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1. HIGHWAY, STATE — BOARD OF COUNTY COMMISSIONERS HAS AUTHORITY TO USE PORTION OF FUNDS RECEIVED UNDER SECTION 6309-2 G. C., WHICH IS PORTION, PROCEEDS OF MOTOR VEHICLE LICENSE TAX LEVIED BY SECTION 6291 G. C. — PURPOSE, TO ACQUIRE RIGHT OF WAY FOR PORTION STATE HIGHWAY UNDER CONSTRUCTION BY STATE HIGHWAY DEPARTMENT WITH COOPERATION OF COUNTY — SECTIONS 1191, 1191-2 G. C.
2. LIQUID FUEL TAXES DISTRIBUTED TO COUNTY UNDER SECTIONS 5537, 5541-8 G. C.—BOARD OF COUNTY COMMISSIONERS MAY NOT LEGALLY USE ANY PORTION — PURPOSE, TO ACQUIRE RIGHT OF WAY FOR STATE HIGHWAY CONSTRUCTED UNDER SECTION 1191 G. C.

SYLLABUS:

1. *A board of county commissioners has authority to use a portion of*

the funds received by the county under authority of Section 6309-2, General Code, being a portion of the proceeds of motor vehicle license tax levied by Section 6291, General Code, for the purpose of acquiring right of way for a portion of a state highway being constructed within such county by the State Highway Department with the cooperation of the county under authority of Sections 1191, and 1191-2, General Code.

2. *The board of county commissioners may not legally use any portion of the liquid fuel taxes distributed to the county under authority of Sections 5537 and 5541-8, General Code, for the purpose of acquiring a right of way for a state highway to be constructed under authority of Section 1191, General Code.*

Columbus, Ohio, November 8, 1940.

Hon. R. E. Snedden, Prosecuting Attorney,
Medina, Ohio.

Dear Sir:

I am in receipt of your request for my opinion in which you inquire:

“Can the Board of County Commissioners pay compensation and damages for obtaining right-of-way for the re-location of a road which, subsequent to the obtaining of such right-of-way, is to be taken into the State Highway system, together with a portion of County road, and the whole to be improved by the State Highway Department, from either the Auto License or Gasoline Tax Fund?”

Section 6291, General Code, which levies the motor vehicle license tax and defines the purpose of such tax, provides in part as follows:

“An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways of this state, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of such vehicles, constructing, maintaining and repairing public roads, highways and streets, and maintaining and repairing bridges and viaducts, paying the counties' proportion of the cost and expenses of co-operating with the department of highways in the improvement and construction of state highways, paying the counties' portion of the compensation, damages, cost and expenses of constructing, reconstructing, improving, maintaining and repairing roads, and for the purpose of enforcing and paying the expenses of administering the law to provide reimbursement for hospitals on account of the expenses for the care of indigent persons injured in motor vehicle accidents, and, until and including April 15, 1941, for the purpose of supplementing

revenues available for paying the salaries and wages of traffic officers in cities.”

It is fundamental that when the state enacts a law levying a tax and in such act has specified the purpose of the tax, it may be used for no other purpose. (Sec. 5, Art. XII, Ohio Constitution.) In Section 6309-2, General Code, the legislature has provided for the distribution of motor vehicle license tax proceeds and therein is contained the following direction:

“ * * * * * * * * * ”

(2) Five per centum of all taxes collected under the provisions of this chapter, together with interest earned by fees deposited by the treasurer of state as provided in section 6309 of the General Code, shall constitute a fund for the use of the several counties for the highway, road and other purposes specified in paragraphs (3) and (3a) of this section. Said fund shall be divided equally among all the counties in the state. Said fund shall be paid out on vouchers prepared by the registrar and warrants drawn by the auditor of state in equal proportions to the county auditor of each county within the state to be used for the purposes herein designated.

(3) Forty-seven per centum of all taxes collected under the provisions of this chapter shall be for the use of the county in which the owner resides or in which the place is located at which the established business or branch business in connection with which the motor vehicle registered is used, as the case may require, for the construction, reconstruction, improvement, maintenance and repair of roads and highways, and maintaining and repairing bridges and viaducts, and for the purposes specified in paragraph (3a) of this section.”

Since the board of county commissioners is a public office and has such powers and such only as have been granted it by statute, we must refer to the statutes in order to determine to what extent it is authorized to cooperate with the State Highway Department in the location or relocation of a highway. In section 1191, General Code, we find the following language granting authority to boards of county commissioners to cooperate with the State Highway Department in the construction of highways:

“ * * * Said commissioners shall also be authorized to cooperate with said department in constructing, reconstructing, resurfacing or widening a state highway, where the result of such construction, reconstruction, resurfacing or widening is to produce a pavement more than twenty feet in width, and the commissioners shall under such circumstances be authorized to pay all or any agreed portion of the cost of so much of any such pavement so constructed, reconstructed, resurfaced or widened as lies outside of or extends beyond such width of twenty feet, together with all or any agreed por-

tion of so much of the cost of grading, drainage structures, right of way, and other appurtenances and incidental expenses as may be occasioned by or result from such construction, reconstruction, resurfacing or widening of the pavement in excess of twenty feet in width. * * * County commissioners of any county shall be authorized to cooperate with the department of highways in the cost of obtaining right of way required for or in connection with any state highway improvement or repair contemplated by the director; and to pay any agreed proportion of the cost of such right of way. Unless otherwise expressly restricted, the authority granted to county commissioners by this section to cooperate with the department of highways shall extend to all portions of the state highway system, both within and without municipal corporations, subject to the condition that the consent of a municipal corporation be given to the performance of any work within its limits."

Section 1191-2, General Code, grants authority to the county commissioners to purchase or condemn property for such purposes. This section reads as follows:

"Where county commissioners, under authority of sections 1191 and 1191-1 of the General Code, cooperate with the department of highways, said commissioners shall be authorized, with the approval of the director, to purchase or appropriate such property as may be needed, or pay damages, if any, in the construction, reconstruction, resurfacing, widening, maintenance, repair or preservation of state highways, including the bridges and culverts and viaducts thereon, and the approaches thereto, and to purchase or appropriate the right to make waste dumps, borrow pits, and to relocate, alter, widen, clean out, deepen, straighten, or change the channel of any water course necessary for any of the above purposes, and said county commissioners shall follow the procedure specified for the director of highways, as hereinafter provided, for the purchase or appropriation of private property for highway purposes."

It would therefore seem to me, since the motor vehicle license tax is levied, in part, for the purpose of enabling the county to pay a portion of its cooperative agreement with the State Highway Department, and further since the legislature has specifically provided that the county commissioners may as a part of their cooperation, acquire such right of way by either condemnation or purchase, that the county commissioners may use their portion of the motor vehicle license revenues distributed to the county under authority of Section 6309-2, General Code, for the purchase of a right of way to be used by the State Highway Department for the construction of a state highway thereon in cooperation with such board of county commissioners.

You further inquire whether the county's portion of the motor vehicle fuel taxes levied pursuant to Sections 5527 and 5541, General Code, may

legally be used for the same purpose. Under authority of Section 5527, General Code, a one and one-half cent tax is levied upon each gallon of motor vehicle fuel sold for the purpose of being used in motor vehicles on the highways in the state. In Section 5537, General Code, we find the following language providing for the distribution of the proceeds of such tax to counties and defining the purpose for which it may be used:

“Twenty-five per cent. of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state, and shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such counties.”

In Section 5541, General Code, we find that the legislature has levied an additional one and one-half cent tax per gallon on such fuel so to be used. This tax is levied for the purpose, among others, of “enabling counties, townships, and municipal corporations of the state properly to construct, widen, reconstruct and maintain their highways, roads and streets.”

Now we might consider whether the acquisition of a new right of way would ever be a part of the maintenance of an existing road or street; if not, then it would be self evident that no part of the proceeds of the tax funds received pursuant to Section 5537, General Code, could be used for such purpose. However, I do not believe it will be helpful for me to discuss such question at this time, for in Sections 5537 and 5541-8, General Code, in the latter part of which sections the legislature has made provision for the distribution of the tax levied by Section 5541, General Code, the legislature has made similar limitation upon the use of the municipalities' portion of such proceeds, and preceding Attorneys General have been called upon to construe such sections with reference to similar use by the municipality.

In an opinion of my immediate predecessor in office found in Opinions of the Attorney General, 1937, Vol. I, page 447, the syllabus reads:

“Proceeds of gasoline taxes distributed to municipalities under the provisions of Sections 5537 and 5541-8, General Code, may not be used for the purpose of purchasing right-of-way in connection with the opening or extending of streets.”

In the second branch of the syllabus of an opinion found in the Opinions of the Attorney General for 1929, Vol. II, page 1566, another predecessor in office ruled:

“The money derived from such taxes may not be used by municipalities for the purpose of purchasing additional right of way needed in connection with the widening of any street.”

In the first branch of the syllabus of an opinion contained in Opinions of the Attorney General for 1929, Vol. III, page 1891, it was ruled that a portion of the proceeds of the tax distributed under authority of Section 5541-8, General Code, might be used in acquiring right of way for the purpose of *widening* an existing street. Such opinion was arrived at by reasoning that Section 5541-8, General Code, specifically authorizes the use of the funds for the purpose of “widening” the existing highway or street. Similar language is contained in such section with reference to the distribution of the county’s share:

“When appropriated by the General Assembly such highway construction fund shall be appropriated and expended in the following manner and subject to the following conditions:

* * *

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* * *

Seven and one-half per cent of said highway construction fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions 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 within such county.*” (Emphasis added.)

It is elemental that when the legislature grants to a county funds for a specific purpose, they may be used for no other purpose; the designation of purpose is likewise a limitation upon their use for any other purpose or purposes. *Peter v. Parkinson*, 83 O. S., 36, 49; *Elder v. Smith*, 103 O. S., 369.

Such is the hypothesis upon which the opinions of my predecessors are based. It is therefore my opinion that inasmuch as such sections grant no specific authority to acquire rights of way for the construction of a portion of highway which is not a portion of “the county system of public roads and highways,” and is not intended to become such, neither is it intended when completed to be a part of the “state highway system of highways.”

In specific answer to your inquiry, it is my opinion that:

1. A board of county commissioners has authority to use a portion of the funds received by the county under authority of Section 6309-2, General Code, being a portion of the proceeds of motor vehicle license tax levied by Section 6291, General Code, for the purpose of acquiring right of way for a portion of a state highway being constructed within such county by the

State Highway Department with the cooperation of the county under authority of Sections 1191 and 1191-2, General Code.

2. The board of county commissioners may not legally use any portion of the liquid fuel taxes distributed to the county under authority of Sections 5537 and 5541-8, General Code, for the purpose of acquiring a right of way for a state highway to be constructed under authority of Section 1191, General Code.

Respectfully,

THOMAS J. HERBERT,
Attorney General.