

and Girls' Dormitories), State School for the Blind, Columbus, Ohio, in accordance with Item 2 and Item 7 (Alternate H-1) of the Form of Proposal dated December 15, 1933. Said contract calls for an expenditure of five thousand eight hundred and seventy dollars (\$5,870.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also shown that the Controlling Board has approved the release of moneys for this project, in accordance with section 8 of House Bill No. 699 of the 90th General Assembly. In addition, you have submitted a contract bond upon which the Aetna Casualty and Surety Company of Hartford, Connecticut, appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*

2141.

TOWNSHIP—DISTRIBUTION OF GASOLINE TAX FUND—FILING OF PLANS AND SPECIFICATIONS FOR ROAD IMPROVEMENT NECESSARY WHEN.

*SYLLABUS:*

*The provisions of Section 5541-8, General Code, relative to the distribution of the gasoline tax fund to townships do not require that plans and specifications be on file for maintenance work. However, such section does require plans and specifications in connection with the improvement by the construction, widening and reconstruction of roads.*

COLUMBUS, OHIO, January 6, 1934.

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

GENTLEMEN:—In your recent communication you request my opinion upon the following:

“Section 5541-8, General Code, provides for allotting 17½% of the highway construction fund in equal proportions to the several townships within the state. It further provides that when received in the township treasury, it shall be expended by such township for the sole purpose of constructing, maintaining, widening and reconstructing public roads and highways within the township. The following paragraph of the section provides that no part of the said funds shall be

used for any purpose except to pay in whole or in part the contract price of any such work done by contract or pay the cost of labor in constructing, widening and re-constructing such roads and highways, and the cost of materials forming a part of such improvement. It further provides that no obligation against such fund shall be incurred unless and until plans and specifications for such improvement, approved by the county surveyor, shall be on file in the office of the township clerk.

Question 1: Is it necessary that plans and specifications be on file for the maintenance work, or does this provision apply only to constructing, widening and re-constructing roads?

Question 2: In the event you answer the first question to the effect that it applies only to construction, re-construction and widening of roads, what is the line of distinction between maintenance and repair of roads, and construction, re-construction and widening of roads?"

Section 5541-8, General Code, to which you refer, and as last amended (114 O. L. 507), provides in part, that seventeen and one half percent of the highway construction fund shall be divided in equal proportions among the several townships within the state. The same paragraph which provides for the apportionment and payment of the fund to the townships provides that said funds "*shall be expended by each township for the sole purpose of constructing, maintaining, widening and reconstructing the public roads and highways within such towns.*" (Italics, the writer's). The following paragraph of said section contains a proviso which reads in part:

"Provided, however, that no part of said funds shall be used for any purpose except to pay in whole or part the contract price of any such work done by contract or to pay the cost of labor in constructing, widening and reconstructing such roads and highways and the cost of materials forming a part of said improvement; \* \* and provided further that no obligation against such funds shall be incurred unless and until plans and specifications for such improvement, approved by the county surveyor, shall be on file in the office of the township clerk; \* \*

One of the difficulties your inquiries present is that the proviso above mentioned specifies only "*constructing, widening and reconstructing*". It will therefore be seen that in so far as "maintenance" is concerned, the two provisions of the statute are in direct contradiction. While the argument could, of course, be made that the proviso inhibits any expenditure for maintenance purposes, in view of the history of the legislation it is believed such a conclusion is not tenable.

In an opinion of the Attorney General reported in Opinions of the Attorney General for 1929, page 1099, it was expressly held that such funds could not be used for maintenance in view of the language of the section as it was enacted by the 88th General Assembly. However, the section was amended, apparently, in view of said opinion, by the 89th General Assembly, so as to permit the use of such funds for maintenance. In an opinion reported in Opinions of the Attorney General for 1931, page 767, it was held as disclosed by the syllabus, that:

"Under the provisions of Section 5541-8, General Code, as amended by the 89th General Assembly, in House Bill No. 7, the funds distributed

thereunder, to townships, may be used for the purpose of maintaining, as well as constructing, widening, and reconstructing the public roads and highways within such township, irrespective of whether said work is done by force account or by contract."

The next problem your inquiry presents is whether the language of the proviso which requires plans and specifications to be filed includes plans and specifications for maintenance. As has been previously noted, said proviso in the first paragraph or clause mentions "constructing, widening and reconstructing" and nowhere mentions "maintenance." It is believed that by analogy, the opinion in the case of *Buckman vs. State*, 81 O. S., 171, is dispositive of the question. In the course of that opinion by Judge Crew, it was stated:

"As a general rule, unless the contrary intention plainly appears, a proviso is to be construed with reference to the immediately preceding paragraph to which it is attached, and qualifies or limits only the part or paragraph to which it is appended."

An examination of the opinion and statute under consideration will disclose that the proviso was separated by a semicolon in a similar manner to that under consideration herein, and that by applying that rule, the proviso relating to the preparation of plans and specifications would have reference to the improvements mentioned at the beginning of the paragraph of which it is a part, and therefore, would apply only to cases in which "construction, reconstruction and widening" are undertaken. It has been suggested by some that it would be absurd to say that plans and specifications should be prepared and filed every time it was determined that the maintenance crew should fill a mud hole with gravel and that such a construction would violate the rule that statutes will not be construed so as to produce absurd results. However, without attempting to decide the practicability of making such plans and specifications, suffice it to say that in view of the case of *Buckman vs. State, supra*, the legislature has not as yet used language which requires plans and specifications to be made before the townships make expenditures for the maintenance of roads.

The foregoing will dispose of the first question you present.

Consideration will now be given to your second inquiry, with reference to the line of demarcation between "maintenance" and "reconstruction" of roads.

A number of opinions have dealt to some extent with the subject. See Opinions of the Attorney General for 1927, page 641; for 1927, page 2466; for 1928, page 292; for 1928, page 3069 and for 1929, page 1691. In the last opinion above cited, it was stated in the second branch of the syllabus:

"It is a question of fact whether or not a road upon which cinders have been used should be regarded as an unimproved dirt road. The determination of the question depends upon the extent of the improvement by the use of cinders and this question must be determined by the township trustees, whose judgment would not, in the absence of its abuse, be disturbed."

Without attempting to review all of the opinions above referred to, it may be safely stated that it is an engineering question as to whether a proposed improvement is a maintenance operation or a reconstruction project under the terms of Section 5541-8, General Code, and it is impossible for the Attorney General

to lay down a hard and fast rule as a matter of law, to govern. Of course, there will be many cases where there would be no doubt in the minds of anyone as to the proper classification. However, as hereinbefore indicated, the border line cases must each rest upon their own bottoms, and the determination of the authorities charged with such functions will not be disturbed except in case of gross abuse of discretion.

In specific answer to your inquiries, it is my opinion that, the provisions of Section 5541-8, General Code, relative to the distribution of the gasoline tax fund to townships do not require that plans and specifications be on file for maintenance work. However, such section does require plans and specifications in connection with the improvement by the construction, widening and reconstruction of roads.

Respectfully,  
 JOHN W. BRICKER,  
*Attorney General.*

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2142.

APPROVAL, NOTES OF WHITE OAK RURAL SCHOOL DISTRICT,  
 HAMILTON COUNTY, OHIO—\$555.00.

COLUMBUS, OHIO, January 6, 1934.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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2143.

APPROVAL, NOTES OF ANDERSON TOWNSHIP RURAL SCHOOL DISTRICT,  
 HAMILTON COUNTY, OHIO—\$21,139.00.

COLUMBUS, OHIO, January 6, 1934.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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2144.

APPROVAL, BONDS OF EAST CLEVELAND CITY SCHOOL DISTRICT,  
 CUYAHOGA COUNTY, OHIO—\$2,000.00.

COLUMBUS, OHIO, January 6, 1934.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*