

3867.

DISAPPROVAL, CERTIFICATE OF INCORPORATION OF THE HOLY TRINITY MUTUAL FIRE INSURANCE ASSOCIATION.

COLUMBUS, OHIO, January 26, 1935.

HON. GEO. S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I have examined the certificate of incorporation of Holy Trinity Mutual Fire Insurance Association, which you have submitted to me for my approval. It is sought to form a mutual protective association under the provisions of sections 9593, General Code, et seq. In describing the kinds of property to be insured, the certificate says:

“Said association shall insure dwellings, private garages, household goods, furniture and such other property as is authorized by section 9593 of the General Code of Ohio * * *.”

Section 9595, General Code, provides that the certificate must specify the kinds of property proposed to be insured. A reference to section 9593, General Code, might be sufficient if section 9593 specified definitely the kinds of property that may be insured but this statute after specifying certain kinds of property, reads, “and other property not classed as extra hazardous.”

I am of the view therefore that the phrase in the certificate “such other property as is authorized by section 9593” is not a specification of the kinds of property which it is proposed to insure. It is suggested therefore that the certificate specify definitely the different kinds of property which the association proposes to insure.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3868.

CITY—MAY PURCHASE TRUCK FROM PROCEEDS OF GASOLINE AND AUTO LICENSE FUNDS WHEN—LIMITATION ON USE OF SAID SERVICE TRUCK.

SYLLABUS:

(1) *A city may legally purchase, out of the proceeds of funds arising from the provisions of Sections 5537 and 6309-2, General Code, a service truck, providing such truck is used only in connection with the maintaining, repairing, constructing and repaving of the city streets, and is not used in connection with the cleaning and clearing of the city streets.*

(2) *A city may legally purchase out of the proceeds of the funds arising from the provisions of Section 5541-8, General Code, a service truck, providing such truck is used only in connection with the constructing, maintaining, widening, reconstructing, cleaning and clearing of the city streets.*

COLUMBUS, OHIO, January 28, 1935.

HON. RAY W. DAVIS, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR:—You have requested my opinion upon the following state of facts:

“By virtue of General Code Sections 5537 and 6309-2, the city of Circleville receives a portion of the gasoline tax fund and the auto license fund, respectively.

Can the city of Circleville, out of the proceeds of said funds or either of them, purchase a service truck to be used for the general care, maintenance, repair and cleaning of the streets of said city?”

Section 5537, General Code, mentioned in your request, provides for the distribution and uses of the moneys resulting from the so-called “first gasoline excise tax,” levied under the provisions of Section 5527, General Code. Section 5527, General Code, reads in part:

“For the purpose of providing revenue * * for enabling the several municipal corporations of the state properly to *maintain, repair, construct and repave their streets*, * * an excise tax is hereby imposed * *” (Italics mine.)

Section 5537, General Code, reads, so far as pertinent here:

“ * * Thirty per cent. of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be used by such municipal corporation for the sole purpose of *maintaining, repairing, constructing and repaving* the public streets and roads within such corporation.

Wherever a municipal corporation is on the line of the state highway system, one-sixth of the amount so paid to any municipal corporation shall be used by such municipal corporation for the sole purpose of *maintaining, repairing, constructing and repaving* such streets and roads within such municipal corporation, as may be designated by the director of highways as extensions or continuances of the state highway system * *.” (Italics mine.)

Section 6309-2, General Code, also referred to in your request, provides for the distribution and use of the revenues arising from the annual tax upon the operation of motor vehicles on the public roads and highways of this state, under the provisions of Sections 6290 et seq., General Code. Section 6291, General Code, provides in part:

“An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways of this state, for the purpose of * * *maintaining and repairing public roads, highways and streets*, * *”

Section 6309-2, General Code, reads so far as pertinent here:

“The revenue collected under the provisions of this chapter shall be distributed as follows: (1) Twenty-five per centum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district of registration as provided in this chapter. The portion of such money due the municipal corporation shall be paid into the treasuries of such municipal corporations forthwith upon receipt

of the county auditor, * * In the treasuries of such municipal corporations, such moneys shall constitute a fund which shall be used for the *maintenance, repair, construction, and repaving of public streets*, and for no other purpose and shall not be subject to transfer^o to any other fund, provided, however, that as to such municipal corporations, not more than fifty per cent of the total funds available during any year from such source including the unexpended balance of such funds from any previous year, shall be used in such *construction and repaving* which shall be done by contract let after the taking of competitive bids as provided by law, or in the manner provided in the charter of any such municipal corporation. * *” (Italics mine.)

In the case of *State ex rel. Crabbe, Attorney General vs. City of Columbus, et al.*, 21 App., 1, it was held as disclosed by the first paragraph of the syllabus:

“City held empowered to expend funds allotted under gasoline excise tax law to buy sand dryer to be used in city asphalt plant, operated exclusively to prepare materials for maintaining and repairing streets, since city officials have latitude of discretion in use of such funds so long as money is spent to maintain and repair highways, in view of Section 5537, General Code.”

In opinions of the Attorney General for 1931, Vol. 2, page 871, my immediate predecessor discussed the question of whether or not a municipality may purchase a “truck” from its share of motor vehicle license and gasoline tax receipts.

After referring to the foregoing statutes, a 1927 opinion of the Attorney General, and the so-called “second gas tax statutes,” and the foregoing case, it was stated by my immediate predecessor in Opinions of the Attorney General for 1931, Vol II, page 873:

“I assume, of course, that the truck, the purchase of which is the subject of your inquiry, is to be used exclusively for the purpose for which motor vehicle license taxes and gasoline excise taxes may be used, that is, for the maintenance, repair, construction, reconstruction, widening and repaving of streets and highways, as the case may be. If the use of the truck is confined solely to these purposes, it seems clear, from the authorities, that funds derived from the proceeds of the taxes spoken of may lawfully be used for its purchase.”

The so-called second gas tax statutes, Sections 5541 et seq., General Code, referred to in the 1931 opinion last mentioned, provide slightly different uses for the municipality’s share of such taxes. Section 5541, General Code, provides in part:

“For the purpose of providing revenue * * for enabling * * municipal corporations of the state properly to *construct, widen, reconstruct and maintain their public highways, roads and streets* * * an excise tax is hereby imposed * *” (Italics mine.)

Section 5541-8, General Code, provides for the distribution of the tax funds levied by Section 5541, General Code, and the uses for which municipalities may expend such funds. Such section reads in part, as follows:

“When appropriated by the General Assembly such highway construction

fund shall be appropriated and expended in the following manner and subject to the following conditions:

* * * * *

Seven and one-half per cent of said highway construction fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceeding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be expended by each municipal corporation for the sole purpose of *constructing, maintaing, widening, reconstructing, cleaning and clearing the public streets and roads within such corporation, and for the purchase and maintenance of traffic lights.* * *” (Italics mine.)

It will be noted that the Section 5541-8, General Code, last above quoted, authorizes the second gas tax municipal funds to be used for “cleaning and clearing the public streets” in addition to “constructing, maintaining, widening, and reconstructing municipal streets.”

Previous to the inclusion of the words “cleaning and clearing the public streets,” in Section 5541-8, General Code, in 1931 (House Bill No. 7, 114 O. L. 507), such section provided that the municipality’s share of the second gas tax might be used only for *constructing, maintaining, widening and reconstructing the public streets.*”

In Opinions of the Attorney General for 1931, Vol. II, page 921, it was held as disclosed by the syllabus:

“Funds distributed to municipalities under the provisions of Section 5541-8, of the General Code, as amended by the 89th General Assembly (H. B. 7) may be used for the purchase of street sweeping and street cleaning equipment.”

After pointing out that before amendment of Section 5541-8 General Code, in H. B. 7, 1931, it provided that municipalities might use the funds of the second gas tax “for the sole purpose of constructing, maintaining, widening and reconstructing the public streets,” the then Attorney General said at page 921:

“Without attempting to review the numerous opinions construing the language last above quoted, it may be stated that this office consistently held that such funds could not be used for street cleaning purposes. * * It therefore is clear that by reason of the addition of the language ‘cleaning and clearing’ in connection with the enumeration of the purposes for which the fund under consideration may be used by municipalities with respect to streets, as set forth in the amendment, said fund may be used for the purposes of cleaning and clearing streets.

The question is now presented as to whether said funds may be used for the purchasing of machinery with which to accomplish the above purpose. With reference to your question it will be helpful to consider the case of *State ex rel. vs. Columbus*, 21 O. A., 1, in which it was held that a sand dryer could be purchased by the municipality with the gasoline tax funds distributed to it under Section 5537, of the General Code, which then required that such funds be expended ‘for the sole purpose of maintaining and repairing public streets and roads within such corporation.’ By analogy it is believed that the Colum-

bus case, above mentioned, is dispositive of the question you present. In that case the statute made no express provision relative to the purchase of machinery."

In amending Section 5541-8, General Code, to allow the municipalities to use the second gas tax proceeds for "cleaning" streets, the legislature did not see fit to do likewise in the case of the first gas tax and motor vehicle license tax statutes.

It seems clear therefore, that since Sections 5537 and 6309-2, General Code, with respect to the disposition of municipal first gas tax and motor vehicle license tax proceeds were not amended to add the words "for cleaning and clearing the public streets," that the legislature did not intend that such proceeds should be used for the purchase of equipment for street cleaning and clearing purposes.

Hence it would appear that a city may purchase a service truck with funds arising from Sections 5537 and 6309-2, General Code, if such truck will be used only in connection with the maintaining, repairing, constructing and repaving of the city streets. However, it also appears that a city may not purchase a service truck from funds arising from Section 5537, and Section 6309-2, General Code, if the service truck is to be used for "cleaning and clearing" the city streets.

I am therefore of the opinion in specific answer to your question that the city of Circleville may legally purchase, out of the proceeds of funds arising from the provisions of Sections 5537 and 6309-2, General Code, a service truck, providing such truck is used only in connection with the maintaining, repairing, constructing and repaving of the city streets, and is not used in connection with the cleaning and clearing of the city streets.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3869.

APPROVAL, CONTRACT FOR HIGHWAY CONSTRUCTION IN FRANKLIN
COUNTY, OHIO.

COLUMBUS, OHIO, January 29, 1935.

HON. JOHN JASTER, JR., *Director, Department of Highways, Columbus, Ohio.*

3870.

APPROVAL, BONDS OF MONTGOMERY COUNTY, OHIO, \$89,000.00.

COLUMBUS, OHIO, January 29, 1935.

Industrial Commission of Ohio, Columbus, Ohio.