

However, it is believed that your questions relate to the care of trees rather than their constituting obstructions within the bounds of such highways.

While no appropriation of funds for the trimming and treating of trees was made to your department by the last Legislature, you may consent to the Department of Agriculture, or some other department, taking charge of the care of all trees located within such state highways. If such department assumes such work it may make the expenditure necessary for the proper care of such trees from any funds available for the development of forestry.

Therefore, answering your first question specifically, it is my opinion that you may not, in the absence of an appropriation therefor, contract with a private company to trim or treat trees located within the bounds of state highways, except as hereinbefore pointed out. However, you may refer the matter of caring for such trees to the Department of Agriculture or some other proper state department.

Answering your second question specifically, in the absence of an appropriation therefor, your department is not authorized to expend any of its funds for trimming or treating trees along highways.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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1785.

MUNICIPALITY—HOW IT MAY EXPEND MOTOR VEHICLE LICENSE TAX AND GASOLINE TAX.

*SYLLABUS:*

1. *A municipality may expend its share of the motor vehicle license tax and the gasoline excise tax fund for the purpose of placing gravel or cinders on streets or roadways which have previously been graded or improved by the placing of gravel or cinders thereon.*

2. *The funds received by a municipality from the motor vehicle license tax and the gasoline excise tax fund may be used for the purpose of oiling streets and roadways which have been improved with gravel or cinders.*

COLUMBUS, OHIO, February 29, 1928.

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

GENTLEMEN:—Receipt is acknowledged of your communication of recent date requesting my opinion, as follows:

“Section 6309-2 and 5537, G. C., provide that a municipality may use its share of the motor vehicle license and gasoline tax receipts for the sole purpose of maintaining and repairing existing streets and roadways in the corporation, and maintenance and repair is defined as ‘all work done upon any public road or highway or upon any street in which the existing foundation thereof is used as the subsurface of the improvement thereof in whole or substantial part.’

The syllabus of Opinion No. 2748 to be found at page 1180 of the Opinions of the Attorney General for 1921 reads:

'The process of treatment with oil of municipal streets and public roads, authorized by Sections 3751, 3752, 3753 and 3754, G. C., is such a street or road improvement as to come within the meaning of the words "maintenance" and "repair" as used in Section 6309-2 of the General Code.'

*Question 1.* May a municipality's share of the motor vehicle license tax and gasoline tax receipts be legally used for the purpose of re-grading and placing additional gravel or cinders on streets and roadways which have previously been graded and improved with cinders or gravel?

*Question 2.* May such receipts be used for the purpose of oiling streets and roadways which have been improved with gravel or cinders?"

Sections 6309-2 and 5537, General Code, read in part as follows:

Sec. 6309-2. "The revenue collected under the provisions of this chapter shall be distributed as follows:

(1) Fifty per centum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district or (of) registration as provided in this chapter. The portion of such money due the municipal corporations shall be paid into the treasuries of such municipal corporations on the first business day of each month, and the remainder retained in the county treasury. In the treasuries of such municipal corporations and counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads, highways and streets and for no other purpose, and shall not be subject to transfer to any other fund. 'Maintenance and repair' as used in this section, includes all work done upon any public road or highway, or upon any street, in which the existing foundations thereof is (are) used as a sub-surface of the improvement thereof, in whole or in substantial part.

\* \* \*

The 'state maintenance and repair fund' provided for herein shall be available for the use of the commissioner of motor vehicles in defraying the expenses incident to carrying out and enforcing the provisions of this chapter and for the use of the director of highways and public works in the manner provided by law. The general assembly shall make appropriations therefrom for such purpose."

Sec. 5537. " \* \* \*

Thirty per cent of such gasoline tax excise fund shall be paid in vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be used by such municipal corporations for the sole purpose of maintaining and repairing the public streets and roads within such corporation.

Whenever a municipal corporation is on the line of an inter-county highway or main market road, one-sixth of the amount so paid to any municipal corporation shall be used by such municipal corporation for the sole purpose of maintaining and repairing such streets and roads within such municipal corporation, as may be designated by the director of highways and public

works as extensions or continuances of inter-county highways or main market roads.

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A question similar to that raised by your first inquiry was recently considered by this department in Opinion No. 1674, addressed to Hon. John H. Houston, Prosecuting Attorney, Georgetown, Ohio, under date of February 4, 1928, the fifth branch of the syllabus of which opinion reads as follows:

"The term 'maintenance and repair' as used in Section 5537, General Code, embraces all work done upon roads and highways within the meaning of the term in its ordinary acceptation, and in addition thereto, includes all work done upon any public road or highway in which the existing foundations thereof are used as the subsurface of the improvement thereof in whole or in substantial part."

In discussing the meaning of the words "maintenance and repair," as such words are used in Sections 6309-2 and 5537, *supra*, it is stated on pages 13 and 14 of said opinion that:

"With reference to the meaning of the words 'maintenance and repair' as they are used in Section 5537, when construed in connection with 6309-2, General Code, this office in Opinion No. 374, rendered under date of April 23, 1927, to the Bureau of Inspection and Supervision of Public Offices, said as follows:

'Since the gasoline excise tax law is a later enactment than the law with reference to the registration of motor vehicles, it is apparent that, when reference is made in the gasoline tax law to the motor vehicle registration law and the gasoline tax law provides that the moneys derived from the tax created thereby are for the purpose of supplementing the moneys arising under the motor vehicle registration law, and directs that these moneys shall be used for the same purpose as those arising under the former law, the definition of the expression "maintenance and repair" as contained in the former law is adopted in the later one.'

It is well settled that the 'word "includes" is not, ordinarily, a word of limitation, but rather of enlargement.' See *Fraser vs. Bentel*, 161 Cal. 390, 394, and cases cited. As stated in *In re: Gretz's Will*, 75 N. Y. S. 750, 751:

"Including" is not a word of limitation, rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it.'

It seems clear, therefore, that the term 'maintenance and repair' as used in Section 5537, General Code, not only embraces all work within the meaning of the term in its ordinary acceptation, but in addition *includes* 'all work done upon any public road or highway in which the existing foundations thereof is (are) used as the subsurface of the improvement thereof in whole or in substantial part.'

In the light of the above opinion it is quite apparent that the term "maintenance and repair," as used in Sections 6309-2 and 5537, *supra*, embraces all ordinary repairs as well as those which may involve an extensive improvement such as a resurfacing. In the event a street or highway is being resurfaced with funds obtained from the motor vehicle license tax or from the gasoline excise tax fund, as provided in Sections 6309-2 and 5537, *supra*, the test whether such an improvement constitutes "maintenance and repair" is whether or not some part or all of the existing foundation of said street is being used as a subsurface for the new improvement.

In your first question you mention regrading and the placing of additional gravel or cinders on streets and roadways. From this statement, I am assuming that you are referring to a regrading which is for the purpose of placing the roadbed in proper condition to receive the cinders or gravel which are to be placed thereon. If the regrading contemplated changes the present road or street to the extent that the placing of gravel or cinders thereon would constitute a new improvement, then, of course, the municipality's share of the motor vehicle license tax and the gasoline excise tax fund cannot be used for such purpose. It is quite clear that the Legislature has intended the use of such funds for the purpose of keeping up and maintaining streets and highways in municipalities and not for the purpose of paying for an entire new improvement.

With the qualification above noted, it is my opinion that a municipality may expend its share of the motor vehicle license tax and the gasoline excise tax fund for the purpose of placing gravel or cinders on streets or roadways which have previously been graded or improved by the placing of gravel or cinders thereon.

In your communication you refer to and quote the syllabus of Opinion No. 2748, found in Opinions of the Attorney General, 1921, Vol. II, page 1180. I agree with the conclusions therein reached. In that opinion the question was raised as to whether or not the funds received from the motor vehicle license tax might be used for the purpose of oiling streets. In other words, was the oiling of streets "maintenance and repair" within the meaning of Section 6309, General Code.

Therefore, answering your second question specifically it is my opinion that the funds received by a municipality from the motor vehicle license tax and the gasoline excise tax fund may be used for the purpose of oiling streets and roadways which have been improved with gravel or cinders.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

1786.

HIGHWAYS—ESTABLISHMENT, RELOCATION AND ABANDONMENT  
OF STATE HIGHWAYS—SECTION 1189, GENERAL CODE, CON-  
STRUED.

*SYLLABUS:*

*Construing certain provisions of Section 1189, General Code.*

COLUMBUS, OHIO, February 29, 1928.

HON. GEORGE F. SCHLESINGER, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion, as follows:

"In taking up certain matters relating to establishing additional state highways or changing or abandoning existing state highways I find some language in Section 17 of House Bill No. 67, passed by the last General Assembly and designated as Section 1189, General Code, so phrased as to leave me uncertain as to the proper procedure which should be followed. It will be necessary for me to proceed under this section very shortly and in order that my proceedings may be regular and that the intent of the section in