

**OPINION NO. 83-031**

**Syllabus:**

Ohio Const. art. XII, §5a precludes the expenditure of revenues derived from the motor vehicle fuel tax and relating to fuels used for propelling vehicles on public highways for the purpose of providing financial assistance to public mass transportation systems under R.C. 5501.07.

June 1983

**To: Warren J. Smith, Director, Department of Transportation, Columbus, Ohio**  
**By: Anthony J. Celebrezza, Jr., Attorney General, June 15, 1983**

I have before me your request for my opinion on the question whether revenues derived from the Ohio motor vehicle fuel tax, imposed by R.C. Chapter 5735, may be used to provide financial assistance to public mass transportation systems under R.C. 5501.07.

R.C. 5735.05, which imposes an excise tax on dealers in motor vehicle fuel, sets forth the purposes of the tax as follows:

To provide revenue for maintaining the state highway system; to widen existing surfaces on such highways; to resurface such highways; to enable the counties of the state properly to plan, maintain, and repair their roads; to enable the municipal corporations to plan, construct, reconstruct, repave, widen, maintain, repair, clear, and clean public highways, roads, and streets; to enable the Ohio turnpike commission to construct, reconstruct, maintain, and repair turnpike projects; to maintain and repair bridges and viaducts; to purchase, erect, and maintain street and traffic signs and markers; to purchase, erect, and maintain traffic lights and signals; to pay the costs apportioned to the public under section 4907.47 of the Revised Code [installation of protective devices at public railroad highway grade crossings] and to supplement revenue already available for such purposes; to distribute equitably among those persons using the privilege of driving motor vehicles upon such highways and streets the cost of maintaining and repairing the same; to pay the interest, principal, and charges on bonds and other obligations issued pursuant to Section 2g of Article VIII, Ohio Constitution, and sections 5528.10 and 5528.11 of the Revised Code [bonds or other obligations for highway construction]; to pay the interest, principal, and charges on highway obligations issued pursuant to Section 2i of Article VIII, Ohio Constitution, and sections 5528.30 and 5528.31 of the Revised Code [highway obligations]; and to provide revenue for the purposes of sections 1547.71 to 1547.78 of the Revised Code [harbor projects]. . . .

Similar statements of purpose appear in R.C. 5735.25, R.C. 5735.29, and R.C. 5735.30, which levy additional taxes. See also R.C. 5735.31 (imposing upon persons liable for highway use tax an excise tax upon the use of motor vehicle fuel purchased or obtained outside of the state and used in operating a motor vehicle on the public highways of the state).

R.C. 5501.07 states, in part, that the Division of Urban Mass Transportation of the Department of Transportation, see R.C. 5501.04, may issue grants "from any public mass transportation grant appropriation to county transit boards, regional transit authorities,<sup>2</sup> and public mass transportation systems" (footnotes added) in order to help match the nonfederal portion of a grant application for federal funds.

There is no statute which expressly provides for the Department of Transportation to expend revenues derived from the Ohio motor vehicle fuel tax for financial assistance to public mass transportation systems. Whether existing statutory provisions may be construed as authorizing such expenditures by implication, or whether the statutory scheme may be modified to permit such expenditures, depends, in the first instance, upon whether such expenditures would be permitted under the Ohio Constitution. See generally 1969 Op. Att'y Gen. No. 69-121 (Ohio Const. art. XII, §5a precludes moneys subject to its provisions from being expended for the satisfaction or payment of delinquent inheritance taxes owed by the state to the county); 1952 Op. Att'y Gen. No. 1171, p. 134 (assistant tax map draftsmen may not be paid from funds subject to Ohio Const. art. XII, §5a); 1933 Op. Att'y Gen. No. 141, vol. I, p. 159 at 160 ("proceeds of [motor vehicle fuel] taxes are limited in their uses, by both constitutional and express legislative provisions, strictly to the purposes for which the taxes are levied").

<sup>1</sup> See R.C. 306.01-13.

<sup>2</sup> See R.C. 306.30-71.

Ohio Const. art. XII, §5a, states:

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

It is clear that revenues derived from the motor vehicle fuel tax and relating to fuels used for propelling vehicles on public highways are subject to this provision. See 1982 Op. Att'y Gen. No. 82-031; 1954 Op. Att'y Gen. No. 4096, p. 379. I assume, for purposes of this opinion, that the revenues with which you are concerned are of this type and, thus, are subject to art. XII, §5a. Compare R.C. 5735.05 ("The general assembly finds as a fact that, of the revenues which occur from excises imposed by [R.C. 5735.05, 5735.25, 5735.29, and 5735.30], one-half of one per cent are attributable to the operation of motor vehicles upon waters within the boundaries of this state and shall be used for the purposes of [R.C. 1547.71 to 1547.78]") with 1982 Op. Att'y Gen. No. 82-084 (art. XII, §5a is applicable only to moneys derived from fees, excises, or license taxes relating to the registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, and does not apply to fees, excises, or license taxes relating to the registration, operation, or use of vehicles on navigable waterways, or to fuels used for propelling such vehicles). See generally R.C. 5735.14 (providing for reimbursement of motor vehicle fuel tax paid on fuel which is not used for the propulsion of motor vehicles upon highways or waters of the state). The question, then, is whether Ohio Const. art. XII, §5a would permit the expenditure of such motor vehicle fuel taxes for the purpose of providing financial assistance to public mass transportation systems under R.C. 5501.07.

Let me note, first, that R.C. 5501.07(A) permits the Division of Urban Transportation of the Department of Transportation to issue grants to county transit boards, regional transit authorities, or public mass transportation systems only upon certification of the deputy director for urban mass transportation that the grant will be used to help match the nonfederal portion of a grant application for federal funds, and only in the following areas:

- (1) Capital grants which are eligible for federal financial aid under the provisions of the Urban Mass Transportation Act of 1970, the Federal Aid Highway Act of 1973, the "National Mass Transportation Assistance Act of 1974," 88 Stat. 1565, 49 U.S.C. 1601b, and similar federal public mass transportation acts and programs;
- (2) Managerial training programs, technical studies in urban transit, and research, development, and demonstration projects which are eligible for federal financial aid under the provisions of the Urban Mass Transportation Act of 1970 and similar federal public mass transportation acts and programs;
- (3) The rural public mass transportation demonstration programs which are eligible for federal financial aid under the provisions of the Federal Aid Highway Act of 1973, the National Mass Transportation Assistance Act of 1974, and similar provisions of federal public mass transportation acts and programs;
- (4) The discretionary funding program as defined and established under Section 5 of the National Mass Transportation Assistance Act of 1974, and similar federal public mass transportation acts and programs.

The fact that this provision authorizes grants to be made pursuant to specific federal programs and also pursuant to "similar federal public mass transportation acts and programs" makes it difficult to discuss its terms with specificity. It is, however, clear that it encompasses programs which are directed to a variety of

facets of mass transportation—including capital expenditures, managerial training programs, technical studies, and demonstration projects. It is also clear that mass transportation programs are neither directed toward the construction, maintenance, and repair of public highways nor limited to systems which use the highways. See generally 49 U.S.C. §1602(a)(1)(B) (1976 ed. Supp. V 1981) (authorizing federal grants or loans for financing "facilities and equipment for use. . . in mass transportation service and the coordination of such service with highway and other transportation. Eligible facilities and equipment may include personal property such as buses and other rolling stock, and rail and bus facilities, and real property and improvements (but not public highways other than fixed guideway facilities) needed for an efficient and coordinated public transportation system"); 49 U.S.C. §1607(a) (1976 ed. Supp. V 1981) (development of transportation plans and programs shall "consider all modes of transportation"); 49 U.S.C. §1608(c)(6) (1976 ed. Supp. V 1981) (defining "mass transportation" as "transportation by bus, or rail, or other conveyance, either publicly or privately owned, which provides to the public general or special service. . . on a regular and continuing basis").

The Ohio Supreme Court has stated that Ohio Const. art. XII, §5a "closely restricts the expenditure of the fees and taxes received in relation to vehicles using the public highway to purposes directly connected with the construction, maintenance and repair of highways and the enforcement of traffic laws." Grandle v. Rhodes, 169 Ohio St. 77, 157 N.E.2d 336 (1959) (syllabus, paragraph 1). In Grandle v. Rhodes, the court declined to extend the words "other statutory highway purposes," as used in art. XII, §5a, to include the payment of attorney fees incurred by a taxpayer who, on the basis of art. XII, §5a, successfully blocked the disbursement of funds appropriated by the General Assembly for a preliminary study of a parking facility under the Statehouse grounds. In an earlier case, Grandle v. Rhodes, 166 Ohio St. 197, 140 N.E.2d 897 (1957), rehearing 166 Ohio St. 108, 139 N.E.2d 328 (1956), the Ohio Supreme Court had decided that funds subject to art. XII, §5a could not be used to defray the costs of preliminary studies relative to the construction of a parking lot under the Statehouse grounds because such studies did not constitute "statutory highway purposes" within the meaning of art. XII, §5a.

I find it significant that the cases cited above evidently rejected the argument set forth by my predecessor in 1956 Op. Att'y Gen. No. 6581, p. 391, that R.C. 5735.25 and art. XII, §5a should be read as permitting expenditures of highway funds for an underground parking facility. That opinion cited favorably State ex rel. Kauer v. Defenbacher, 153 Ohio St. 268, 91 N.E.2d 512 (1950), which

<sup>3</sup> R.C. 306.30 defines "transit facility," for purposes of provisions dealing with regional transit authorities, to mean any:

(A) Street railway, motor bus, tramline, subway, monorail, rapid transit, aeroplane, helicopter, ferry, or other ground or water transportation system having as its primary purpose the regularly scheduled mass movement of passengers between locations within the territorial boundaries of a regional transit authority, including all right-of-way, power lines, rolling stock, equipment, machinery, terminals, buildings, administration and maintenance and repair facilities, and supporting parking facilities, and franchise rights attendant thereto, but excluding therefrom trucks and facilities designed for use in the movement of property by truck;

(B) Docks, wharves, warehouses, piers, and other port, terminal, or transportation facilities and marinas;

(C) Facilities used, available for use, or designed for use to aid in the safe taking off or landing of aircraft, for the safety, storage, and maintenance of aircraft, for the comfort and accommodation of users of air transportation, including persons, property, and mail, or for the safe and efficient operation and maintenance of an airport; and buildings and facilities as are reasonably necessary for the comfort and accommodation of the users of transit facilities; or

(D) Any combination of the foregoing.

held that expenditures for a turnpike project were permissible under art. XII, §5a, even though the project included various areas and facilities, apart from the traveled portion of the highway, which were to be used for service, administrative, and storage purposes. 1956 Op. No. 6581 stated, at 399:

[In State ex rel. Kauer v. Defenbacher] it will be seen that the court regarded various and sundry areas and facilities, entirely apart from the traveled portion of the highway, devoted to service, administrative, and storage purposes, to be a part of the highway itself, and expenditures therefor to be "a capital outlay for additions and betterments for highway improvement."

This is a modern, common sense, and realistic concept of what the present day motor traffic pressures require in the way of highway improvements. This is a recognition that travel on the roadways proper may be facilitated and made safe by numerous facilities to serve the needs of motor vehicles at times other than when actually in motion on such roadways. (Emphasis in original.)

In deciding the Grandle v. Rhodes cases, the Ohio Supreme Court implicitly rejected the argument that any purpose which may facilitate or improve highway traffic may be considered a highway purpose and adopted, instead, the position that art. XII, §5a must be limited to expenditures directly connected with highways and traffic laws. See generally State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 166 N.E.2d 365 (1960) (holding that the prior acquisition of rights of way constitutes an expenditure for statutory highway purposes within the meaning of Ohio Const. art. XII, §5a); 1954 Op. No. 4096 (concluding that funds subject to Ohio Const. art. XII, §5a may be spent for preparing a master street plan for a municipality but not for rezoning the municipality). The decisions in Grandle v. Rhodes are consistent with the history of art. XII, §5a, which, as discussed by my predecessor in Op. No. 82-084, indicates that the term "public highways," as used in that provision, was intended to refer to only streets and roads.

Art. XII, §5a has been construed to permit the expenditure of highway funds for physical appurtenances to a roadbed which benefit the vehicular traffic on the road. See, e.g., State ex rel. Walter v. Vogel, 169 Ohio St. 368, 159 N.E.2d 892 (1959) (money derived from motor vehicle fuel and license taxes may be used by a municipality to furnish electricity for lighting urban portions of limited access highways). But see 1964 Op. Att'y Gen. No. 894, p. 2-95 (declining to extend the holding of State ex rel. Walter v. Vogel to the lighting by a municipality of its streets under R.C. 727.14). Art. XII, §5a has, in addition, been interpreted to encompass expenditures for certain types of planning and studies. See, e.g., R.C. 5735.05. For example, R.C. 307.152 authorizes a board of county commissioners to enter into an agreement for the preparation of "comprehensive transportation and land use studies and major thoroughfare reports" and to pay the costs of the agreement from revenues derived from, among other sources, the motor vehicle fuel tax. One of my predecessors did, however, conclude that such authority must be read, in conjunction with the provisions of Ohio Const. art. XII, §5a, as requiring that such agreements "limit such expenditures to planning relating directly to the construction, reconstruction, improvement and repair of roads and bridges." 1967 Op. Att'y Gen. No. 67-107 (syllabus, paragraph 2).

Art. XII, §5a has not, to my knowledge, been construed as permitting the expenditure of highway funds for purposes relating generally to public mass transportation, and I am reluctant to apply such a construction. See generally 1964 Op. No. 894, at 2-96 (declining to find that funds subject to Ohio Const. art. XII, §5a may be used by a municipality for the lighting of its streets and stating: "It may well be true that the [Ohio Supreme] Court would make further exceptions to the limitation of uses of the aforementioned tax revenues stated in [Ohio Const. art. XII, §5a]. However, this office is not empowered, nor shall we attempt to extend a Supreme Court decision construing a provision of the Ohio Constitution"). It may be argued that improved mass transportation programs will benefit the highway system by improving the transportation system as a whole and restoring

highway utility.<sup>4</sup> See generally Salaman, Towards Balanced Urban Transportation: Reform of the State Highway Trust Funds, 4 Urb. Law. 77 (1972); Ohio Constitutional Revision Commission 1970-1977, vol. 4, pp. 1755-61 (anonymous memorandum submitted to the finance and taxation committee to provide it with supplemental information concerning art. XII, §5a). It is possible that some of the expenditures authorized by R.C. 5501.07 might provide such indirect benefit to the highways. See 49 U.S.C. §1601 (1976) ("(a) The Congress finds—. . . (2) that. . .the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and (3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems"). I cannot, however, find that such a possibility is sufficient to permit the general expenditure of motor vehicle tax funds for the purposes of R.C. 5501.07. Art. XII, §5a, as adopted by the people of Ohio and applied by the Ohio Supreme Court, authorizes the expenditure of highway funds only for purposes which bear a close relationship to the construction and maintenance of public roads or the safety and convenience of the vehicular traffic on the roads. See also R.C. 5735.05 (including among purposes of the levy of the motor vehicle fuel tax: "to distribute equitably among those persons using the privilege of driving motor vehicles upon such highways and streets the cost of maintaining and repairing the same"); Shafer v. Glander, 153 Ohio St. 483, 92 N.E.2d 601 (1950). The expenditures authorized by R.C. 5501.07 do not, in my judgment, serve the purposes set forth in Ohio Const. art. XII, §5a.

It is, therefore, my opinion, and you are hereby advised, that Ohio Const. art. XII, §5a precludes the expenditure of revenues derived from the motor vehicle fuel

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<sup>4</sup> 23 U.S.C. §134 (1976 ed. Supp. V 1981) states, in part:

(a) It is declared to be in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective, the Secretary shall cooperate with the State and local officials in the development of transportation plans and programs which are formulated on the basis of transportation needs with due consideration to comprehensive long-range land use plans, development objectives, and overall social, economic, environmental, system performance, and energy conservation goals and objectives, and with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. The planning process shall include an analysis of alternative transportation system management and investment strategies to make more efficient use of existing transportation facilities. The process shall consider all modes of transportation and shall be continuing, cooperative, and comprehensive to the degree appropriate based on the complexity of the transportation problems. After July 1, 1965, the Secretary shall not approve under section 105 of this title [federal aid for highways] any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section. No highway project may be constructed in any urban area of fifty thousand population or more unless the responsible public officials of such urban area in which the project is located have been consulted and their views considered with respect to the corridor, the location, and design of the project.

tax and relating to fuels used for propelling vehicles on public highways for the purpose of providing financial assistance to public mass transportation systems under R.C. 5501.07.