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1. COMMISSIONERS, COUNTY—AUTHORIZED UPON WRITTEN REQUEST OF COUNTY ENGINEER TO EMPLOY ENGINEER OR ENTER INTO CONTRACT WITH ENGINEER OR FIRM OF ENGINEERS—SURVEY OF NEED FOR ELIMINATION OF GRADE CROSSINGS ON COUNTY ROADS—SECTION 305.15 RC.
2. EXPENSE MAY BE PAID FROM FUNDS DISTRIBUTED TO COUNTY PURSUANT TO SECTION 4501.04 RC—SOURCE, MOTOR VEHICLE TAXES, SECTION 5735.27 RC—“SECOND GASOLINE TAX”—NOT FROM FUNDS ARISING FROM “FIRST GASOLINE TAX”—DISTRIBUTED TO COUNTIES, SECTION 5735.23 RC.

SYLLABUS:

1. Under the provisions of Section 305.15, Revised Code, the commissioners of a county are authorized, upon the written request of the county engineer, to employ an engineer or enter into a contract with an engineer or firm of engineers to make a survey of the need for and practicability of the elimination of grade crossings on county roads within their county.

2. The expense of such engineering service may be paid from funds distributed to such county pursuant to Section 4501.04, Revised Code, arising from motor vehicle taxes and pursuant to Section 5735.27, Revised Code, known as the “second gasoline tax,” but not from funds arising from the “first gasoline tax” distributed to counties pursuant to Section 5735.23, Revised Code.

Columbus, Ohio, December 9, 1954

Hon. Ralph E. Carhart, Prosecuting Attorney
Marion County, Marion, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“The City and County of Marion have contemplated a traffic survey, to try to eliminate railroad crossings in the city of Marion, Ohio. They contemplate hiring a traffic engineer and paying such engineer to make a survey which may or may not lead to the actual elimination of such railroad crossings.

"The County Commissioners of Marion County, Ohio, would like to pay for their share of the survey out of distribution of liquid fuel and gas tax money as distributed under Amended Revised Code Sections 5735.23 and 5735.27. I have been unable to find a ruling by your office covering this particular situation in so far as a county is concerned.

"May I refer to two 1930 Attorney General Opinions, Nos. 491 and 2050, which relate only to cities.

"If a ruling has already been made on this particular question, will you please give me your citation by return mail, or if an informal opinion has been rendered by your office, will you please send me a copy of it."

The distribution of funds arising from the motor vehicle taxes and the gasoline taxes is provided for under Sections 4501.04, 5735.23 and 5735.27 of the Revised Code. As to the share of the motor vehicle license taxes apportioned to counties, the following provision is made by Section 4501.04 supra:

"(C) Forty-seven per cent of all taxes collected under such chapters shall be for the use of the county in which the owner resides or in which the place is located at which the established business or branch business in connection with which the motor vehicle registered is used, for the *construction, reconstruction, improvement, maintenance, and repair of roads and highways, and maintaining and repairing bridges and viaducts.*"

(Emphasis added.)

The sections referred to, all relate to licenses and fees connected with motor vehicles. It will be noted that the purposes for which the county is authorized to expend its share of this tax include *construction, reconstruction, improvement, maintenance and repair of roads and highways and maintaining and repairing bridges and viaducts.*

Section 5735.23, Revised Code, provides for the distribution of what is generally known as the "first gasoline tax" and the provision of that section as to the share of counties and the purposes for which this fund may be used, reads as follows:

"Twenty-five per cent of such gasoline excise tax fund shall be paid in equal proportions on vouchers and warrants drawn by the auditor of state to the county treasurer of each county within the state, and shall be used only for the purpose of *maintaining and repairing* the county system of public roads and highways within such county, the construction and repair of walks or paths

along county roads in congested areas, the construction and maintenance of suitable buildings for the housing of county road machinery, and the purchase, installation, and maintenance of traffic signal lights.” (Emphasis added.)

It will be noted that as to this tax, the fund can be used only for the purposes of *maintaining and repairing* the system of public roads and highways within the county, and the construction or repair of walks or paths along the county roads, and the construction and maintenance of suitable buildings for the housing of county road machinery, and the purchase, installation, and maintenance of traffic lights. No authority is here given for any expenditure for construction of roads or bridges.

Section 5735.27, Revised Code, provides for the distribution of a share of what is known as the “second gasoline tax” to the counties, and the purposes for which they may use their share, as follows:

“(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.)

Here it will be noted that the authorized purpose of the use of this fund is for maintaining, *constructing*, widening, and *reconstructing* the county system of public roads and highways.

It is therefore clear that only the motor vehicle taxes and the second gasoline tax funds are available to the county for road construction.

Construing these statutes as they appeared in the General Code, it was held in Opinion No. 2050, Opinions of the Attorney General for 1930, page 1034:

“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.”

In the course of that opinion the then Attorney General referred to a former opinion, to wit, Opinion No. 101, Opinions of the Attorney General for 1929, page 150, wherein it was held:

“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.”

In that opinion it was pointed out that a bridge is to be regarded as a part of the highway which passes over it. Accordingly, in Opinion No. 2050 above referred to it was said:

“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.” (Emphasis added.)

Attention was also called to a former opinion, No. 1580, Opinions of the Attorney General for 1930, page 349, where it was held:

“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 of the General Code, referred to in the above syllabus, provided for a tax levy “for the payment of the county’s proportion of the compensation, damages and expenses of constructing, reconstructing, improving, maintaining and repairing roads.” It was held in that opinion that an improvement which involves the separation of a grade crossing is to be considered as the improvement of a road or bridge and accordingly that any tax levy which may be used for the construction of a road or bridge may be devoted to the elimination of a grade crossing. Opinion No. 2050 above referred to called attention to the fact that Section 5541 of the General Code, which governed the distribution of the second gasoline tax, expressly provided 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.” It was suggested by the then Attorney General that that language might give rise to the conclusion that the legislature intended to inhibit the use of such tax for grade crossing elimination by a county or municipality since it was not mentioned in connection with them. This implication, however, was disposed of by the following statement at page 1036:

“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.”

While the opinion of my predecessor to which I have referred somewhat at length, No. 2050, of 1930, may seem to be rather liberal in its construction of the statutes under consideration, yet it has been the rule upon which action has been predicated for a long time, and I do not feel it necessary to question its soundness. It is plain, from the analysis of the statutes involved, that the proceeds of the “first gasoline tax” in the hands of the county are available only for maintenance and repair of the county roads and not for construction; but that the proceeds of the motor vehicle taxes and the “second gasoline tax” in the hands of the county are available for road construction, and therefore, in my opinion, for use in construction involving a railway grade separation.

It only remains to consider whether the expenditure of these funds for the type of service mentioned in your letter is legally permissible. There can be no doubt that the design and detailed plan for any extensive public improvement that has been determined upon is an essential part of the improvement, and may form a part of its cost. But your letter indicates that it is proposed to make a survey which may or may not result in a grade elimination project. This means, I presume, to determine the necessity and practicability of such project.

In Opinion No. 4096 which was issued on July 14, 1954, I had occasion to consider a somewhat similar question relative to the use by a municipality of these same funds for paying the cost of a survey and preparation of a master street plan in a municipality. It was held as shown by the first paragraph of the syllabus:

“Funds allocated to a municipality from the motor vehicle license tax pursuant to Section 4501.04, Revised Code, and from gasoline taxes pursuant to Sections 5735.23 and 5735.27, Revised Code, may be used to defray the expense of preparing a master street plan for such municipality.”

In the course of that opinion reference was made to the case of *State ex rel. Kauer v. Defenbacher*, 153 Ohio St., 268, where the court granted a writ of mandamus, requiring the defendant, Director of Finance to issue an incumbrance certificate against moneys arising under the "second gasoline tax," to pay the cost to be incurred by the Ohio Turnpike Commission in making a "study of *any turnpike project or projects*, and to employ the necessary engineering and other forces for such purpose."

The court in its opinion stated that such engineering services are part of the "cost of constructing the state highways." Certainly the same ruling would apply to the county's cost of constructing county highways.

Furthermore, I find in Section 305.15 of the Revised Code, specific authority given to the county commissioners to employ special engineering services in connection with a public improvement, particularly roads, bridges, etc. That section provides:

"When the services of an engineer are required with respect to roads, turnpikes, ditches, bridges, or any other matter, and when, on account of the amount of work to be performed, the board of county commissioners deems it necessary, upon the written request of the county engineer, the board may employ a competent engineer and as many assistant engineers, rodmen, and inspectors as are needed, and may also enter into contracts with any person, firm, or partnership qualified to perform engineering services in the state for this purpose and fix the compensation therefor. * * *"

It will be noted that this employment of an engineer or firm of engineers is conditioned on the written request of the county engineer.

Accordingly, in specific answer to the questions submitted, it is my opinion:

1. Under the provisions of Section 305.15, Revised Code, the commissioners of a county are authorized, upon the written request of the county engineer, to employ an engineer or enter into a contract with an engineer or firm of engineers to make a survey of the need for and practicability of the elimination of grade crossings on county roads within their county.

2. The expense of such engineering service may be paid from funds distributed to such county pursuant to Section 4501.04, Revised Code, arising from motor vehicle taxes and pursuant to Section 5735.27, Revised

Code, known as the "Second Gasoline tax," but not from funds arising from the "first gasoline tax" distributed to counties pursuant to Section 5735.23, Revised Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General