

issue of Cuyahoga Falls Improvement Bonds B-98X, in the aggregate amount of \$100,000, being part of an authorization of \$302,881.46, dated April 1, 1932, bearing interest at the rate of 6% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1252.

TAXES—SPECIAL FUND TO MAINTAIN OFFICE OF FIRE
M A R S H A L — GENERAL ASSEMBLY DETERMINES
AMOUNT—IF THERE IS NO APPROPRIATION, IT DOES
NOT FOLLOW THAT THE TAX PAID BE RETURNED
TO THE INSURANCE COMPANIES.

SYLLABUS:

1. *The proceeds of the tax levied by Section 841, General Code, are required to be placed to the credit of a special fund for the maintenance of the office of the State Fire Marshal until the end of the year for which such tax is required to be paid, at which time any unexpended balances in such fund may be transferred to the general fund of the state as provided in such section.*

2. *The General Assembly has discretionary power to determine the amount of such revenues which shall be appropriated for the uses and purposes of the office of State Fire Marshal and an action in mandamus will not lie to control such discretion.*

3. *In the event the General Assembly does not see fit to appropriate for the uses and purposes of the office of State Fire Marshal the entire proceeds of the tax levied by Section 841, General Code, there is no authority whereby any part of such taxes may be refunded to the insurance companies taxed by such section.*

COLUMBUS, OHIO, September 29, 1937.

HON. ALFRED A. BENESCH, *Director of Commerce, Columbus, Ohio.*

DEAR SIR: Your letter of recent date is as follows:

“Section 841 of the General Code provides as follows:

‘For the purpose of maintaining the Department of State Fire Marshal and the payment of the expenses inci-

dent thereto, each fire insurance company doing business in this state shall pay to the state * * * * * in addition to the taxes required to be paid by it, one-half of one percent on the gross premium receipts after deducting return premiums, etc. The money so received shall be placed to the credit of a special fund for the maintenance of the office of State Fire Marshal. If any portion of such special fund remain unexpended at the end of the year for which it was required to be paid, and the State Fire Marshal so certifies, it shall be transferred to the general fund of the state.'

At the last session of the Legislature, there was enacted an appropriation bill which provided a budget of \$140,662.00 for the Division of State Fire Marshal for the years 1937 and 1938, or approximately \$70,000.00 per year. The revenues accruing from the one-half of one percent tax on the gross premium receipts of fire insurance companies, as aforesaid, will approximate \$120,000.00 per year.

I should like to have your opinion on the following:

1. Is the Treasurer of State required to place these revenues in a special fund to the sole credit of the Division of State Fire Marshal to be used for the payment of the expenses incident to the operation of the Division of State Fire Marshal?

2. If such allocation has not been made, has the Director of Commerce, as the titular head of the Department of which the Division of State Fire Marshal is a constituent, the right to demand that such allocation be made?

3. Assuming that the revenues so derived from the fire insurance companies have been placed to the credit of the general fund, by what proceeding can they be restored to the special fund created by the statutory provision aforesaid?

4. Since the legislative enactment provides that the revenues in question be devoted to the maintenance of the Division of State Fire Marshal, and the payment of the expenses incident thereto, has the Legislature the right to provide for such maintenance an amount less than that actually paid in by the insurance companies?

5. In the event that the Legislature has such right and authority, are the insurance companies not entitled to the refund of the difference between the amount paid in by way of assessment and the amount actually appropriated by the

Legislature for the expenses of maintaining the Division of State Fire Marshal?

6. In the event that the Legislature appropriates for the expenses of the Division of State Fire Marshal an amount less than the total of the revenues hereinafter referred to, are not the insurance companies entitled to institute an action in mandamus requiring that the total amount of the revenues, if necessary for such maintenance, be used for that purpose?

I am impelled to pose these questions because the appropriation for the maintenance of the Division of State Fire Marshal will be wholly exhausted on October 15, and I shall apparently have no alternative except to discontinue the operations of the Division until further appropriations are made available."

With respect to your first three questions, there is no question but that Section 841 of the General Code, quoted in your letter, provides in clear and unmistakable terms that the tax therein levied shall be placed to the credit of a special fund for the maintenance of the office of State Fire Marshal where they are to remain until transferred to the general fund as therein provided. I am advised that these revenues are handled in the offices of the Treasurer and Auditor of State in accordance with the requirements of Section 841, General Code, and the question as to what remedy may be available to compel compliance with such section is accordingly moot.

Coming then to a consideration of your next three questions, a situation whereby the General Assembly fails to appropriate all revenues allocated to the maintenance of a so-called self-supporting department of the state government is not new in Ohio.

Section 1316, General Code, provides that all moneys from fees received by the State Dental Board shall be paid into the state treasury to the credit of a fund for the use of the State Dental Board. This office held in an opinion appearing in Opinions of the Attorney General for 1916, Vol. I, page 220, as set forth in the syllabus:

"Section 1316, G. C., 106 O. L., 297, is not such an appropriation of the funds paid into the state treasury by the secretary of the state dental board as is contemplated by Section 22 of article II of the Constitution, as such funds cannot be used by said Board until so appropriated."

Sections 1295-25 and 1295-26, General Code, make similar pro-

vision as to all moneys received by the State Board of Optometry. It was held in an opinion appearing in Opinions of the Attorney General for 1920, Vol. I, page 192, as set forth in the syllabus:

“All moneys received by the Secretary of the State Board of Optometry under the act of March 20, 1919, (108 O. L., Part 1, p. 73) must be paid monthly into the state treasury, and no part thereof can be drawn therefrom except in pursuance of a specific appropriation made by law. See section 22 of Article II of the State Constitution.”

A very similar situation to the one which you present was under consideration in an opinion of this office appearing in Opinions of the Attorney General for 1932, Vol. III, page 1352, in which revenues of the State Medical Board, which the Medical Practice Act provides shall be paid into the state treasury to the credit of a fund for the use of such board, had accumulated over a period of years in excess of appropriations to the approximate amount of \$85,000. The then Attorney General held as set forth in the first two branches of the syllabus:

“1. The State Medical Board has no right to expend all of the funds in the state treasury at the present time, accumulated from fees received for examinations to practice medicine, surgery and nursing, but only such portion of said funds appropriated by section 1 of House Bill No. 624 of the 89th General Assembly.

2. Sections 1294 and 1295-18, General Code, set aside in the state treasury the fees received by the Secretary of the State Medical Board from examinations for the practice of medicine, surgery and nursing, for the use of said board, but the moneys accumulated from said fees can only be used when appropriated by the legislature.”

The appropriation of public moneys for maintenance of the state government and its various departments is essentially a legislative power which under Article II, Section 1 of the Constitution is vested in the General Assembly. I know of no authority whereby it may be said that the General Assembly is without power to exercise its discretion in determining what amount, if any, shall or shall not be appropriated under circumstances such as set forth in your inquiry. The hereinabove cited opinions of this office in which I concur have all recognized this legislative prerogative. In the instant case, Section 841, *supra*, clearly contemplates that the entire amount of the

tax levied may not be appropriated for the uses and purposes of the office of the State Fire Marshal in that the provision is made for transfer of such excess to the general fund of the state. The conclusion is accordingly inescapable that there is no authority for refund of any portion of such taxes to the insurance companies in question, nor may an action in mandamus lie to compel the General Assembly to appropriate the entire amount of such revenues. It is perfectly apparent that the remedy in the existing situation lies within the discretion of the General Assembly.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1253

APPROVAL—BONDS OF VILLAGE OF MAPLE HEIGHTS,
CUYAHOGA COUNTY, OHIO, \$25,000.00 (Limited).

COLUMBUS, OHIO, September 29, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio,
GENTLEMEN :

Re: Bonds of Village of Maple Heights, Cuyahoga
County, Ohio, \$25,000.00 (Limited).

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of Broadway sewer district No. 1 bonds in the aggregate amount of \$146,186.60, Series 6, dated August 18, 1927, bearing interest at the rate of 5½% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.