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TOWNSHIP TRUSTEES—MAY NOT LAWFULLY EXPEND FUNDS, MOTOR VEHICLE FUEL TAX, DISTRIBUTED UNDER SECTION 5541-8 G. C. TO CONSTRUCT OR PURCHASE PERMANENT IMPROVEMENTS FOR STORAGE AND HOUSING EQUIPMENT USED TO MAINTAIN, CONSTRUCT AND REPAIR PUBLIC ROADS AND BRIDGES.

SYLLABUS:

Township trustees may not lawfully expend funds derived from motor vehicle fuel tax distributed under the provisions of Section 5541-8, General Code, for the purpose of constructing or purchasing permanent improvements for storage and housing equipment used in maintaining, constructing and repairing public roads and bridges.

Columbus, Ohio, July 20, 1949

Hon. Seabury H. Ford, Prosecuting Attorney  
Portage County, Ravenna, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“In view of your recent Opinion No. 413, issued April 22, 1949, holding that funds received under G. C. 6309-2 by municipal corporation may be lawfully expended for the cost of housing and storage of equipment used in maintaining streets and roads, would you now interpret G. C. 5541-8, so that townships may now lawfully expend money received from the Motor Vehicle Fuel Tax and placed in their ‘Gasoline Tax Fund’ for the purpose of constructing or purchasing storage and housing for equipment used in maintaining, constructing and repairing public roads and bridges?”

If not, is there any other provision of law whereby township trustees may expend taxes received from motor vehicle licenses or from gasoline tax distribution for such purposes?”

My opinion No. 413, issued April 22, 1949, which you have referred to, was based upon the interpretation of Section 6309-2 of the General Code, which section provides for the distribution of revenue from the Motor Vehicle License Tax and the purpose for which such revenue may be used. The question in that opinion was: Can the funds under Section 6309-2 be used by municipalities to defray the expenses of power, light heat, gas, telephone and office supplies for a highway maintenance garage in which the municipality stored its vehicles and equipment owned and maintained for the maintenance and repair of public roads and highways and maintaining and repairing bridges and viaducts. In that opinion I concluded what in my judgment reasonably came within the definition of the word “incidental”, and quoting from page 5 of that typewritten opinion rendered to the Bureau of Inspection and Supervision of Public Offices, I stated:

“The expense incurred from such storage is incidental to the maintenance, repairing, constructing and repaving streets and/or maintaining and repairing bridges and viaducts.

What is meant by the word ‘incidental’ The word ‘incidental’ was referred to by the court in the case of *In Re Elimina-*

tion of Highway-Railroad Crossing, 64 N. Y. S. (2nd), 764, at page 771, citing Corpus Juris Secundum:

'\* \* \* At first blush, the word "incidental" connotes subordination to a primary purpose, and ordinarily the use of the word is regarded as referring to minor matter; the word also has the significance of matters collateral and accessory, directly pertinent to, or in some relation to. \* \* \*'

It is, therefore, my opinion that the funds received by a municipal corporation from the proceeds of motor vehicle license fees, distributed under Section 6309-2 General Code, may be lawfully expended for the purpose of paying the cost of housing and storage of equipment used in maintaining, repairing, constructing and repaving public streets and in maintaining and repairing bridges and viaducts in the municipality."

It is true that the expenses under consideration in said opinion may come within the meaning of "current expense" as referred to in Section 5625-4 of the General Code, but they are also within the meaning of the word "incidental." I believe that it is reasonable and logical to treat such expenses as closely related, collateral and directly pertinent to the primary purpose therein intended. However, the question before me in the instant case is one of acquiring housing and storage for equipment. From the very nature of the thing sought to be acquired, it appears to me that same comes within the meaning of the term "permanent improvement." Such housing and storage requires the acquisition of land and buildings. The definition of "permanent improvement" as set forth in the Uniform Tax Levy Law, Section 5625-1(e) is as follows:

"'Permanent improvement' or 'improvement' shall mean any property, asset or improvement with an estimated life or usefulness of five (5) years or more, including land and interests therein, and including reconstructions, enlargements and extensions thereof, having an estimated life or usefulness of five years or more."

Furthermore, I hesitate to extend the meaning or to include within the meaning of the word "incidental" a "permanent improvement" because specific provision has been made by the legislature under the Uniform Tax Levy Law to acquire permanent improvements, being Section 5625 et seq. of the General Code.

Section 5625-3 of the General Code reads in part as follows:

"The taxing authority of each subdivision is hereby authorized to levy taxes annually, subject to the limitation and restric-

tions of this act (G. C. Secs. 5625-1 to 5625-39,) on the real and personal property within the subdivision for the purpose of paying the current operating expenses of the subdivision and the acquisition or construction of permanent improvements. The taxing authority of each subdivision and taxing unit shall, subject to the limitations and restrictions of this act (G. C. Secs. 5625-1 to 5625-39,) levy such taxes annually as are necessary to pay the interest and sinking fund on and retire at maturity the bonds, notes and certificates of indebtedness of such subdivision and taxing unit including levies in anticipation of which the subdivision or taxing unit has incurred indebtedness. \* \* \*

Section 5625-4 of the General Code reads as follows:

“The taxing authority of each subdivision shall divide the taxes levied into the following separate and distinct levies:

1. The general levy for debt charges within the ten mill limitation.
2. The general levy for current expense within the ten mill limitation.
3. Special levies authorized by the provisions of this act within the ten mill limitation.
4. The general levy for debt charges authorized by law or by vote of the people outside of the ten mill limitation.
5. Other special or general levies authorized by law or by vote of the people outside of the ten mill limitation.”

Section 5625-5 of the General Code reads in part as follows:

“The purpose and intent of the general levy for current expenses is to provide one general operating fund derived from taxation from which any expenditures for current expenses of any kind may be made, and the taxing authority of a subdivision may include in such levy the amounts required for the carrying into effect of any of the general or special powers granted by law to such subdivision, including the acquisition or construction of permanent improvements and the payment of judgments, but except the construction, reconstruction, re-surfacing or repair of roads and bridges in counties and townships and the payment of debt charges. The power to include in the general levy for current expenses additional amounts for purposes for which a special tax is authorized shall not affect the right or obligation to levy such special tax. \* \* \*

My reasoning I believe is borne out in Attorney General's Opinions for 1944, No. 6740, where the following question was submitted to the then Attorney General:

“May the proceeds of the motor vehicle license fees or gasoline tax, or both, be used by a municipality to finance the cost of a building to be used solely for the housing of street repair and construction equipment?”

The Attorney General in answering the question referred to Section 1190-1 of the General Code, which section is now repealed, but at that time specifically authorized the Director of Highways to pay from any fund appropriated for the purpose of maintenance of highways, expenses of providing buildings for storing machinery, and the then Attorney General stated as follows:

“It is fundamental that buildings of a permanent nature become a part of the realty and by analogy, it would seem clear that if money may not be used for the purchase of realty, it could not be used for the construction of a building. In support of this conclusion, as pointed out in the opinion you refer to, Section 1190-1 of the General Code expressly authorizes the Director of Highways to pay from any fund appropriated for the purpose of maintaining the highways, expenses of providing buildings for storing machinery, etc. *From the above it is believed that it may be argued with some force that when the Legislature intended that the use of funds levied for maintenance could be used to construct buildings, it so expressed such intent in a legislative enactment.*

It further must be kept in mind that the Legislature has provided means whereby municipalities may obtain funds to construct buildings. Section 2293-1 of the General Code authorizes bond issues for building purposes under certain conditions. Section 5625-5 authorizes a general tax levy and Section 5625-6 provides for a special tax levy, for building purposes.”

Therefore, in specific answer to your question, I am of the opinion that since the legislature has made specific provision for township trustees to acquire permanent improvements, the purchase of such improvements from other funds may not be implied as being authorized in another section of the law.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.