

OPINION NO. 69-074**Syllabus:**

1. A county may expend its portion of funds derived from the county motor vehicle tax levied pursuant to Section 4504.02, Revised Code, for purchase of right-of-way. However, municipalities may not expend funds allocated by Section 4504.05, Revised Code, for the purpose of right-of-way.

2. Funds derived from Section 4504.02, Revised Code, may be used by both the county and municipalities for the removal of ice and snow. However, municipalities are limited in their expenditures to streets designated on the map submitted pursuant to Section 4504.03, Revised Code.

3. Both the county and municipalities may expend funds

derived from Section 4504.02, Revised Code, for the construction and/or maintenance of culverts, bridges and railroad separations.

4. Money received from Section 4504.02, Revised Code, may not be used to pay the salaries of employees of the county engineer's office for inspection work.

5. Money may not be allocated and distributed to municipalities pursuant to Section 4504.04, Revised Code, for projects which have been started or completed prior to application for funds.

To: C. Howard Johnson, Franklin County Pros. Atty., Columbus, Ohio
By: Paul W. Brown, Attorney General, July 1, 1969

I have your request for my opinion which reads as follows:

"In reviewing the new \$5.00 Motor Vehicle License Tax, several questions regarding both the County and City funds have arisen as follows:

"1. May this money be used for the following items:

"(a) Purchase of right-of-way.
"(b) Removal of snow and ice.
"(c) The construction and/or maintenance of culverts, bridges and railroad separations.

"(d) Engineering and construction inspection on any eligible work.

"2. Can money be allocated to the cities for projects which have been started before application for funds has been approved?

"3. In the case where the work involved exceeds the allotment of a city, can money be allocated in a succeeding year or years for this project, even though the work has been completed?"

In answering your questions I have taken note of the fact that the tax with which you are concerned is the county motor vehicle license tax levied pursuant to Section 4504.02, Revised Code, as distinguished from the municipal motor vehicle license tax levied by Section 4504.06, Revised Code. I should also mention that in certain of your questions a distinction must be made between county and municipal expenditures, and I have done so where necessary.

Answering your questions in the order in which they are presented:

1. (a)

County:

The pertinent portion of Section 4504.02, Revised Code, states the tax is:

"For the purpose of paying the costs of enforcing and administering the tax provided for in this section; and for planning, constructing, improving, maintaining, and repairing public roads, highways, and streets, maintaining and repairing bridges and viaducts; paying the county's portion of the costs and expenses of cooperating with the department of highways in the planning, improvement, and construction of state highways; paying the county's portion of the compensation, damages, cost, and expenses of planning, constructing, reconstructing, improving, maintaining, and repairing roads;
* * *"
(Emphasis added)

Sections 163.01 to 163.22 of the Revised Code set forth the procedure for appropriation of property. Section 163.14, Revised Code, contained therein states in part:

"In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages * * *"
(Emphasis added)

It must, therefore, be concluded that by using the words compensation and damages in Section 4504.02, Revised Code, the legislature intended that money received under Section 4504.02, Revised Code, be spent for appropriation of right-of-way.

Following the reasoning set forth above, it is my opinion that a county may purchase right-of-way with funds derived from Section 4504.02, Revised Code.

Municipalities:

A separate consideration is whether or not a municipality within a county may use funds allocated pursuant to Section 4504.05, Revised Code, for the purchase of right-of-way. Section 4504.04, Revised Code states in pertinent part:

"Any municipal corporation located within a county levying a county motor vehicle license tax may at any time following adoption by the board of county commissioners of a map prepared pursuant to section 4504.03 of the Revised Code make application in writing to the board for funds available under section 4504.05 of the Revised Code to plan, construct, reconstruct, improve, maintain, or repair any

of the streets within the municipality shown on such map, to pay the municipal corporation's portion of the cost of cooperating with the county or with the department of highways in the planning, construction, reconstruction, improvement, maintenance, or repairing of any of the roads or highways designated on such map * * *

Notice that the above-quoted section does not make reference to compensation or damages as did Section 4504.02, Revised Code. You may also note that Section 4504.06, Revised Code, which levies the municipal rather than the county motor vehicle license tax, does include payment of compensation and damages in its purpose clause.

By expressly omitting payment of compensation or damages from Section 4504.04, Revised Code, I must conclude that the legislature meant to exclude municipalities from purchasing right-of-way.

It is therefore my opinion that municipalities may not expend funds allocated by Section 4504.05, Revised Code, for the purpose of purchasing right-of-way.

(b)

The statewide motor vehicle tax which is levied by Section 4503.02, Revised Code, and distributed pursuant to Section 4501.04, Revised Code, states that the fund may be used to "clear and clean public highways." You will notice that neither Section 4504.02, nor Section 4504.04, Revised Code, contains these words.

One of my predecessors considered a question similar to yours in Opinion No. 5661, Opinions of the Attorney General for 1942. The question presented there was whether or not funds from the motor vehicle license tax and the "first" gasoline tax could be used to purchase salt to be used on streets. There also the sections setting forth the distribution of the taxes did not include the words "clean and clear" as had been done in the section distributing the "second" gasoline tax. In deciding that a municipality had the power to expend the proceeds from all three taxes to purchase salt, it was stated:

"It appears to me that all operations designed to keep a road or street in good and safe condition for the purpose for which it is constructed, may properly be included within the term 'maintenance'. In some cases maintenance may amount to repair; in others it may be of a purely temporary or emergency character.
* * *

The above reasoning was followed in Opinion No. 2283, Opinions of the Attorney General for 1961.

I concur with the reasoning stated above for both the county and municipalities. However, in the case of a municipality the allocation would be contingent upon compliance with the procedures set forth by Section 4504.04, Revised

Code, and would be limited to streets designated on the map submitted pursuant to Section 4504.03, Revised Code.

(c)

County:

Section 4504.02, Revised Code, provides authority to the county for maintaining bridges and viaducts. A viaduct is defined by Webster's Seventh New Collegiate Dictionary as:

"a bridge esp. when resting on a series of narrow reinforced concrete or masonry arches, having high supporting towers or piers, and carrying a road or railroad over an obstruction (as a valley or river)"

On the basis of the above definition, I would include railroad separations under the general term of viaduct. This conclusion is reinforced by the wording in Section 5561.06, Revised Code, wherein viaducts are spoken of as part of a grade crossing, specifically:

"The cost of constructing a grade crossing improvement, including the making of * * * viaducts, above or below the railroad tracks * * *"

Therefore, maintenance of railroad separations is authorized by Section 4504.02, Revised Code.

In Opinion No. 101, Opinions of the Attorney General for 1929, at page 151, my predecessor referred:

"* * * to the established rule that when streets or highways are mentioned, bridges are included within the term unless the statute involved indicates otherwise. * * *"
(See also 9 C.J. 422)

The logic behind such a rule would seem to be that a "highway" must also include all essential elements unless specifically excluded. The legislature in Section 5501.01, Revised Code, defines "road" or "highway" to include:

"* * * bridges, viaducts, grade separations, appurtenances and approaches on or to such road or highway."

Admittedly, the county and municipal road and street system is not specifically covered by Section 5501.01, Revised Code. However, a Court of Appeals stated in State, ex rel., v. Vogel, 108 Ohio App. 294, 297 (1958):

"* * * when the same word ('highway') is employed in different acts by the same legislative body, the word may be determined to mean the same thing in each of the acts. * * *"

It would be ironic that a county could build a road or highway but could not build a bridge to complete the highway.

Therefore, it is my opinion that the county may expend funds derived from Section 4504.02, Revised Code, to construct and/or maintain bridges, culverts and railroad separations.

Municipality:

A separate question is raised as to whether or not a municipality may use funds allocated by Section 4504.05, Revised Code, for the construction and/or maintenance of culverts, bridges and railroad separations. Section 4504.04, Revised Code, does not specifically mention maintenance of bridges or viaducts as did Section 4504.02, Revised Code. However, following the reasoning outlined above and that of the 1929 Opinion No. 101, *supra*, since the items in question are not specifically excluded they should be included in the word "street" as used in the statute.

Thus, since Section 4504.04, Revised Code, allows expenditures for construction and maintenance of streets, a logical interpretation would also allow expenditures for construction and/or maintenance of bridges, culverts, and railroad separations, and you are so advised.

(d)

Section 325.17, Revised Code, states:

"The officers mentioned in section 325.27 of the Revised Code may appoint and employ the necessary deputies, assistants * * * or other employees for their respective officers * * * When so fixed, the compensation (shall be paid) * * * from the county treasury * * *"

(Words in parentheses and underlining added)

The county engineer is one of the officers mentioned in Section 325.27, Revised Code, as stated in Opinion No. 4150, Opinions of the Attorney General for 1935, at page 425:

"* * * Undoubtedly by the words 'county treasury' the legislature means 'the general fund' when no other fund is mentioned."

Section 5543.09, Revised Code, states in pertinent part:

"The county engineer shall supervise the construction, reconstruction, improvement, maintenance, and repair of the highways, bridges, and culverts under the jurisdiction of the board of county commissioners * * * When the engineer has charge of the highways, bridges, and culverts within his county, and under the control of the state, he shall also supervise their construction, reconstruction, improvement, and repair."

(Emphasis added)

Therefore, it is my opinion that money received from Section 4504.02, Revised Code, may not be used to pay the salaries of employees of the county engineer's office for inspection work. The same restriction is applicable to municipalities.

However, expense other than salaries would be chargeable to eligible work.

2. and 3.

Your second and third questions are very similar and therefore I will answer them together. The combined question may be stated as: may money be allocated to a municipality for projects which have been started prior to allocation of funds or completed prior to allocation of funds?

Section 4504.05, Revised Code, states in part that moneys received by the county shall be credited to a fund for municipal corporations:

"(B) (1) * * * to be allocated and distributed as provided in section 4504.04 of the Revised Code."

Section 4504.04, Revised Code, states in pertinent part:

"* * * the board of county commissioners shall have encumbered the moneys necessary to fulfill awarded contractual or other obligations for approved project costs. The county auditor shall draw a warrant for such encumbered amount, upon notification * * * that work on an approved project has commenced * * *"

(Emphasis added)

Reading the above section in conjunction with Section 5705.41, Revised Code, I conclude that the money allocated must be in the treasury. Therefore, money may not be allocated for a succeeding year if such funds are not in existence at the present time. See also Section 5705.44, Revised Code, as to continuing contracts.

A perusal of the complete statute leads to the conclusion that the statute only refers to new projects not yet undertaken. The statute uses terms such as "proposed construction" or "work to be done." The implication is that the statute does not anticipate the allocation of money to projects which have been started or completed prior to application for funds pursuant to Section 4504.04, Revised Code.

Therefore, it is my opinion that money may not be allocated and distributed to municipalities pursuant to Sections 4504.04 and 4504.05, Revised Code, for projects which have been started or completed prior to application for funds.