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COUNTY COMMISSIONERS—ISSUANCE AND SALE OF BONDS—PROCEEDS CANNOT BE USED TO BUILD AND IMPROVE COUNTY ROADS WHEN RETIREMENT OF SUCH BONDS IS TO BE MADE THROUGH COUNTY'S PORTION OF HIGHWAY CONSTRUCTION FUND—SECOND GASOLINE TAX UNDER 5735.25 R. C.

SYLLABUS:

A board of county commissioners may not issue and sell bonds, use the proceeds thereof to build and improve county roads, and provide for the retirement of such bonds from that portion of the highway construction fund raised through the imposition of the second gasoline tax under Section 5735.25, Revised Code, and appropriated by the legislature to the counties under the provision of Section 5735.27, Revised Code.

Columbus, Ohio, April 1, 1957

Hon. Paul J. Mikus, Prosecuting Attorney
Lorain County, Elyria, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Revised Code Section 5735.27 provides in part that ‘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 constructing, widening, and

reconstructing such roads and highways, and the cost of materials forming a part of said improvement . . .’ Since the above code section is applicable to county roads, the Board of County Commissioners of Lorain County, Ohio, desire your opinion on the permissibility of issuing a substantial amount of bonds and proposing to pay for said bonds on annual maturity dates with funds which are to be allocated to Lorain County pursuant to the provisions of the above code section.

“Since the code section specifically provides for payment for work done by contract and cost of labor and/or materials for such construction, widening, and reconstruction work and the proposed borrowing of money would pay for such contract price of such road work, then such funds as provided in the above code section could logically be used to retire the borrowed indebtedness incurred to initially finance such road work.”

As I view it, you have asked the question whether a board of county commissioners has authority to issue and sell bonds, use the proceeds to improve county roads, and also to provide for the retirement of such bonds from funds appropriated to the county by the General Assembly under Section 5735.27, Revised Code, from the highway construction fund. This latter fund is one raised from what is generally known as the second gasoline tax imposed under the provisions of Section 5735.25, Revised Code.

Generally, Section 5735.25, Revised Code, provides for the imposing of an excise tax on dealers in motor vehicle fuel at the rate of two cents per gallon, the proceeds to be used for the purpose of road building and road improvement, to pay the expenses of administering the law and to retire bonds issued under Section 5528.01, Revised Code, by the commissioners of the sinking fund designated by Section 8 of Article VIII, Ohio Constitution.

In particular, with reference to counties, Section 5735.25, Revised Code, provides in part as follows:

“To provide revenue * * * to enable the counties and townships of the state to properly construct, widen, reconstruct, and maintain their public highways, roads, and streets, * * *.”

Section 5735.26, Revised Code, after providing for the use of part of this revenue for purposes about which we are not here concerned, then goes on to say:

“* * * The balance of taxes collected under section 5735.25 of the Revised Code after the credits to said rotary fund, and

after deduction of the cost of administration of the motor vehicle fuel laws, and 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 credited to a fund to be known as the *highway construction fund* which shall be used *solely* for the purposes enumerated in section 5735.25 of the Revised Code. No disbursements shall be made from said highway construction fund except in pursuance of specific appropriations made by the general assembly.” (Emphasis added.)

It should be noted that Section 5735.27, Revised Code, also, further expressly limits the purpose for which the highway construction fund may be used to those purposes set out in that section, such limited purposes being a part but not all of the purposes set out in Section 5735.25, Revised Code.

Section 5735.27, Revised Code, provides in part as follows:

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

“(B) Seven and one-half per cent of said highway construction fund shall be paid in equal proportions on vouchers and warrants drawn by the auditor of state to the county treasurer of each county for the *sole* purpose of maintaining, constructing, widening, and reconstructing the county system of public roads and highways.” (Emphasis added.)

From a reading of this statute it can be seen that if the board of county commissioners were to use a part of the highway construction fund appropriated to the county for the purpose of retiring bonds, even though the proceeds from the sale of such bonds had been used for road improvements, that such a use would not be in conformity to the purposes expressed in this statute.

Also, it should be noted that while a board of county commissioners is given authority under the Uniform Bond Act to issue bonds for certain purposes, such a board is also required to pass a resolution to properly levy a tax to retire such an issue, or in the case of revenue bonds, to provide for the retirement of bonds out of certain revenues. No authority

is given in the Uniform Bond Act, or elsewhere, to the county commissioners, to issue bonds for road improvement and to retire the same from money appropriated by the legislature to the county out of the highway construction fund.

As stated in 14 Ohio Jurisprudence, 2d, Counties, Section 82:

“Boards of county commissioners, being the creatures of statute, have such powers, and such only, as are conferred by statute or as are necessarily implied from those expressly given, and a board of county commissioners can act for and bind the county only within the limits of such authority. * * *”

Therefore, I am of the opinion and you are advised that a board of county commissioners may not issue and sell bonds, use the proceeds thereof to build and improve county roads and provide for the retirement of such bonds from that portion of the highway construction fund raised through the imposition of the second gasoline tax under Section 5735.25, Revised Code, and appropriated by the legislature to the counties under the provision of Section 5735.27, Revised Code.

Respectfully,
WILLIAM SAXBE
Attorney General