

**Note from the Attorney General's Office:**

1964 Op. Att'y Gen. No. 64-1499 was approved and followed by 2014 Op. Att'y Gen. No. 2014-027.

**OPINION NO. 1499**

**Syllabus:**

1. Township trustees may not use or expend the moneys derived from the annual license tax on motor vehicles for the purpose of acquiring real estate even though such real estate is to be used to store road machinery and equipment.

2. Township trustees may not use or expend moneys derived from gas taxes and distributed to the township pursuant to Section 5735.27, Revised Code, for the purpose of acquiring real estate even though such real estate is to be used to store road machinery and equipment.

3. The express grant of authority to township trustees to

use gas tax funds for the purpose of constructing and maintaining a suitable building for housing road machinery and equipment does not imply the authority to purchase real estate with gas tax funds even though such real estate is to be used to store road machinery and equipment. (The second branch of Opinion No. 152, Opinions of the Attorney General for 1963, is modified to the extent that it is in conflict with the conclusion herein.)

-----

To: Edward D. Mosser, Harrison County Pros. Atty., Cadiz, Ohio  
By: William B. Saxbe, Attorney General, October 30, 1964

Your request for my opinion reads as follows:

"My office has been contacted for an opinion by a Board of Township Trustees with respect to the following problems:

"1. Under the provision of Section 4501.42 (sic) of the Revised Code, can the revenues collected under the Chapters therein referred to (i.e. motor vehicle license and/or gas tax funds) be used for the purpose of purchasing real estate on which to store road machinery, equipment materials and supplies?

"2. Could the same source of funds be used to pay the cost of construction of a guard rail and sidewalk adjacent to the property purchased, if the construction of such guard rail and sidewalk were necessitated by required grading on the property purchased?

" \* \* \* \* \* "

Although the section erroneously cited in your letter of request does not provide for the distribution of gas tax funds, I will consider your letter of request as involving also the possible use of gas tax funds for the purposes stated.

Section 5 (a) of Article XII of the Ohio Constitution provides:

"No moneys derived from fees, excises, or licenses taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used in 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."

Section 4501.03, Revised Code, provides for the distribution of the annual license tax on motor vehicles collected under

Sections 4503.02, 4503.12, Revised Code. Section 4501.03, supra, provides in part:

"The registrar of motor vehicles shall open an account with each county and district of registration in the state. He shall pay all moneys received by him under sections 4503.02 and 4503.12 of the Revised Code, directly to the treasurer of state for distribution in the manner provided for in section 4501.04 of the Revised Code."

Section 4501.04, Revised Code, provides in part:

"All moneys paid into the state treasury under section 4501.03 of the Revised Code, after receipt by the treasurer of state of a certification from the commissioners of the sinking fund certifying there are sufficient moneys to the credit of the state highway bond retirement fund created by section 5528.02 of the Revised Code to meet in full all payments of interest, principal and charges for the retirement of bonds issued pursuant to section 5528.01 of the Revised Code, due and payable during the current calendar year, shall be distributed as follows:

\* \* \* \* \*

"(E) Five per cent of all such moneys shall be for the use of the several townships and shall be distributed to the several townships in the ratio which the total number of miles of township roads under the jurisdiction of each board of township trustees in each township bears to the total number of miles of township roads in the state, as determined by the director of highways. Before such distribution is made each board of township trustees shall certify in writing to the director of the actual number of miles under its statutory jurisdiction which are used by and maintained for the public."

Although this section contains no express restriction or limitation upon the use of the license tax moneys by the townships, there is an implied restriction on the township's use by reason of the tax levying section. Section 4503.02, supra, levies the annual license tax and provides in part:

"An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways, for the purpose of \* \* \* constructing, maintaining, and repairing public roads, highways, and streets, maintaining and repairing bridges and viaducts, \* \* \* for the purpose of enforcing and paying the expenses of administering the law to provide reimbursement for hospitals on account of the expense for the care of in-

digent persons injured in motor vehicle accidents\* \* \*to purchase, erect, and maintain street and traffic signs and markers; to purchase, erect, and maintain traffic lights and signals; and to supplement revenue already available for such purposes, and to pay the interest, principal, and charges on bonds issued pursuant to section 5528.01 of the Revised Code. Such tax shall be at the rates specified in section 4503.04 of the Revised Code and shall be paid to and collected by the registrar of motor vehicles or deputy registrar at the time of making application for registration."

Clearly, the use of the money contemplated by the township trustees is not within the purview of the purpose of the tax and would be violative of Section 5 (a) of Article XII of the Ohio Constitution. Accordingly, the answer to your question in regard to the annual license tax on motor vehicles must be in the negative.

In regard to the gas tax funds referred to in your letter of request, townships are authorized by law to participate in the proceeds of but one of the four taxes levied upon motor fuels; said tax being the additional tax levied in Section 5735.25, Revised Code, and distributed pursuant to Section 5735.27, Revised Code. See Opinion No. 2202, Opinions of the Attorney General for 1958, at page 377.

Section 5735.27, supra, provides in part:

"When appropriated by the general assembly the highway construction fund shall be appropriated and expended in the following manner:

"\* \* \* \* \* \* \* \* \*"

"(D) Seventeen and one-half percent of said highway construction fund shall be appropriated for and divided in equal proportions among the townships within the state, and shall be paid on vouchers and warrants drawn by the auditor of state to the county treasurer of each county for the total amount payable to the townships within each of the counties. Upon receipt of said vouchers and warrants, each treasurer shall pay to each township within the county its equal proportional share of said funds, which shall be expended by each township for the sole purpose of constructing, maintaining, widening, and reconstructing the public roads and highways within such township, and paying costs apportioned to the township under the provisions of section 4907.47 of the Revised Code.

"No part of said funds 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 construct-

ing, widening, and reconstructing such roads and highways, and the cost of materials forming a part of said improvement; provided that such funds may be used for the purchase of road machinery and equipment and for the construction and maintenance of suitable buildings for housing road machinery and equipment, and that all such improvement of roads shall be under the supervision and direction of the county engineer as provided in section 5575.07 of the Revised Code. No obligation against such funds shall be incurred unless plans and specifications for such improvement, approved by the county engineer, are on file in the office of the township clerk, and all contracts for materials and for work done by contract shall be approved by the county engineer before being signed by the board of trustees. The board of township trustees of any township may pass a resolution permitting the board of county commissioners to expend such township's share of said funds, or any portion thereof, for the improvement of such roads within said township as may be designated in said resolution."

Although the legislature has now authorized townships to use the money derived from the above-mentioned gas tax for the purpose of constructing and maintaining suitable buildings for housing road machinery and equipment, 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.

Referring again to Section 5 (a) of Article XII of the Constitution, it is manifest that the lack of such statutory authority renders the proposed use violative of the Ohio Constitution. However, in a recent opinion, I ruled that inasmuch as a county, under similar statutory authority, did have the express authority to construct and maintain such a building, the county also had the implied authority of necessity to use gas tax funds for the purpose of acquiring land upon which the building was to be placed. See Opinion No. 152, Opinions of the Attorney General for 1963.

Upon reconsideration of the question of implied authority in the light of the constitutional restriction, Section 5 (a) of Article XII, supra, I am constrained to conclude that the authority to construct and maintain suitable buildings for housing road machinery and equipment does not imply the authority to acquire real estate. The constitutional mandate of Section 5 (a) of Article XII, supra, restricts the use of gas tax moneys to the therein specifically enumerated uses, including "other statutory highway purposes." An examination of the tax levy section, Section 5735.25, supra, contains no mention of real estate acquisition; nor does Section 5735.27, supra, contain any statutory authorization for real estate acquisition.

It is a well recognized principle of law in Ohio that township trustees possess only such powers as are expressly conferred upon them by statute or are by necessary implication requisite to perform the duties so imposed upon them. 52 O. Jur. 2d, Townships, Section 42. This same rule applies to the board of county commissioners, 14 O. Jur. 2d, Counties, Section 82.

The doctrine of implied powers has been recognized in Ohio for many years. See Commissioner of Gallia County v. Halcomb (1835), 7 Ohio Reports, Part I, page 232, at 234; Hopple v. Trustees of Brown Township (1862), 13 Ohio St., 311, at 324; Trustees of New London Township v. Miner (1875), 26 Ohio St., 452, at 456.

The Supreme Court, in the Brown Township case, supra, explained the doctrine of implied powers on page 324 as follows:

"The township, although denominated by the statute a body politic and corporate, is not invested with the general powers of a corporation. This class of aggregate persons, incorporated for mere municipal purposes, are often denominated quasi corporations, and are invested, by the statutes creating them, with limited powers only, co-extensive with the duties imposed upon them. The same is true of the trustees, and other officers through whom they act. They, in like manner, only possess the powers expressly conferred upon them, as such body and officers respectively, by the statute, and, perhaps, where the statute is silent upon the subject, the authority, by necessary implication, which is requisite to execute the duties so imposed upon them. In the exercise of their powers, as trustees of the township, the trustees can take nothing by implication, therefore, beyond the authority thus conferred by the statute."

In the Gallia County case, supra, the Supreme Court, on page 234, viewed the question of implied powers as follows:

"The inquiry, then, is, can it be necessary as an incident to the very existence of this quasi corporation, or to the complete discharge of all the powers, duties, and obligations conferred upon it by law, that it should have the authority to sustain an action for the willful or negligent destruction of a public bridge; for where such necessity does not exist, a power not granted in express terms can not be conferred by implication. \* \* \*"

When your question is viewed in the light of the Supreme Court's pronouncements on the doctrine of implied powers, it is manifest that the Board of Trustees does not have the implied power to expend gas tax moneys for the purchase of real estate which is to be used for storing road machinery and equipment. The reasons for this conclusion are:

1. There is no mandatory duty upon boards of trustees to expend gas tax moneys for constructing and maintaining suitable buildings for housing road machinery and equipment by Section 5735.27, supra.
2. The expenditure of gas tax funds by township trustees for the purchase of real estate to be used for storing road machinery and equipment is not, under Section 5735.27, supra,

necessary in performing the duty of constructing, widening and reconstructing roads and highways in the township.

3. Townships have a duty by reason of Chapters 5571, and 5575, Revised Code, to maintain and repair roads within the township, and

4. Townships have authority to acquire road machinery and equipment and to build suitable buildings to house such road machinery and equipment pursuant to Section 5575.01, et seq., of the Revised Code. See Opinion No. 6267, Opinions of the Attorney General for 1943.

Therefore, since township trustees may acquire road machinery and house it in suitable buildings under other provisions of the law, there is no basis of necessity that trustees be deemed to have the implied power to expend gas tax moneys for real estate. The purchase of real estate for the purpose described in your inquiry with gas tax funds is not essential to the performance of the road repair and maintenance duties imposed under Section 5735.27, supra.

To the extent that Opinion No. 152, supra, in regard to the implied power to purchase real estate is inconsistent with this conclusion, it is hereby overruled and of no force or effect.

In regard to your specific questions, since I have concluded that the township trustees cannot purchase the real estate with the proceeds of either the annual motor vehicle license tax or the gas tax, there is no need to consider your second question.

Therefore, it is my opinion and you are hereby advised that:

1. Township trustees may not use or expend the moneys derived from the annual license tax on motor vehicles for the purpose of acquiring real estate even though such real estate is to be used to store road machinery and equipment.

2. Township trustees may not use or expend moneys derived from gas taxes and distributed to the township pursuant to Section 5735.27, Revised Code, for the purpose of acquiring real estate even though such real estate is to be used to store road machinery and equipment.

3. The express grant of authority to township trustees to use gas tax funds for the purpose of constructing and maintaining a suitable building for housing road machinery and equipment does not imply the authority to purchase real estate with gas tax funds even though such real estate is to be used to store road machinery and equipment. (The second branch of Opinion No. 152, Opinions of the Attorney General for 1963, is modified to the extent that it is in conflict with the conclusion herein.)