

**OPINION NO. 83-052****Syllabus:**

1. The board of county commissioners and the county engineer may not require a municipality to expend money available under R.C. 4504.05(B)(1) for the repair of a bridge for which the county has the duty of repair where the municipality has not applied for money for that purpose under R.C. 4504.04.
2. Pursuant to R.C. 4504.04, the allocation and disbursement of money in the fund established by R.C. 4504.05(B)(1) is dependent upon approval by the board of county commissioners.

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**To: John H. Hanna, Henry County Prosecuting Attorney, Napoleon, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, October 11, 1983**

I have before me your opinion request in which you ask the following questions:

- [1.] Can the Board of County Commissioners and the County Engineer find that the needs of the County as a whole for the orderly and efficient flow of traffic within and through the county require the municipality's share of the county motor vehicle license tax provided under Section 4504.05 be used to construct and/or keep in repair a bridge inside a municipal corporation on a county road running through such incorporated community?
- [2.] [Does R.C. 4504.05] require [that] each municipality's share of the permissive county motor vehicle license tax be maintained in a separate fund until such time [as] the discretionary approval by

the Board of County Commissioners authorizes the expenditures of these funds for a proposed municipal use that is necessary or conducive to the orderly and efficient flow of traffic within and through the county and meets the need[s] of the county as a whole?

Further information provided by your office and the county engineer indicates that your concern in asking both questions is whether the county engineer and the county commissioners may allocate money to a municipality from the county motor vehicle license tax for repair of a bridge which the county is under a duty to repair, see R.C. 5591.02 and R.C. 5591.21, even though the city has not requested the use of such money for that purpose.

R.C. 4504.05 provides as follows for the allocation and distribution of the money received by a county levying a county motor vehicle license tax:

(A) First, for payment of the cost and expense incurred by the county in the enforcement and administration of the tax;

(B) The remainder of such moneys shall be credited to funds as follows:

(1) That part of the total amount which is in the same proportion to the total as the number of motor vehicles registered in the municipal corporations in the county is to the total number of motor vehicles registered in the county in the most recent registration year, shall be placed in a separate fund to be allocated and distributed as provided in section 4504.04 of the Revised Code.

(2) The remaining portion shall be placed in the county motor vehicle license and gasoline tax fund and shall be allocated and disbursed only for the purposes specified in section 4504.02 of the Revised Code, other than paying all or part of the costs and expenses of municipal corporations in constructing, reconstructing, improving, maintaining, and repairing highways, roads, and streets designated as necessary and conducive to the orderly and efficient flow of traffic within and through the county pursuant to section 4504.03 of the Revised Code.

Pursuant to this section, once the county receives money from the collection of the motor vehicle license tax, the money not used for administrative costs is placed in one of two funds. A certain portion of the money collected is placed in the fund established pursuant to R.C. 4504.05(B)(1) and is then allocated and distributed according to the scheme set forth in R.C. 4504.04. Any money which is not used for administrative expenses as set forth in R.C. 4504.05(A) or deposited in the fund established by R.C. 4504.05(B)(1) is placed in the county motor vehicle license and gasoline tax fund.

Money placed as required by R.C. 4504.05(B)(1) must be allocated and distributed according to the provisions of R.C. 4504.04, which states, in pertinent part:

Any municipal corporation located within a county levying a county motor vehicle license tax may at any time following adoption by the board of county commissioners of a map prepared pursuant to section 4504.03 of the Revised Code make application in writing to the board for funds available under section 4504.05 of the Revised Code to plan, construct, reconstruct, improve, maintain, or repair any of the streets within the municipality shown on such map, to pay the municipal corporation's portion of the cost of cooperating with the county or with the department of transportation in the planning, construction, reconstruction, improvement, maintenance, or repairing of any of the roads or highways designated on such map, to pay the municipal corporation's portion of the compensation, damages, cost, and expenses of planning, constructing, reconstructing, improving, maintaining and repairing roads and streets designated on such map. . . .

In addition to such application there shall be filed with the

county engineer, in the case of any proposed construction or permanent improvement, a copy of the preliminary plans and an estimate of cost of such construction or improvement or, in any other case, a general statement of the work to be done and the location. Upon approval by the county engineer of such preliminary plans and estimate of cost or proposed use, and upon his finding that the proposed construction, improvement, or other use of funds requested by the municipal corporation is necessary to the orderly and efficient flow of traffic within and through the county, the board of county commissioners may allocate to such municipal corporation, from funds available for such purpose as provided in [R.C. 4504.05], all or part of the cost of such construction, improvement, repair, or other use, bearing in mind the needs of the county as a whole, and in the case of municipal streets, the board may give priority to those streets designated as primary on the map prepared pursuant to [R.C. 4504.03]. (Emphasis added.)

Before money from the fund established by R.C. 4504.05(B)(1) may be used, R.C. 4505.04 requires that several steps be taken. First, a municipality desiring to use the funds must make application for the funds and with such application must submit the necessary plans and estimate or statement of use. Second, the county engineer must approve the plans and estimate or statement of use and find that the proposed construction, improvement or other use "is necessary to the orderly and efficient flow of traffic within and through the county." It is then up to the board of county commissioners to determine whether it will allocate to the municipal corporation, from funds available for such purpose under R.C. 4504.05, all or part of the cost of the proposed use. R.C. 4504.04 specifies that the county commissioners' decision as to whether to allocate money to an applicant should be made "bearing in mind the needs of the county as a whole," and that where the funds will be used for municipal streets, the board may give priority to streets designated as primary streets.

The county engineer's participation in the allocation and distribution of funds under R.C. 4504.04 is, thus, limited to the approval of the plans and estimate or statement of use of the funds and to a finding that the proposed use is necessary to the orderly and efficient flow of county traffic. Once the county engineer has given his approval and has made the necessary finding, the county commissioners may then decide whether to allocate to the municipality all or part of the cost of the proposed use. The scheme set forth in R.C. 4504.04, however, contemplates that before a county allocates money to a municipal corporation for a particular use, the municipal corporation will have applied for such money for that use. R.C. 4504.04 does not authorize the county engineer and county commissioners to determine that a portion of the money in the fund established by R.C. 4504.05(B)(1) will be used for a particular purpose unless a municipal corporation makes application for money to be used for that purpose.

The portion of the money received by a county levying a county motor vehicle license tax which is not used for costs of administration of the tax or placed in the fund established by R.C. 4504.05(B)(1) is placed in the county motor vehicle license and gasoline tax fund. Such portion:

shall be allocated and disbursed only for the purposes specified in [R.C. 4504.02], other than paying all or part of the costs and expenses of municipal corporations in constructing, reconstructing, improving, maintaining, and repairing highways, roads, and streets designated as necessary and conducive to the orderly and efficient flow of traffic within and through the county pursuant to [R.C. 4504.03].

R.C. 4504.05(B)(2).<sup>1</sup> R.C. 4504.05(B)(2), therefore, authorizes the use of this portion of the county motor vehicle license tax for the purposes specified in R.C. 4504.02, with the exceptions set forth in R.C. 4504.05(B)(2). One purpose for which R.C. 4504.02 authorizes the use of such money is "maintaining and repairing bridges and viaducts." Since the money placed in the motor vehicle license and gasoline tax fund, as required by R.C. 4504.05(B)(2), is not subject to the allocation and distribution procedures set forth in R.C. 4504.04, it appears that the county may use money placed in such fund pursuant to R.C. 4504.05(B)(2) for the maintenance and repair of a bridge for which the county has the duty of repair, with or without the consent of the municipality in which such bridge is located.<sup>2</sup>

Your second question asks whether R.C. 4504.05 requires that a municipality's share of the county motor vehicle license tax be kept in a separate fund until disbursement of such money is approved by the county commissioners. It is my understanding that your concern is whether the funds allocated for distribution to the various municipalities under R.C. 4504.04 must be kept in the separate fund created by R.C. 4504.05(B)(1) until the county commissioners approve disbursement of the money. As set forth above, R.C. 4504.05(B)(1) states that a portion of the county motor vehicle license tax "shall" be placed in a separate fund established by R.C. 4504.05(B)(1). The placement of that portion of the county motor vehicle license tax in the fund established by R.C. 4504.05(B)(1) is, therefore, mandatory. See Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (in statutory construction the word "shall" is to be construed as mandatory unless there is a clear legislative intent that the word be interpreted in a different manner). R.C. 4704.05(B)(1) specifies that money in such fund is to be allocated and distributed pursuant to R.C. 4504.04. As stated in response to your first question, R.C. 4504.04 makes the allocation of money in the fund established by R.C. 4504.05(B)(1) discretionary with the board of county commissioners, once the necessary approval by the county engineer has been obtained. Any such decision by

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<sup>1</sup> R.C. 4504.02 states, in pertinent part:

For the purpose of paying the costs of enforcing and administering the tax provided for in this section; and for planning, constructing, improving, maintaining, and repairing public roads, highways, and streets; maintaining and repairing bridges and viaducts; paying the county's portion of the costs and expenses of cooperating with the department of transportation in the planning, improvement, and construction of state highways; paying the county's portion of the compensation, damages, cost, and expenses of planning, constructing, reconstructing, improving, maintaining, and repairing roads; paying any costs apportioned to the county under section 4907.47 of the Revised Code; paying debt service charges on notes or bonds of the county issued for such purposes; paying all or part of the costs and expenses of municipal corporations in planning, constructing, reconstructing, improving, maintaining, and repairing highways, roads, and streets designated as necessary or conducive to the orderly and efficient flow of traffic within and through the county pursuant to section 4504.03 of the Revised Code; purchasing, erecting, and maintaining street and traffic signs and markers; purchasing, erecting, and maintaining traffic lights and signals; and to supplement revenue already available for such purposes, any county by resolution adopted by its board of county commissioners may levy an annual license tax, in addition to the tax levied by sections 4503.02, 4503.07, and 4503.18 of the Revised Code, upon the operation of motor vehicles on the public roads or highways.

<sup>2</sup>See generally 1981 Op. Att'y Gen. No. 81-083 and 1981 Op. Att'y Gen. No. 81-007 (concerning the county's duty to repair bridges within a municipal corporation).

the board is, of course, subject to judicial review for abuse of discretion. See State ex rel. Kahle v. Rupert, 99 Ohio St. 17, 122 N.E. 39 (1918) (all public officers are required to exercise an intelligent discretion in the performance of their official duties). Since no other procedure for disbursement of such funds is specified, the money placed in the fund established by R.C. 4504.05(B)(1) may not be disbursed without the county commissioners' approval, but must remain in such separate fund until the county commissioners determine that it is to be disbursed.

It is, therefore, my opinion, and you are advised, that:

1. The board of county commissioners and the county engineer may not require a municipality to expend money available under R.C. 4504.05(B)(1) for the repair of a bridge for which the county has the duty of repair where the municipality has not applied for money for that purpose under R.C. 4504.04.
2. Pursuant to R.C. 4504.04, the allocation and disbursement of money in the fund established by R.C. 4504.05(B)(1) is dependent upon approval by the board of county commissioners.