

2050.

GRADE CROSSING ELIMINATION—USE OF MUNICIPAL MOTOR VEHICLE LICENSE AND GAS TAX RECEIPTS FOR ENGINEERING SERVICES FOR SUCH PROJECT CONSIDERED.

*SYLLABUS:*

*The municipality's portion of the motor vehicle license and gasoline tax receipts may be used for the purpose of employing an engineer engaged solely in the preparation of plans and supervision of construction of railroad grade separation projects in so far as said funds are available for the purpose of the construction of public streets and roads.*

COLUMBUS, OHIO, July 2, 1930.

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

GENTLEMEN:—Acknowledgment is made of your recent communication presenting the following question :

“May a city's portion of the Motor Vehicle License and Gasoline Tax receipts be used for the purpose of employing an engineer to prepare plans for the elimination of railroad grade crossings, and to represent the city in all matters in connection therewith?”

Inasmuch as in numerous opinions heretofore issued it has been indicated that engineers may be employed and paid from the gasoline tax for services rendered solely in connection with projects for which such tax may legally be expended, the sole question which your inquiry presents is whether or not the municipality's portion of the motor vehicle license and gasoline tax may be used for the purpose of the elimination of railroad grade crossings.

In my opinion No. 101, issued to you under date of February 16, 1929, it was held as disclosed by the syllabus :

“1. The moneys allotted to a municipality under the provisions of Sections 5537 and 6309-2 of the General Code, may legally be expended for the purpose of maintaining and repairing bridges and viaducts upon streets within the municipality. (Opinion, Attorney General, 1924, page 335, overruled.)

2. County commissioners may legally expend the county's portion of the motor vehicle license and gasoline tax receipts for the purpose of maintaining and repairing bridges on public roads and highways in the county system of highways.”

It was pointed out in said opinion that a bridge is to be regarded as a part of the highway which passes over it, except where the language of some particular statute is such as to show plainly that the term is not intended to include bridges. The opinion above mentioned overruled an opinion of a former Attorney General with reference to this subject. Therefore we may now proceed upon the theory that when reference is made in the statute to highways or streets such term includes bridges and viaducts, unless it is otherwise indicated in the statute.

Section 6309-2 of the General Code, which relates to the distribution of the motor vehicle license tax, as last amended, provides in substance that the municipality's share shall be used for the “maintenance, repair, construction and repaving of public streets”. The section, however, further provides that not more than fifty per cent of the total funds available during any year shall be used in construction and repaving.

Section 5537 of the General Code, as last amended and which relates to the distribution of the first gasoline tax, provides that the amount distributed to municipal corporations shall be used for the sole purpose "of maintaining, repairing, constructing and repaving the public streets and roads" and further contains the same limitation with reference to the amount that may be used for construction and repaving.

Section 5541-8 of the General Code, as last amended and which relates to the distribution of the so-called second gasoline tax, provides that the amount allotted to municipalities shall be expended "for the sole purpose of constructing, maintaining, widening and reconstructing public streets and roads within such corporations".

In analyzing the provisions of the three sections last above mentioned it will be observed that all of them authorize the use of the tax for the construction of public streets. While there is some difference in the language in that the former section mentions public streets in connection with the use of said tax and the latter two sections employ the term public streets and roads, it is not believed that this distinction has any significance in so far as your inquiry is concerned. From what has been said it is obvious that if a project which eliminates a railroad grade crossing amounts to the construction of a bridge or a road then clearly such an undertaking would come within the provision of any of the sections above mentioned, relating to the distribution of said tax.

My Opinion No. 101, hereinbefore referred to, is conclusive upon the proposition that such funds may be used in connection with the construction of bridges or viaducts upon public roads or streets.

In this connection your attention is directed to my Opinion No. 1580, issued to your bureau under date of March 5, 1930, wherein it was held, as disclosed by the second branch of the syllabus:

"The proceeds of the levy provided for under Section 6926, General Code, which are not obligated to pay bonds issued in anticipation of the collection thereof, may be used to pay the county's share of the cost of a grade elimination project instituted under the provisions of Section 6956-22 of the General Code."

Section 6926, General Code, which was construed in said opinion and upon which the above conclusion was based, requires a tax levy "for the payment of the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, improving, maintaining and repairing roads". It will therefore be seen that in said opinion, in order to reach the conclusion hereinbefore referred to, it was necessary to construe the term "road" as including an improvement which results in the separation of a railroad grade crossing from the public highway.

In said opinion, after quoting Section 6926, above referred to, and the syllabus of my Opinion No. 101, above referred to, the following comment appears:

"Without an extended discussion it may be stated that the opinion above referred to overruled an opinion of the Attorney General rendered in 1924, and my said opinion was based upon the fundamental proposition of law to the effect that unless it is otherwise indicated, the terms 'road' or 'street' will include bridges thereon.

In view of the conclusion in my opinion last mentioned, the only question now remaining is whether or not the improvement which results in the separation of a grade crossing is to be considered as a road or a bridge. It is not believed that there has been an opinion or decision rendered upon this particular question. However, it is obvious that whatever method is adopted in connection with a grade separation project it results in the road being con-

tinued over or under a railroad. Whether said structure technically amounts to a bridge or a road, or both, it necessarily follows that it is a portion of a highway."

It is believed that the foregoing compels the conclusion that the motor vehicle license tax or the gasoline tax may be used for the purpose of employing engineers solely engaged in the preparation of plans and other matters in connection with the elimination of railroad grade crossings.

However, in this connection it may be mentioned that Section 5541-8 of the General Code, which relates to the distribution of the second gasoline tax, expressly provides that the state's share of the amount distributed thereunder may be used, among other things, "for supplying the state's share of the cost of eliminating railway grade crossings upon such highway". In view of the language last above mentioned a logical argument could be presented to the effect that the Legislature in said section, having expressly provided in the one instance for the use of said moneys in connection with the elimination of railroad grade crossings, intended to inhibit the use of such tax for such purpose in all other instances. However, I am not inclined to this construction for the reason that I regard this statement as a reiteration of a power that already existed. It may also be true that in view of the different provisions of law with reference to the power of the state to eliminate railway grade crossings there is some other reason for the express mentioning of this matter under this section. In any event in so far as municipalities are concerned, in view of the citations and discussions hereinbefore made, it would appear that the power exists to use such funds in connection with the construction of railway grade separation projects.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

2051.

APPROVAL, ABSTRACT OF TITLE RELATING TO PROPOSED PURCHASE BY STATE OF OHIO OF CERTAIN TRACT OF LAND OF MINNIE M. DANIEL, CITY OF COLUMBUS, FRANKLIN COUNTY, OHIO.

COLUMBUS, OHIO, July 2, 1930.

HON. CARL E. STEEB, *Business Manager, Ohio State University, Columbus, Ohio.*

DEAR SIR:—There has been submitted to me for my examination and approval, an abstract of title, warranty deed form and encumbrance estimate relating to the proposed purchase by the State of Ohio of a certain tract of land and the appurtenances thereunto belonging, which is owned of record by one Minnie M. Daniel, said property being situated in the city of Columbus, Franklin County, Ohio, and being more particularly described as follows:

"Being all of Lot No. Three (3) and part of Lot No. Four (4) in R. P. Woodruff's Subdivision of the South half of the S. half Lot No. Two Hundred Seventy-Eight (278) of R. P. Woodruff's Agricultural College Addition, as the same are numbered and delineated upon the recorded plat of said addition, of record in Plat Book 3, page 421, Recorder's Office, Franklin County, Ohio, said portion of Lot No. Four (4) being more particularly described as follows: