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TOWNSHIP TRUSTEES—MAY PURCHASE REAL PROPERTY CONTAINING STONE OR GRAVEL FOR ROAD MATERIAL—PAYMENT MAY BE FROM MOTOR FUEL EXCISE OR LEVY OF PROPERTY TAX OR BOND ISSUE—PROPERTY TAX LEVY OR BOND ISSUE MUST HAVE FAVORABLE VOTE OF ELECTORS—FIRST PARAGRAPH OR SYLLABUS OF OPINION 4339 OAG 1935 OVERRULED SECTIONS 5549.24, 5749.24, 5735.26 RC

SYLLABUS:

Under the provisions of Chapter 5549, R. C., a board of township trustees is authorized to purchase real property containing suitable stone or gravel for road materials. The cost of such purchase may be met either (1) by the use of revenues from the motor fuel excise allocated to such township as provided in Section 5735.26, R. C., or (2) through the levy of a property tax or the issue of bonds as provided in Section 5549.24, R. C.; but no such property tax may be levied nor may such bonds be issued without a favorable vote of the electors of the township as provided in Section 5749.24, R. C. (Opinion No. 58, O.A.G. for 1923, p. 33, and Opinion No. 2045, O.A.G. for 1928, p. 1071, distinguished; first paragraph of the syllabus in Opinion No. 4339, O.A.G. for 1935, overruled.)

Columbus, Ohio, June 9, 1956

Hon. Sumner J. Walters, Prosecuting Attorney
Van Wert County, Van Wert, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The Trustees of Ridge Township in this County have for a number of years owned and operated a stone quarry. It has become necessary for them to purchase additional land in connection with their stone quarry operation and I am concerned with the question of whether or not the question of purchasing this additional land must be submitted to the public for a vote or whether they may purchase it from available money in their general fund without a vote of the public.

"I have read Attorney General's Opinion for 1935, Number 4339. In that Opinion at Page 698 a former Attorney General's Opinion for 1923 at page 33 was quoted as follows: 'Trustees of a township owning a stone or gravel quarry cannot purchase additional lands for such quarry without the submission of the question to the voters of the township and their approval thereof.' Also in that same Opinion, Attorney General's Opinion for 1928, Volume 2, Page 1073, is quoted as follows: 'In both forms of Section 3298-20, General Code, that is, before and after its amendment in the Uniform Bond Act, the inhibition against township trustees levying a tax or issuing bonds without a vote of the people is on the purchase of real estate and machinery. *This section is clearly limited to the initial expenditure, that is, the original acquisition of real estate and machinery necessary to quarry stone or gravel, and does not cover the operation of the stone quarry or gravel pit, once it has been acquired, or the repair or replacement of machinery necessary to such operation. A favorable vote of the people authorizing the purchase of real estate and machinery or operating the same establishes a definite policy, that is, it authorizes the purchase of said real estate and authorizes the trustees to purchase machinery and operate the quarry. Once this policy has been established the authority to operate continues and carries with it the power to replace parts of machinery that have been broken and to purchase new machinery to replace that which has become worn out in the course of such operation.*'

"These two quotations appear to be in conflict, therefore, would you please render your Opinion as to whether or not the Ridge Township Trustees may purchase additional land for the operation of their quarry without a vote of the public, and if

not, please render your Opinion as to the procedure for getting this question upon the ballot and the vote required for passage."

The principal difficulty involved in the question thus presented stems from the fact that Section 5549.24, Revised Code, in its present form, does nothing more, in express terms, than to forbid the levy of a tax or the issuance of bonds to finance the purchase of real property containing stone or gravel for road materials unless the tax is first approved by the electors. One may readily infer, from a consideration of this section alone, that somewhere in the statutes authority is given in general terms to acquire property without regard to the method of financing employed.

This section appears to be a "relic" of sorts, being a somewhat fragmentary survival of an enactment of 1915 in a general revision of the state's highway laws. See Amended Senate Bill No. 125, 80th General Assembly, 106 Ohio Laws, 574 (653). Sections 257, 258 and 259, of that act, later codified as Sections 3298-20, 3298-21 and 3298-22, General Code, provided:

"SECTION 257. The trustees of a township may levy a tax in such amount, as they determine, to purchase real property, containing suitable stone or gravel, and the necessary machinery for operating the same, when deemed necessary for the construction, improvement, or repair of the public roads within the township, to be under the control of the trustees or a person appointed by them. The question of levying such tax, for such purpose, and the amount asked therefor shall be submitted to the qualified electors of the township at a general election. Twenty days' notice thereof shall be previously given by posting in at least ten public places in the township. Such notice shall state specifically the amount to be raised. If a majority of all votes cast at such election are in favor of the proposition, the tax therein provided for shall be considered authorized. Such tax may be levied in addition to all other taxes for township purposes, but subject however to the limitation on the combined maximum rate for all taxes now in force."

"SECTION 258. The electors voting at such election shall have placed on their ballots the words, 'Tax for purchase of real property for road materials—Yes;' 'Tax for purchase of real property for road materials—No.'"

"SECTION 259. When such tax has been voted in a township, the trustees thereof, in anticipation of such tax may issue the township bonds, in the aggregate amount not to exceed the tax voted less the interest on the bonds, in denominations

of not less than one hundred dollars, bearing interest at a rate not exceeding five per cent and payable not later than ten years from date. Such bonds shall not be sold below par, and accrued interest, and the proceeds shall be used solely for the purchase of such real estate and the necessary machinery for operating the same. Such bonds shall be signed by the trustees, countersigned by the township clerk, and repaid from the tax when collected."

In addition, Section 260 of the act, later codified as Section 3298-23, General Code, provided for joint action by two or more townships in such a project, by provisions which are now set out without changes here pertinent in Section 5549.22, Revised Code. The final sentence in that section as originally enacted read:

"Any township now owning real property containing suitable stone or gravel, or that may hereinafter purchase such real property under the provisions of this chapter may by a majority vote of the trustees of said township sell an interest to any other township or townships in the same county or an adjoining county, but the interest so sold must be an equal undivided interest between all the townships so interested, and no township shall purchase an interest in such real property until the question of such purchase has been submitted by a vote of the qualified electors of said township or townships *as herein provided.*"
(Emphasis added.)

These four sections constituted all of the provisions of Amended Senate Bill No. 125, supra, relative to the subject here under study.

By referring to Section 3298-20, General Code, as thus originally enacted, it is quite plain that (1) that section supplied the basic grant of authority to purchase the property in question, and (2) it authorized the levy of a tax, subject to a vote of the electorate, to finance such a purchase.

In 1927, in the enactment of the Uniform Bond Act (House Bill No. 1, 87th General Assembly, 112 Ohio Laws, 364), Section 3298-21 supra, was repealed, and Section 3298-20, General Code, was amended to read as follows:

"Section 3298-20. No tax shall be levied on bonds issued by the trustees of the township to purchase real property containing suitable stone or gravel and the necessary machinery for operating the same, unless approved by a vote of the people *in the manner provided by law.*"
(Emphasis added.)

This amendment having been effected as a part of the Uniform Bond Act, the legislative purpose, so far as the issue of bonds is concerned, in repealing former Section 3298-21, General Code, is obvious since that act, in Sections 2293-19, et seq., General Code, made detailed provision for the submission of such issues to the electors.

As to the manner of voting on a tax levy for the purpose here in question, it would seem that the expression "in the manner provided by law" is indicative of a legislative notion that such a "manner" had been provided in Sections 5625-15, et seq., General Code, a part of the "tax levy law" (House Bill No. 80, 87th General Assembly, 112 Ohio Laws, 391), enacted in the same month, April, 1927, as was the Uniform Bond Act. Accordingly, we may conclude that these provisions now set out in Sections 5705.16 et seq., Revised Code, should be followed to the extent that they are pertinent in arranging for a vote on such a levy.

A more important question is the effect of the change in the wording of Section 3298-20, General Code, effected by the 1927 amendment. Previously the language of this section, it could be argued, implied that in granting the power to levy a tax for the purpose at hand the condition was imposed that the matter be first approved by a vote of the electors. In any event, since such levies, at the date of the original enactment of this section, constituted the only source of general funds available to townships it must be concluded that the grant of power to levy a tax for this purpose was also a grant of power to acquire land for the purpose of operating a gravel quarry.

In the language of Section 3298-20, General Code, as amended in 1927, we may note that (1) this *express* grant of power is deleted, and (2) it does not too clearly appear that a vote of the electors is a condition of the acquisition of land and the operation of a quarry, however financed.

It must be remembered, however, that the retention of the prohibition in this section of the levy of a tax or the issuance of bonds without popular approval is indicative of a legislative intent not to withdraw the grant of power previously bestowed. We may conclude, therefore, that such power is granted by implication in this section as thus amended, now set out in Section 5549.24, Revised Code.

Moreover, it would seem that authority to acquire land for the purpose at hand is probably granted also in Section 5549.04, Revised Code, which provides in part:

“The board of county commissioners or board of *township trustees may contract for and purchase* such material as is necessary for the purpose of constructing, improving, maintaining, or repairing any highways, bridges, or culverts within the county, and may also appropriate *additional land* necessary for cuts and fills together with a right of way to or from *such land for the removal of material.*” * * * (Emphasis added.)

While the statute mentions the purchase of “materials,” I feel sure from the context that it includes the acquisition of the land “which contains suitable stone” etc.; or at least an easement to take the stone etc. from the land. Appropriation proceedings almost invariably relate to the taking of *land* or an interest therein, and I do not believe that the legislature intended by this statute merely to authorize the purchase or condemnation of a pile of gravel which a landowner had quarried. This statute appears to afford abundant authority to a township to purchase or if necessary to appropriate land containing road material.

With this conclusion in mind we may observe that the language of existing Section 5549.24, Revised Code, does not purport to limit such authority to acquire land only in those cases when the matter has been referred to the electorate, but by its plain terms imposes such limitation only where it is proposed to finance the purchase by a tax levy or by a bond issue. We may conclude, therefore, that if funds are otherwise available such popular vote is not required.

On this point the 1923 opinion may readily be distinguished in view of the statutory changes noted above, which were effected in 1927.

Moreover, I am unable to disagree with the end result, as stated in the second paragraph of the syllabus in the 1928 opinion for the reason that in 1927, 112 Ohio Laws, 391, 393, there was inserted in Section 5625-5, General Code, a provision forbidding the use of the general fund for “construction * * * or repair of roads;” and the purchase of land to obtain a supply of gravel, etc., is clearly nothing more than a preliminary step in a road building or repair program.

In 1929, however, by the amendment of Section 5541-8, General Code, 113 Ohio Laws, 70, 71, provision was made for the allocation to townships of a portion of the revenues of the so-called “second gasoline tax,” such revenues to be used solely for construction, repair, etc., of township roads. This being the case I cannot agree with the conclusion in

Opinion No. 4339, Opinions of the Attorney General for 1935, page 696 as stated in the first paragraph of the syllabus, as follows :

“A board of township trustees may purchase land containing gravel for use on the township roads, and machinery to operate such land, only pursuant to authority of the electors, notwithstanding the fact that sufficient available funds may be on hand for such purpose.”

It does not appear that the writer of the 1935 opinion, *supra*, considered the effect of the statutory changes of 1927, above noted, but relied almost entirely on the conclusions reached in the 1923 and 1928 opinions discussed above. For this reason I am constrained to overrule the first paragraph of the syllabus in Opinion No. 4339, *supra*.

As indicated above, there is a prohibition in Section 5705.05, Revised Code, former Section 5625-25, General Code, of the use of the “general operating fund” produced by the general property levy for construction, etc., of roads. Accordingly, since the acquisition of the land here in question is merely a preliminary step in the entire road building process we may doubt the availability of such funds in the instant case.

You will note, however, that in Section 5735.27, Revised Code, there is provision for the allocation of certain motor fuel excise revenues to townships for road construction, repair, etc., purposes. Because I regard the land purchase here in question as a mere preliminary in the overall process of road building and repair program I do not hesitate to conclude that the funds thus realized are available for such purchase.

For these reasons, in specific answer to your inquiry, it is my opinion that under the provisions of Chapter 5549, Revised Code, a board of township trustees is authorized to purchase real property containing suitable stone or gravel for road materials. The cost of such purchase may be met either (1) by the use of revenues from the motor fuel excise allocated to such township as provided in Section 5735.26, Revised Code, or (2) through the levy of a property tax or the issue of bonds as provided in Section 5549.24, Revised Code; but no such property tax may be levied nor may such bonds be issued without a favorable vote of the electors of the township as provided in Section 5749.24, Revised Code. (Opinion No. 58, Opinions of the Attorney General for 1923, p. 33, and Opinion No. 2045, Opinions of the Attorney General for 1928, p. 1071, distin-

guished ; first paragraph of the syllabus in Opinion No. 4339, Opinions of the Attorney General for 1935, overruled.)

Respectfully,

C. WILLIAM O'NEILL

Attorney General