

which I can arrive at some conclusion as to the sufficiency of the title of the record owners of said lands.

I am herewith enclosing said warranty deeds and a plat of Fort Jefferson State Park.

Respectfully,
GILBERT BETTMAN,
Attorney General.

721.

TAX AND TAXATION—GASOLINE TAX—TOWNSHIP'S SHARE UNDER SECTION 5541-8, GENERAL CODE, NOT TO BE USED FOR MAINTAINING AND REPAIRING IMPROVED TOWNSHIP ROADS.

SYLLABUS:

Funds appropriated and apportioned to the several townships within the state, under the provisions of Section 5541-8, as amended by the 88th General Assembly, may not be used by such townships for the purpose of maintaining and repairing improved township roads.

COLUMBUS, OHIO, August 9, 1929.

HON. JOHN R. PIERCE, *Prosecuting Attorney, Celina, Ohio.*

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

“Quoting from Section 5541-8, General Code, as enacted by the 88th General Assembly:

‘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.’

There are no unimproved roads in Mercer County coming within the provisions of this clause. Quoting again:

‘In which event such funds may be used for constructing, widening and reconstructing such township roads as the township trustees shall designate.’

Again, there are townships in Mercer County having no unimproved roads which come within this clause worthy of improvement. In other words, there are unimproved roads coming under this latter provision which are virtually abandoned, ought to be abandoned, and probably will be abandoned, in which case it will be very unpopular for the trustees to spend money just because they had it to spend on such roads. The other township roads, which are improved and come within the last clause aforementioned, if reconstructed or widened would also be unpopular because it would be merely spending money foolishly because the trustees had it to spend.

Therefore, my question is, where townships have no secondary or county system of highways within the township, and where it would be unwise and a foolish expenditure of money to improve unimproved roads in the townships which are virtually abandoned, and where the other township roads which are improved do not require widening or reconstructing, can the trustees of such townships use their share of their gas fund for maintenance and repair of improved township roads?”

Section 5541-1, General Code, as amended by the 88th General Assembly, provides in part:

“For the purpose of providing revenue for supplying the state’s share of the cost of constructing, widening and reconstructing the state highways of this state, and also for supplying the state’s share of the cost of eliminating railway grade crossings upon such highways, and also for enabling the several counties, townships and municipal corporations of the state to properly construct, widen, reconstruct and maintain their public highways, roads and streets, and supplementing revenue already available for such purposes, there is hereby levied * * * .”

From a reading of this portion of the act, it would appear that the maintenance of township roads is one of the purposes of the tax. However, Section 5541-8, General Code, to which you refer, in so far as is pertinent specifically provides:

“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 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.”

The language of the Legislature is clear and unambiguous as to the purposes for which such funds apportioned among the townships within the state shall be used, viz., “the sole purpose of constructing, widening and reconstructing the public roads and highways within such township.” This restriction as to the purposes for which such funds shall be expended clearly limits the broad provision of Section 5541-1, supra,

and is further carried into the proviso, which you quote. Throughout the remainder of this portion of the section reference is made to "such work," "said improvement" and "such improvement." The further provision, that the trustees of any township may authorize the county commissioners to expend such township's share of these funds, extends only to the "improvement of such roads within said township." There is not only an absence of any authority to use the funds in question for purposes of maintenance and repair, but an express limitation as to the use of these funds for the sole purpose of constructing, widening and reconstructing the public roads and highways within the township.

In view of the fact that there are no unimproved dirt roads of the secondary or county system of highways in Mercer County, as stated in your letter, the funds under consideration may be used only for constructing, widening and reconstructing such township roads as the township trustees shall designate. There is no provision to the effect that moneys paid by the county treasurer to each township, as set for in this section, shall be used during the year or within any specified time after which such funds are received. Under the provisions of Section 5625-9, funds available for constructing, widening and reconstructing township roads which have been received by a township pursuant to Section 5541-8, supra, should be held in a special fund until required for such purpose. Section 5625-9 provides in part as follows:

"Each subdivision shall establish the following funds:
* * * * *

(f) A special fund for each class of revenue derived from a source other than the general property tax, which the law requires to be used for a particular purpose. * * * * *

Apparently, such improved township roads as you mention may only be maintained and repaired with funds derived from a township tax levy for such purposes, pursuant to the provisions of Sections 3298-15d and 3298-18, General Code.

The conclusions reached herein are further strengthened in view of the provision in Section 5541-8, supra, wherein it is said 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." Ordinary maintenance and repair does not customarily necessitate the preparation of plans and specifications. The specific purposes for which these funds may be used are outlined in my opinion Number 607, directed to you under date of July 10, 1929.

Specifically answering your question, I am of the opinion that funds appropriated and apportioned to the several townships within the State, under the provisions of Section 5541-8, as amended by the 88th General Assembly, may not be used by such townships for the purpose of maintaining and repairing improved township roads.

Respectfully,
GILBERT BETTMAN,
Attorney General.