

agriculture in administering and enforcing the provisions of this act; excepting, however, any surplus over and above the amount necessary to administer and enforce the provisions of this act shall be transferred to the general revenue fund.”

Thus, it appears that no part of the revenue derived under this act can be used for an inspection not authorized under the act.

It appears from the above discussion that your question must be answered in the negative, since the Legislature has neither expressly nor impliedly granted to the Director of Agriculture such power or authority.

In specific answer to your inquiry, I am of the opinion that: (1) Under the provisions of House Bill No. 444, passed by the 93rd General Assembly, the Director of Agriculture has no authority to inspect and certify plants other than those included within the definition of “nursery stock” as contained in Section 1122(4), General Code, unless said plants come within the provisions of Section 1127, General Code; (2) The Director of Agriculture has no authority to promulgate the regulation providing for the inspection and certification of plants other than those included within the definition of “nursery stock” as contained in Section 1122(4), General Code.

Respectfully,

THOMAS J. HERBERT,

*Attorney General.*

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1087.

GAS TAX FUNDS—MOTOR VEHICLE LICENSE MONEYS—  
APPROPRIATED AND DISTRIBUTED TO COUNTY—  
TOWNSHIP—MAY BE LAWFULLY DISTRIBUTED BY  
COUNTY COMMISSIONERS OR TOWNSHIP TRUSTEES—  
TO RETIRE NOTES, SECTION 7201, G. C.—DEFERRED IN-  
STALLMENTS OF PURCHASE PRICE OF ROAD MA-  
CHINERY OR EQUIPMENT—SECTIONS 5527, 5537, 5541,  
5541-8, 6309-2, G. C.

**SYLLABUS:**

*“Gas tax funds” appropriated and distributed to a township (Sec-  
tions 5541 and 5541-8, General Code) and “gas tax funds” appropriated  
and distributed to a county (Sections 5527, 5537, 5541 and 5541-8, Gen-  
eral Code), as well as “motor vehicle license moneys” appropriated to a  
county (Section 6309-2, General Code), may lawfully be expended by  
township trustees or county commissioners, as the case may be, for the  
purpose of retiring notes lawfully issued under authority of Section 7201,*

*General Code, to evidence deferred installments of the purchase price of road machinery or equipment.*

COLUMBUS, OHIO, August 23, 1939.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

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

“May we respectfully request your opinion upon the following question:

Where either the county commissioners or township trustees have purchased road machinery under the provisions of Section 7201, General Code, may the notes issued for the balance of the purchase price be paid, at maturity, from gas tax funds, in the case of purchase by the township, or from either gas tax, or motor vehicle license moneys, in the case of purchase made by the county?”

The “gas tax funds”, to which you refer, are undoubtedly the taxes levied under the first or “original gasoline tax act”, which are levied by virtue of the provisions of Section 5527, General Code, and distributed in accordance with the terms of Section 5537, General Code, and the taxes levied under the second or “additional gasoline tax act”, for which provision is made in Section 5541 General Code, and which are distributed under the provisions of Section 5541-8 of the General Code.

By Section 5537, General Code, it is provided, *inter alia*, that after the creation of “a special fund to be known as the gasoline tax rotary fund”, the revenues derived from the taxes levied under the provisions of Section 5527 shall be divided among the municipal corporations within the state, the counties of the state and the state department of highways, in the respective proportions of thirty, twenty-five and forty-five per centum, the act providing with reference to counties that:

“Twenty-five per cent. of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state, and *shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such counties.*

\* \* \*.”

(Italic the writer's.)

Section 5541-8, General Code, which directs the distribution of the revenues derived from the taxes imposed under authority of Section 5541,

General Code, was amended by the 93rd General Assembly in House Bill No. 17, which became effective on July 18, 1939. This section, after distributing the funds as therein provided, reads in part as follows:

“Provided, however, that no part of said funds shall be used for any purchase 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; provided further that \* \* \* such funds \* \* \* may be used for the purchase of road machinery or equipment; and, provided further that all such improvement of roads shall be under the supervision and direction of the county *engineer* 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 *engineer*, shall be on file in the office of the township clerk; and provided further that all contracts for material and for work done by contract shall be approved by the county engineer. 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.”

Prior to its amendment, the proviso above quoted read as follows at the place indicated by the asterisks:

“\* \* \* provided further that no portion of such funds shall be used for the purchase of road machinery or equipment; \* \* \*”

The “motor vehicle license moneys” to which you refer in your letter, are provided for in Chapter 21, Part Second, Title II, of the General Code, entitled “Motor Vehicles” (Section 6290, et seq.), Section 6309-2 containing provisions for the distribution of such moneys. By the terms of this section all taxes collected under the provisions of the chapter are apportioned among the municipal corporations, the counties and the state in the percentages and the manner detailed in the section.

From the above resume it will be noted that in so far as the funds referred to in your letter are concerned, townships only participate in the revenues derived from the taxes levied by Section 5541, General Code.

Since the amendment, as above pointed out, of Section 5541-8, General Code, where an explicit prohibition was deleted and express authority given to use funds derived from taxes imposed under Section 5541, General Code, “for the purchase of road machinery or equipment”,

there can be no question as to the lawfulness of the use of these funds by either the county commissioners or township trustees for the purpose specified.

Touching the expenditure of funds derived from taxes levied pursuant to the provisions of Section 5527 and related sections of the General Code and motor vehicle license moneys, by county commissioners for road machinery and equipment, it was held as follows in Opinion No. 1540, Opinions of the Attorney General for 1930, Vol. 1, p. 289:

“1. Moneys distributed to counties under the provisions of Section 6309-2, General Code, which relates to the motor vehicle license tax and moneys distributed to the counties under Section 5537, General Code, which relates to the first gasoline excise tax, may be used to purchase road machinery and equipment which is to be used exclusively for maintenance and repair of the county system of roads and highways.

\* \* \*

For similar rulings on the use of such funds, see Opinions, Attorney General, 1929, Vol. II, p. 1147; 1930, Vol. I, p. 416; and 1931, Vol. III, p. 1544.

With these preliminary observations as to the character of these funds and the use to which they may be put, I come to your specific question. Section 7201, General Code, provides in part as follows:

“County commissioners and township trustees, in the purchase of machinery, tools, trucks and other equipment for use in constructing, maintaining and repairing roads, shall be authorized to purchase such machinery, tools, trucks and equipment upon the following terms, to-wit: not less than one-third of the purchase price thereof shall be paid in cash, and of the remainder not less than one-half shall be paid at any time within one year from the date of purchase and not less than one-half at any time within two years from the date of purchase. Such commissioners or trustees shall be authorized to issue to the purchaser the notes of the county or township, as the case may be, signed by the commissioners or trustees and attested by the signature of the county auditor or township clerk, and covering such deferred payments and payable at the time above provided, which notes may bear interest at not to exceed six per cent per annum and shall not be subject to the provisions of sections 2293-1 to 2293-44, inclusive, of the General Code. *In the legislation under which such notes are authorized, the county commissioners or township trustees shall make provision for levying and collecting annually by taxation an amount sufficient to*

*pay the interest, if any, thereon and to provide a sinking fund for the final redemption of such notes at maturity.*

The provisions of section 5660 of the General Code shall apply only to such portion of the purchase price of such machinery, tools, trucks or equipment as is to be paid in cash. \* \* \*

The power herein conferred on township trustees shall be exercised by them only with the consent to and approval of such purchase and the terms thereof by the county commissioners of the county."

(Italic the writer's.)

Sections 2293-1 to 2293-44, inclusive, of the General Code, mentioned in the above section, are a part of the Uniform Bond Act, while Section 5660, General Code, is the outgrowth of what is historically known as the "Burns Law." This section was repealed in 1927 (112 v. 391) and replaced by Sections 5625-33, 5625-36 and 5625-37, General Code.

You will notice that in the provision above emphasized, the Legislature has made mandatory the inclusion in the legislation under which notes evidencing the deferred payments to be paid for road machinery or equipment are, issued—*not a tax levy*, but "provision for levying and collecting annually, by taxation, an amount sufficient to pay the interest, if any, "on such notes and to provide a sinking fund for their final redemption." This provision is a clear legislative recognition of and compliance with the terms and spirit of Section 11 of Article XII of the Constitution of Ohio, adopted September 3, 1912. This section reads:

"No bonded indebtedness of the state, or any political subdivision thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The very obvious purpose of the people in adopting this section was to put an end to the then too prevalent practice on the part of political subdivisions of incurring indebtedness with little more than a hope that such indebtedness might some day and in some manner be paid. As stated by Judge Jewell, at page 325, in the case of *Dix v. Shoemaker, et al.*, 24 O. N. P. (N. S.), 321 (C. P. Delaware County, 1922; Affirmed Ct. of Ap.; Pet. in Error dismissed, 109 O. S., 629):

"The sole purpose of this provision in our Constitution is to prevent the state and other subdivisions from contracting a debt without providing a revenue to meet such indebtedness when it becomes due. The word 'legislation' referred to in the

Constitution must not be limited to the bond resolution. The bond resolution and the apportioned assessment meet the requirements of the statute."

The second headnote in this case reads as follows:

"The requirement of Section 11 of Article XII of the Constitution that provision must be made in case of all bond issues of the state and its subdivisions for the levying and collecting annually by taxation 'an amount sufficient to pay the interest on said bonds and to provide a sinking fund for their final redemption at maturity,' is satisfied in the case of road improvement bonds when an apportioned assessment is made in amount sufficient to meet these charges, notwithstanding no levy therefor was made in the bond resolution."

In the opinion at page 324, the court cited and quoted from the opinion in the case of *Link v. Karb, Mayor*, 89 O. S., 326 (1914), saying as follows:

"In the case of *Link v. Karb, Mayor*, 89 O. S., 26, this constitutional provision is held to be directed to the legislation under which bonded indebtedness is incurred and not to the mere issuance of the bonds. In the opinion written by Donahue, Judge, it is said:

'We have reached the conclusion that in obedience to this amendment to the constitution, the taxing officials of any political subdivision of the state must provide in the resolution or ordinance authorizing such issue, or in a resolution or ordinance in relation to the same subject matter passed prior to the issuing of such bonds, for levying and collecting annually by taxation an amount sufficient to pay the interest thereon, and provide a sinking fund for their final redemption at maturity. *This, of course, does not require the immediate levying of a tax certain, either in amount or rate, for the provision of this amendment is that the tax shall be levied annually and collected annually, but it does mean that at the time the issue of bonds is authorized, the taxing authorities proposing to issue such bonds shall provide that a levy shall be made each year thereafter during the term of the bonds in an amount sufficient to pay the interest thereon and retire the bonds, and such provision, so made at the time the bonds are authorized, shall be binding and obligatory upon the taxing officers of that political subdivision.*'

(Italic the writer's.)

The third branch of the syllabus of the Link case reads as follows:

“This provision of the constitution does not require that at the time the issue of bonds is authorized there shall then be levied any specific amount or any specific rate, but it does require that provision shall then be made for an annual levy during the term of the bonds in an amount sufficient to pay the interest on the bonds proposed to be issued and to provide for their final redemption at maturity, which levy must be made annually in pursuance of the provisions of the original ordinance or resolution requiring the same. *The amount necessary to be levied for the purposes specified is to be determined by the taxing officials at the time the levy is made.*”

(Italics the writer's.)

From the above authorities it would seem clear that the levy required to be made by Section 7201, supra, need not be made when the legislation authorizing the purchase of road machinery and equipment on the installment plan is passed, but that provision must be made for an annual levy in a sufficient amount to retire the notes at the stipulated times, the amount of such levy to be fixed and determined at the time the levy is made. And it is equally clear from the earlier discussion in this opinion that “gas tax funds” and “motor vehicle license moneys” may lawfully be expended to purchase and pay for such machinery and equipment.

These facts being true, I can see no reason why, if there be sufficient funds of the kinds here involved in the treasury, to retire any notes issued under authority of Section 7201, supra, the levy provided for in the legislation to purchase should not be reduced in amount or entirely omitted. Certainly, it would be difficult to justify the imposition of an additional tax upon the taxpayers when the county or the township, as the case might be, already has funds in the treasury earmarked by law for the very use to which funds from such a levy would be used. To hold otherwise could only promote waste and extravagance.

For the reasons above set forth, therefore, and in specific answer to your question, it is my opinion that:

“Gas tax funds” appropriated and distributed to a township (Sections 5541 and 5541-8, General Code) and “gas tax funds” appropriated and distributed to a county (Sections 5527, 5537, 5541 and 5541-8, General Code), as well as “motor vehicle license moneys” appropriated to a county (Section 6309-2, General Code), may lawfully be expended by township trustees or county commissioners, as the case may be, for the purpose of retiring notes lawfully issued under authority of Section 7201,

General Code, to evidence deferred installments of the purchase price of road machinery or equipment.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*

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1088.

NURSERYMAN—WHEN CONTRACT ENTERED INTO WITH PERSON TO FURNISH SEED, SMALL PLANTS, ETC.—CULTIVATION—GROWING PLANTS—SUCH “CONTRACT GROWER” A NURSERYMAN—SUBJECT TO INSPECTION FEES—WHAT CONSTITUTES “PLACE OF BUSINESS”—SECTIONS 1137, 1122 (5), 1122 (4), 1122 (6), G. C.

*SYLLABUS:*

*Where a nurseryman enters into a contract with a person, whereby such person is furnished seed, small plants, etc., by the nurseryman, cultivates the growing plants, and when such plants have arrived at maturity sells the finished products to the nurseryman at a price dependent upon the grade and number of plants delivered, such “contract grower” is a nurseryman within the purview of Sections 1122(5) and 1122(6) of the General Code, and is therefore subject to the inspection fees provided in Section 1137, General Code; but said “contract grower” does not operate a “place of business,” as that term is defined in Section 1122(10), General Code, and therefore is not required to pay the fee for the operation of a place of business, as provided in Section 1137, General Code.*

COLUMBUS, OHIO, August 23, 1939.

HON. JOHN T. BROWN, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR: Your recent request reads as follows:

“Frequently, nurserymen in Ohio, who hold valid nursery certificates issued by the Ohio Department of Agriculture, enter into contracts with certain persons, who are commonly known as ‘contract growers’, to produce nursery stock for them. The usual contract arrangement between the aforementioned parties referred to is as follows:

The nurseryman supplies the planting stock such as seed, cuttings, small plants, scions or buds, as the case may be, for a certain predetermined price. The ‘contract grower’ plants the