

1129.

## APPROVAL, BONDS OF MARGARETTA TOWNSHIP RURAL SCHOOL DISTRICT, ERIE COUNTY—\$40,000.00.

COLUMBUS, OHIO, October 30, 1929.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

1130.

## GASOLINE TAX—TOWNSHIP'S SHARE—WHERE AND HOW USED—WHETHER CINDERED ROAD IS UNIMPROVED A QUESTION OF FACT.

## SYLLABUS:

1. *The proceeds of the gasoline tax distributed to townships under the provisions of Section 5541-8 of the General Code, must be used upon the unimproved dirt roads of the secondary system, if any such exist. Such use must be by way of construction, reconstruction or widening, and must be of such character as not to constitute merely maintenance and repair, but the improvement made need not necessarily include a traffic bearing surface of materials other than the natural soil itself.*

2. *It is a question of fact whether or not a road upon which cinders have been used should be regarded as an unimproved dirt road. The determination of the question depends upon the extent of the improvement by the use of cinders and this question must be determined by the township trustees, whose judgment would not, in the absence of its abuse, be disturbed.*

COLUMBUS, OHIO, October 30, 1929.

HON. HOWARD M. NAZOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads as follows:

“General Code Section 5541-8 provides that the money received by townships from the gasoline tax must be expended by each township for the sole purpose of constructing, widening and reconstructing the public roads and highways within such township; provided, however, that such fund shall be used by the township trustees for the purpose of constructing, widening and reconstructing unimproved dirt roads of the secondary or county system of highways within the township.

Each township in Ashtabula County has roads in it of the secondary county system, so that the money received by all the townships will need to be expended in accordance with the foregoing provisions.

In your opinion, would a road which had been cindered be an unimproved dirt road, and could the township trustees, under the supervision of the county surveyor, repair dirt roads under the above provisions? It is impossible for me to see how a dirt road could be reconstructed unless the meaning of that term should be construed to mean the repairing of the same and the keeping

of them in substantially the same condition as they were when originally opened.”

In considering the questions you raise, it will be well to set forth all of that portion of Section 5541-8 of the General Code relating to the township's portion of the money derived from the gasoline tax. Such portion, as set forth in 113 O. L. p. 72, is as follows:

“Ten per cent of said highway construction fund shall be appropriated for and divided in equal proportions among the several 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 several counties. Upon receipt of said vouchers and warrants each county 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, widening and reconstructing the public roads and highways within such township. Provided, however, that such funds shall be used by the township trustees for the purpose of constructing, widening and reconstructing unimproved dirt roads of the secondary or county system of highways within the township, unless there be no unimproved dirt roads of the secondary or county system of highways within such township, in which event such funds may be used for constructing, widening and reconstructing such township roads as the township trustees shall designate. Provided, however, 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; and provided further that all of such improvement of roads shall be under the supervision and direction of the county surveyor as provided in Section 3298-15k of the General Code; and provided further that no obligation against such funds shall be incurred unless and until plans and specifications for such improvement, approved by the county surveyor, shall be on file in the office of the township clerk; and provided further that all disbursements of such funds shall be upon vouchers of the township trustees approved by the county surveyor. The trustees of any township are hereby authorized at their discretion to pass a resolution permitting the 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.”

It must be confessed that the phraseology of the portion of the section quoted is in some respects unfortunate. While it would be difficult to give force and effect to all of the language used, yet it does not appear to be so difficult to give effect to the intention of the Legislature, which may be gathered from the context.

The most cursory reading of that portion of the section which you quote is convincing evidence that the legislative intent is not in exact accord with the language used. The section requires the township trustees, in the first instance, to use these funds for the purpose of constructing, widening and reconstructing unimproved dirt roads of the secondary or county system of highways within the township. While this language would so indicate, it was clearly not the intention of the Legislature that this money be exclusively used to “construct” an unimproved dirt road. Taken literally, the language would seem to indicate that this was what should be done, and, of course, this work would consist of perhaps only the ditching, grading and crown-

ing of a right of way which had never had anything done upon it theretofore. By the same literal interpretation of the succeeding words, the conclusion might be reached that reconstruction and widening would apply only to such work as would, when completed, result in a dirt road yet unimproved in the sense that there would be no surface material thereon other than the natural soil itself. Such an interpretation of the statute would negative the right, in any event, to put surface materials upon any road in the secondary system, and would result in devoting these funds solely to the ditching, draining, grading or widening of roads without placing any surfacing material thereon. Such a construction is, in my opinion, too narrow. In fact, it might well be asserted that the real intention of the Legislature was that roads theretofore unimproved should, by the means of these funds, be improved in the sense that a traffic bearing material other than the natural dirt itself, would be placed thereon.

If this conclusion be reached, however, it would mean that no reconstruction or widening of an existing dirt road could be made except in the event that a hard surface was put thereon at the same time. Such a construction would, in my opinion, also be too narrow. There doubtless exist in the secondary systems of many of the counties dirt roads which, at present, are scarcely passable, but which, by proper drainage and grading, may be rendered useful to the communities, although no hard surface is placed thereon. In view of the ambiguity of the language of the section, I do not feel warranted in restricting the use of these funds except that, where used upon the secondary system, the road upon which they are used must be an unimproved dirt road (and by this I mean a road which has no bearing surface of materials other than the native soil itself) and the work done upon such road must be either construction, reconstruction or widening as distinguished from maintenance and repair alone.

The distinction between maintenance and repair work and construction, reconstruction and widening need not be elaborately discussed. In the case of a dirt, a general improvement which would include ditching, draining and grading over an appreciable portion of its length would be either construction or reconstruction, as the case may be. Widening would comprehend an enlargement of that portion of the road available for traffic. On the other hand, neither the dragging of a road nor the occasional filling of holes would constitute anything other than maintenance and repair.

A familiar method adopted in the improvement of roads in those subdivisions which are limited with respect to funds is that known as stage construction. By this method the draining and grading of a road, and its widening if necessary, are done as one proceeding and its further improvement by placing a surface thereon is deferred until funds become available therefor. It is often advantageous to proceed in this manner, inasmuch as it insures time to permit what will ultimately be the foundation of the road to settle, thus insuring a substantial foundation. In my view, the use of the funds here in question for work of this character upon a road which theretofore has had no permanent improvement, and thus comes within the designation of an unimproved dirt road, would not be unlawful even though the initial proceeding may not include definite provision for surfacing materials other than the soil. If it is contemplated ultimately to improve the road by use of surfacing material, these funds may undoubtedly be used for the preliminary work of grading, widening and draining.

In your inquiry you ask whether a road which has been cindered should be regarded as an unimproved dirt road within the meaning of this section. The Legislature has not given us any definition of what an unimproved dirt road is, and, in the absence thereof, recourse must be had to the common, ordinary interpretation of the term. In my opinion it would be a question of fact to be determined in each instance

whether or not a particular road was improved or unimproved. Ordinarily, the use of cinders is regarded as a more or less temporary expedient and the whole surface of the road is not so treated but occasional spots are cindered where, were it not for their use, the road would be impassable. Such use of cinders would scarcely result in the road being classified as improved, for it would still remain substantially a dirt road. On the other hand there are roads which throughout a substantial portion of their length have a complete surfacing of cinders, and in an instance of that kind, the cinders being materials foreign to the natural soil and constituting a traffic bearing surface in themselves, I believe that the road should be regarded as improved. As I have heretofore stated, this would be a question of fact to be determined in the first instance by the township trustees, whose judgment would not, in the absence of its abuse, be disturbed.

You further inquire whether township trustees, under the supervision of the county surveyor, may use these funds to repair dirt roads. From what I have heretofore said, the answer to your inquiry is obviously in the negative. Your doubt is, as you indicate, engendered by the use of the word "reconstruction". It is not my belief that the Legislature intended these funds to be used for maintenance work with respect to either dirt roads or improved roads. Nowhere is the word "maintenance" used, and it seems to me that the conclusion must be reached that these funds are to be used solely with reference to construction work where a road has theretofore been unimproved. Where, however, the roads of the secondary system are already improved and the money may accordingly be used upon township roads, such funds may be used for construction, widening or reconstruction. The predominant purpose of the Legislature apparently is that these funds shall be expended for improvements rather than mere maintenance.

For the purpose of clarity, my conclusion may be recapitulated as follows:

1. The proceeds of the gasoline tax distributed to townships under the provisions of Section 5541-8 of the Code, must be used upon the unimproved dirt roads of the secondary system, if any such exist. Such use must be by way of construction, reconstruction or widening, and must be of such character as not to constitute merely maintenance and repair, but the improvement made need not necessarily include a traffic bearing surface of materials other than the natural soil itself.

2. It is a question of fact whether or not a road upon which cinders have been used should be regarded as an unimproved dirt road. The determination of the question depends upon the extent of the improvement by the use of cinders, and this question must be determined by the township trustees whose judgment would not, in the absence of its abuse, be disturbed.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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1131.

DISAPPROVAL, ABSTRACT OF TITLE TO LAND OF R. E. MILLER IN  
THE VILLAGE OF CARROLLTON, CARROLL COUNTY, OHIO.

COLUMBUS, OHIO, October 30, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication of recent date, submitting for my examination and approval an abstract of title, warranty