I, p. 258, approved and followed.)
4. A county that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may use for such purpose revenues derived from a tax levied under R.C. 5705.06(D) for the repair of roads other than state roads or revenues derived from a tax levied under R.C. 5705.19(G) for the repair of roads in the county or townships.
5. A board of county commissioners that agrees to contribute to the repair and maintenance of the roads of a township within the county pursuant to R.C. 5535.08 may appropriate therefor moneys from such fund or funds within the county treasury as may lawfully be expended for that purpose. Pursuant to R.C. 5705.39, such appropriation shall not be effective until the county auditor files with the board of county commissioners a certificate that the amount of such appropriation, taken together with all other outstanding appropriations, does not exceed the total of estimated revenue available for expenditure from the fund or funds in question, as certified by the county budget commission. When the amount of the appropriation does not exceed that estimate, the county auditor shall give such certificate forthwith upon receiving from the board of county commissioners a certified copy of the board's appropriation measure.