

July 10, 2014

The Honorable Jessica A. Little
Brown County Prosecuting Attorney
510 E. State Street, Suite 2
Georgetown, Ohio 45121

SYLLABUS:

2014-027

A township may not expend motor vehicle fuel excise tax revenues distributed to it pursuant to R.C. 5735.27 to acquire real estate upon which the township will construct a building to house road machinery and equipment. (1964 Op. Att'y Gen. No. 1499, p. 2-388, approved and followed.)



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OPINION NO. 2014-027

The Honorable Jessica A. Little
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Georgetown, Ohio 45121

Dear Prosecutor Little:

You have requested an opinion regarding the purposes for which a township may expend motor vehicle fuel excise tax revenues distributed to it under R.C. 5735.27. Specifically, you wish to know whether a township may use any of those revenues to purchase real estate upon which it will construct a building to house road machinery and equipment.

In order to answer this question, it is first necessary to discuss the limitations imposed by the Ohio Constitution and the Revised Code upon the purposes for which motor vehicle fuel excise tax revenues may be expended. Article XII, § 5 of the Ohio Constitution provides that “[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.” Revenues derived specifically from motor vehicle license taxes and motor vehicle fuel excise taxes are addressed in Article XII, § 5a of the Ohio Constitution:

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.

As explained by the Ohio Supreme Court, Article XII, § 5a of the Ohio Constitution “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[.]” *Grandle v. Rhodes*, 169 Ohio St. 77, 157 N.E.2d 336 (1959) (syllabus, paragraph 1).

In keeping with this constitutional restriction, the General Assembly has enacted a comprehensive statutory scheme governing the levy, collection, distribution, and expenditure of motor vehicle license taxes and motor vehicle fuel excise taxes. *See, e.g.*, R.C. 4501.04 (distribution of moneys in the auto registration distribution fund and the purposes for which such moneys may be used by townships and other political subdivisions); R.C. 5735.05 (imposition of a motor vehicle fuel excise tax and statement of the purposes for which the revenues may be used); R.C. 5735.25 (levy of an additional motor vehicle fuel excise tax and description of the purposes for which the revenues may be used); R.C. 5735.27 (creation of the gasoline excise tax fund in the state treasury and payment of certain amounts therefrom to townships for the road and highway purposes described therein). You are concerned with R.C. 5735.27, which creates the gasoline excise tax fund in the state treasury. The gasoline excise tax fund is composed of revenues derived from the motor vehicle fuel excise taxes levied pursuant to R.C. 5735.05 and R.C. 5735.25. *See* R.C. 5735.23; R.C. 5735.26. R.C. 5735.27 describes the manner in which motor vehicle fuel excise tax revenues credited to the gasoline excise tax fund are distributed among and to the counties, municipal corporations, and townships of the state. R.C. 5735.27 also specifies the purposes for which those revenues, once distributed, may be expended. With respect to townships, R.C. 5735.27(A)(5)(d) provides, in relevant part:

All amounts [of motor vehicle fuel excise tax revenue] credited pursuant to [R.C. 5735.27(A)(5)(a) and (b)] shall be paid to the county treasurer of each county for the total amount payable to the townships within each of the counties. The county treasurer shall pay to each township within the county its proportional share of the funds, which shall be expended by each township only for the purposes of planning, constructing, maintaining, widening, and reconstructing the public roads and highways within the township, paying principal, interest, and charges on bonds and other obligations issued pursuant to [R.C. Chapters 133 or 505] or incurred pursuant to [R.C. 5531.09] for the purpose of acquiring or constructing roads, highways, bridges, or viaducts or acquiring or making other highway improvements for which the board of township trustees may issue bonds under those chapters, and paying costs apportioned to the township under [R.C. 4907.47].

No part of the funds designated for road and highway purposes 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 planning, constructing, widening, and reconstructing such roads and highways, and the cost of materials forming a part of the improvement; *provided that the funds may be used for the purchase of road machinery and equipment, the planning, construction, and maintenance of suitable buildings for housing road machinery and equipment, and the payment of principal, interest, and charges on bonds and other obligations issued pursuant to [R.C. Chapters 133 or 505] for the purpose of purchasing road machinery and equipment or planning, constructing, and maintaining suitable buildings for housing road machinery and equipment[.]* (Emphasis added.)

Thus, R.C. 5735.27(A)(5)(d) limits a township's expenditure of motor vehicle fuel excise tax revenues to the purposes stated therein. *See* 1992 Op. Att'y Gen. No. 92-049, at 2-201 ("revenues derived from motor vehicle fuel excise taxes may be used only for the purposes described in the

statutes governing the levying, collection and distribution of those taxes”). *See generally State ex rel. Walton v. Edmondson*, 89 Ohio St. 351, 106 N.E. 41 (1914) (where the expenditure of public funds is limited by statute, the funds may not be spent for a purpose not specified in the statute). Included among the purposes for which a township may expend motor vehicle fuel excise tax revenues distributed to it pursuant to R.C. 5735.27 is “the planning, construction, and maintenance of suitable buildings for housing road machinery and equipment[.]” R.C. 5735.27(A)(5)(d). *See generally* R.C. 5549.21 (“[t]he board of township trustees ... shall provide suitable places for housing and storing machinery and tools owned by the township”). You wish to know whether a board of township trustees may expend motor vehicle fuel excise tax revenues to purchase real estate upon which to construct such a building.

As you have noted, a 1964 opinion of the Attorney General addressed this issue and concluded that “[t]ownship trustees may not use or expend moneys derived from gas taxes and distributed to the township pursuant to [R.C. 5735.27] for the purpose of acquiring real estate even though such real estate is to be used to store road machinery and equipment.” 1964 Op. Att’y Gen. No. 1499, p. 2-388 (syllabus, paragraph 2). In reaching this conclusion, the opinion examined the language of R.C. 5735.27(D), now R.C. 5735.27(A)(5), which at the time permitted a township to use motor vehicle fuel excise tax revenues “for the construction and maintenance of suitable buildings for housing road machinery and equipment[.]”¹ 1964 Op. Att’y Gen. No. 1499, p. 2-388, at 2-392; *see also* 1961 Ohio Laws 313, 321 (Am. S.B. 158, eff. Sept. 21, 1961). The opinion reasoned that a board of township trustees may not use revenues distributed to the township pursuant to R.C. 5735.27 to purchase real estate upon which to construct a building to house road machinery and equipment because “the legislature has not expressly authorized townships to use said funds for the acquisition of land upon which such a building is to be placed.” 1964 Op. Att’y Gen. No. 1499, p. 2-388, at 2-392. The opinion further concluded that the authority to use motor vehicle fuel excise tax revenues to construct and maintain a building for housing road machinery and equipment does not imply the authority to use such funds to purchase real estate upon which to construct the building. *Id.* (syllabus, paragraph 3). In reaching this conclusion, the opinion noted that Article XII, § 5a of the Ohio Constitution strictly restricts the expenditure of motor vehicle fuel excise tax revenues to the purposes enumerated therein. *Id.* at 2-392. The opinion reasoned that the authority to purchase real estate with motor vehicle fuel excise tax revenues is not implied because the purchase of real estate “is not essential to the performance of the road repair and maintenance duties imposed under [R.C. 5735.27].” *Id.* at 2-394.

We approve and follow 1964 Op. Att’y Gen. No. 1499, p. 2-388’s conclusion that a board of township trustees may not expend motor vehicle fuel excise tax revenues distributed to the township

¹ Since the issuance of 1964 Op. Att’y Gen. No. 1499, p. 2-388, the General Assembly has amended R.C. 5735.27 to permit a township to use motor vehicle fuel excise tax revenues for the purpose of “the *planning*, construction, and maintenance of suitable buildings for housing road machinery and equipment[.]” 1965 Ohio Laws 1367, 1368 (Am. H.B. 443, eff. Oct. 30, 1965) (emphasis added).

pursuant to R.C. 5735.27 to acquire real estate upon which the township will construct a building to house road machinery and equipment. As recognized in the 1964 opinion, Article XII, § 5a of the Ohio Constitution strictly limits the expenditure of motor vehicle fuel excise tax revenues to the purposes enumerated therein. Included among the purposes for which such revenues may be expended is “other statutory highway purposes[.]” Ohio Const. art. XII, § 5a. Accordingly, in order for a board of township trustees to expend motor vehicle fuel excise tax revenues on the purchase of real estate, it must have express statutory authority to do so, or such authority must be necessarily implied from a statutory provision. *See Drees Co. v. Hamilton Twp.*, 132 Ohio St. 3d 186, 2012-Ohio-2370, 970 N.E.2d 916, at ¶13 (a board of township trustees, as a creature of statute, has only those powers expressly granted to it by statute or necessarily implied therefrom); *accord Trs. of New London Twp. v. Miner*, 26 Ohio St. 452, 456 (1875); *see also* 1984 Op. Att’y Gen. No. 84-050, at 2-164 (a board of township trustees’ authority to act in financial transactions must be clearly and distinctly granted).

While R.C. 5735.27 has been amended on numerous occasions since the issuance of 1964 Op. Att’y Gen. No. 1499, p. 2-388, the General Assembly has not granted a board of township trustees express authority to expend motor vehicle fuel excise tax revenues to purchase real estate upon which to construct a building to house road machinery and equipment. Rather, R.C. 5735.27(A)(5)(d) authorizes a township to expend such revenues for the purpose of “the planning, construction, and maintenance of suitable buildings for housing road machinery and equipment[.]” That R.C. 5735.27 has not been amended to explicitly authorize the acquisition of real estate supports the conclusion that the General Assembly does not intend for motor vehicle fuel excise tax revenues to be used to purchase real estate. *See State v. Cichon*, 61 Ohio St. 2d 181, 183-84, 399 N.E.2d 1259 (1980) (“legislative inaction in the face of longstanding judicial interpretations of [a statute] evidences legislative intent to retain existing law”); *see also* 2010 Op. Att’y Gen. No. 2010-014, at 2-96 to 2-97 (that the General Assembly has not amended pertinent statutes to abrogate conclusions reached in an Attorney General opinion implies legislative approval of the opinion’s conclusions); 2002 Op. Att’y Gen. No. 2002-010, at 2-57 to 2-58 (same as previous parenthetical).

While it may be suggested that the authority to “plan” a suitable building using motor vehicle fuel excise tax revenues implies the authority to purchase real estate using those moneys, we are of the opinion that it does not. The term “planning” is not defined for purposes of R.C. 5735.27, and, therefore, it is appropriate to use the ordinary dictionary definition of this term when interpreting R.C. 5735.27. *See* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”). The dictionary defines the term “plan” as “a detailed formulation of a program of action” and, more specifically, “a drawing or diagram drawn on a plane.” *Merriam-Webster’s Collegiate Dictionary* 947 (11th ed. 2005); *see also Random House Webster’s Unabridged Dictionary* 1480 (2001) (defining “plan” as, *inter alia*, “to draw or make a diagram or layout of, as [in] a building”). *Black’s Law Dictionary* similarly defines “plan” as “[a] delineation; a design; a draft, form or representation[;] representation of anything drawn on a plane, as a map or chart ... a sketch.” *Black’s Law Dictionary* 1150 (6th ed. 1990). Accordingly, we interpret the language authorizing a township to “plan” a building using motor vehicle fuel excise tax revenues as authorizing a township to use those revenues to fund activities such as the preparation of building blueprints, building specifications, and other design plans, rather than as authorizing the acquisition of

real estate with such revenues. This interpretation is consistent with the bill analysis of Am H.B. 443, which amended R.C. 5735.27 to include the word “planning.” See 1965 Ohio Laws 1367, 1368 (Am. H.B. 443, eff. Oct. 30, 1965). As explained in the bill analysis, “*labor planning costs and costs for planning suitable buildings for housing road machinery and equipment are [now] included among the limited items for which highway construction fund moneys can be spent.*” Ohio Legislative Service Comm’n, Analysis, Am. H.B. 443, 106th Gen. A. (as reported by the Senate Taxation Committee) (emphasis added). Thus, we do not construe the language of R.C. 5735.27(A)(5)(d) that authorizes a township to use motor vehicle fuel excise tax revenues for the “planning, construction, and maintenance” of a building to house road machinery and equipment as authorizing such revenues to be expended on the purchase of real estate. See *Clark Rest. Co. v. Evatt*, 146 Ohio St. 86, 64 N.E.2d 113 (1945) (syllabus, paragraph 3) (“[i]n the construction and application of taxing statutes, their provisions cannot be extended by implication beyond the clear import of the language used; nor can their operation be so enlarged as to embrace subjects not specifically enumerated”).

Had the General Assembly intended townships to have the authority to use motor vehicle fuel excise tax revenues to purchase real estate upon which to construct a building to house road machinery and equipment, it could have enacted express language in R.C. 5735.27 similar to that used in other taxing statutes. See, e.g., R.C. 345.01(A) (the taxing authority of a municipal corporation, township, or county may levy a tax for the purpose of purchasing a site for and erecting a memorial to commemorate the service of all members and veterans of the military); R.C. 505.39 (a board of township trustees may levy a tax upon all taxable property in the township or in a fire district to provide “buildings and sites for [fire] apparatus and appliances”); R.C. 517.03 (a board of township trustees may levy a tax for the purpose of defraying the expenses of the purchase or appropriation of lands for cemetery purposes); R.C. 5705.19(I) (the taxing authority of any subdivision, see R.C. 5705.01(A), may levy a tax for the purpose of “providing and maintaining fire apparatus, appliances, buildings, or sites therefor”); R.C. 5705.19(J) (the taxing authority of any subdivision may levy a tax for the purpose of “providing and maintaining motor vehicles, communications, other equipment, buildings, and sites for such buildings used directly in the operation of a police department”). See generally *Lake Shore Elec. Ry. Co. v. Pub. Utils. Comm’n of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (if the General Assembly intended a particular meaning, “it would not have been difficult to find language which would express that purpose” having used that language in other statutes); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 69, 110 N.E. 627 (1915) (if the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result).

Thus, in light of the strict limitations placed on the expenditure of motor vehicle fuel excise tax revenues by Article XII, § 5a of the Ohio Constitution, and the General Assembly’s failure to expressly authorize the acquisition of real estate with such revenues, we conclude that a township may not expend motor vehicle fuel excise tax revenues distributed to it pursuant to R.C. 5735.27 to acquire real estate upon which to construct a building to house road machinery and equipment. See generally *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916) (any doubt as to the expenditure of public funds must be resolved against the expenditure); 1992 Op. Att’y Gen. No. 92-049, at 2-201 (“[t]he use of motor vehicle fuel tax excise revenues has been discussed in a number of prior opinions of the Attorney General, which have generally favored a strict construction of the

applicable statutes”). In doing so, we approve and follow the conclusions reached in 1964 Op. Att’y Gen. No. 1499, p. 2-388.²

The General Assembly has not, of course, left townships without the means to fund the purchase of real estate upon which to construct a building to house road machinery and equipment. A board of township trustees is authorized by R.C. 505.262 to issue securities in order to provide revenue for the township’s acquisition of real property. Nevertheless, to the extent that a result different than that reached in this opinion and 1964 Op. Att’y Gen. No. 1499, p. 3-288 is desired, the remedy lies with the General Assembly. See 2013 Op. Att’y Gen. No. 2013-004, at 2-42; 2012 Op. Att’y Gen. No. 2012-027, at 2-237; see also *Bd. of Educ. v. Fulton Cnty. Budget Comm’n*, 41 Ohio St. 2d 147, 156, 324 N.E.2d 566 (1975) (“[t]he remedy desired by appellants ... must be obtained from the source of their problem—the General Assembly” (footnote omitted)).

² You have suggested that the conclusions reached in 1993 Op. Att’y Gen. No. 93-057 may conflict with those reached in 1964 Op. Att’y Gen. No. 1499, p. 2-388. The 1993 opinion concluded that “[a] township may expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27(A)(5) to plan, construct, and maintain a driveway and parking lot that serve a building in which the township houses road machinery and equipment.” 1993 Op. Att’y Gen. No. 93-057 (syllabus, paragraph 3). The opinion found that it is “reasonable to conclude that the authority conferred upon a township by R.C. 5735.27(A)(5) to expend motor vehicle fuel excise tax revenues to plan, construct, and maintain suitable buildings for housing road machinery and equipment also permits a township to expend those revenues to plan, construct, and maintain a driveway and parking lot that will serve those buildings and the machinery and equipment housed therein.” *Id.* at 2-272. In reaching this conclusion, the opinion reasoned that a driveway is necessary for the township to “have proper and ready access to [the road] machinery or equipment” and the parking lot “may serve as a parking or turnaround area” for the township’s road machinery and equipment. *Id.*

We are of the opinion that the conclusions reached in 1993 Op. Att’y Gen. No. 93-057 do not conflict with those of 1964 Op. Att’y Gen. No. 1499, p. 2-388. The 1993 opinion does not address the acquisition of real estate with motor vehicle fuel excise tax revenues. Rather, the 1993 opinion concludes that a township is authorized to use such revenues to plan, construct, and maintain a driveway and parking lot, both of which are necessary appurtenances that make a building that houses road machinery and equipment fully functional. See 1993 Op. Att’y Gen. No. 93-057, at 2-272 (“[c]ertainly a variety of difficulties might reasonably be anticipated (particularly in inclement weather) if large road machinery or equipment must make its way to and from that building absent a driveway designed and constructed for that purpose”). The opinion does not conclude that a township may use motor vehicle fuel excise tax revenues to purchase real estate upon which to construct the driveway or parking lot. See 1998 Op. Att’y Gen. No. 98-008, at 2-46 n.8 (discussing 1964 Op. Att’y Gen. No. 1499, p. 2-388 and stating “[w]hether or not this office would find the purchase of a site to be included within the purpose of planning, constructing, and maintaining suitable buildings to house road machinery is a question that need not be reconsidered at this time”).

Based on the foregoing, it is my opinion, and you are hereby advised that a township may not expend motor vehicle fuel excise tax revenues distributed to it pursuant to R.C. 5735.27 to acquire real estate upon which the township will construct a building to house road machinery and equipment. (1964 Op. Att'y Gen. No. 1499, p. 2-388, approved and followed.)

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General