

Division of Conservation, and Arthur W. Hornig, of Sandusky, Ohio. This contract covers the construction and completion of contract for combined general, plumbing and electrical work for remodeling cottage, Sandusky, Ohio, as set forth in Item No. 1 of the form of proposal dated October 25, 1930. Said contract calls for an expenditure of three thousand one hundred thirty-five (\$3,135.00) dollars.

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence showing that the Controlling Board has approved the expenditure. In addition, you have submitted a contract bond, upon which the Aetna Casualty and Surety Company of Hartford, Connecticut, appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law, and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the Workmen's Compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

2656.

COUNTY ROADS—TRANSFER OF FUNDS—MONEYS—IN FUND USED  
FOR COOPERATING IN STATE PROJECTS MAY BE USED FOR  
COUNTY ROAD MAINTENANCE—CONSTITUTION NOT VIOLATED.

*SYLLABUS:*

*The application of a portion of moneys on hand in the fund provided by Section 1222, General Code, to county road maintenance is not violative of Section 5, Article XII of the Constitution, although a portion of such moneys was raised by the tax provided in Section 1222, General Code, prior to amendment by the 88th General Assembly.*

COLUMBUS, OHIO, December 10, 1930.

HON. R. S. CUNNINGHAM, *Prosecuting Attorney, Lancaster, Ohio.*

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

"We have in the state and county road fund approximately thirty thousand dollars available which could be used to pay the county's proportion of cost and expense of any work conducted by the Department of Highways cooperating with the county in road projects as provided in Section 1222, G. C.

The county commissioners of Fairfield County desire to use a portion of this fund for general road maintenance as provided in Section 6906, G. C.

We request an opinion from you on the legality of such use of funds and suggest that you outline the necessary procedure for transfer if a transfer of funds is necessary."

Section 1222, General Code, after authorizing a board of county commissioners to levy a one and one-half mill tax for the purpose of providing a fund, provides as follows:

“ \* \* \* The proceeds of such levy shall be used for the purpose of paying the county’s proportion of the cost and expense of any work conducted by the Department of Highways in cooperating with such county and also for the purposes provided in Sections 6965 to 6972, inclusive, or 6906 to 6956, inclusive, of the General Code; and the funds produced by such levy shall not be subject to transfer to any other fund, either by order of court or otherwise.

\* \* \* ”

Prior to amendment by the 88th General Assembly, this section did not authorize the application of the levy in question to county road maintenance, no reference having been made to Sections 6906 to 6956, General Code. It read in part as follows:

“ \* \* \* The proceeds of such levy shall be used for the purpose of paying the county’s proportion of the cost and expense of any work conducted by the Department of Highways in cooperating with such county and also for the purposes provided in G. C. §§ 6965 to 6972, inclusive; and the funds produced by such levy shall not be subject to transfer to any other fund either by order of court or otherwise.

\* \* \* ”

I am advised that the funds in question which are now on hand were raised pursuant to taxes levied under Section 1222, *supra*, prior to amendment by the 88th General Assembly. Your question then becomes one of whether or not this tax money may, in view of the present law, be spent for the purpose of county road maintenance, notwithstanding the fact that at the time it was levied there was no authority so to apply the same.

The express language of Section 1222, *supra*, as it now exists, would clearly indicate that your question must be answered in the affirmative, were it not for the provision of Section 5, Article XII of the Constitution, which provides:

“No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object for the same, to which only, it shall be applied.”

This section has been under consideration in a number of opinions of the various courts of Ohio and also in numerous opinions of this office. It is only necessary to here comment upon a few of these. The case of *Porter, et al. vs. Hopkins*, 91 O. S. 74, was an action to contest the constitutionality of the Workmen’s Compensation Act. It was contended that the provision of that act to the effect that the use of public funds raised by general taxation shall be used for the purpose of paying a county’s contribution to the Workmen’s Compensation Fund, was violative of Section 5, Article XII of the Constitution, *supra*. In the opinion of the court by Johnson, Judge, appearing on pp. 83, 84, is the following language:

“It is further contended that by this statute the public funds are diverted from the purpose for which they were levied and collected, in contravention of Section 5 of Article XII of the Constitution, which provides that no tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied. The case of *State, ex rel., vs. Edmondson*, 89 Ohio St., 351, is cited in support of this view. In that case the law of April 2, 1908, provided for the creation of a fund by each county for the relief of its own blind. The blind fund of

each of the several counties was created by levy expressly provided for by the statute, which distinctly stated 'the object of the same.' Section 8 of the law of 1913 on the same subject required the treasurers of the different counties to transfer to the state treasurer all moneys in their possession, or that might come into their possession, under the law of 1908, and the law of 1913 provided for the use and distribution of these moneys as part of a fund to be expended for the purposes of the entire state. It was held that this diversion of the taxes levied by the different counties pursuant to law was a violation of the provisions of the constitution quoted above.

No such invalidity exists in the act we have under examination. It fixes a certain charge of debt which is to be paid by the several sub-divisions named, the amount of which is to be deducted from the taxes collected before they are distributed by the proper ministerial officers. The maintenance of contingent and general funds for general purposes is provided for by statutes which are familiar. The municipal and other subdivisions are fully empowered to raise such funds. It would be wholly impracticable to specifically name in the different budgets the amount to be raised for each specific item. There are many incidental charges which are necessarily taken care of out of the funds of the character referred to as the needs arise. The fact that the amount raised does not meet the exact requirements from time to time and that some inconvenience may arise does not affect the validity of the statutory requirements."

A somewhat similar question was under consideration by the Supreme Court in the case of *State, ex rel. vs. Zangerle*, 103 O. S. 566. The Griswold Act, passed December 18, 1919, 108 O. L. Pt. 2, 1085, provided for the application of public funds collected by taxation, to public health fund purposes. The constitutionality of the act was attacked on the ground that the provision for the diversion of funds, raised for general village and township purposes, to the purposes of the act, amounted to the application of a tax levied for a certain distinct object to a different object in violation of Section 5, Article XII of the Constitution. Upon this point, the court said at pp. 582, 583:

"It is true that the agreed statement shows that the amounts retained by defendant were retained indiscriminately out of the entire amount of taxes collected in the village for the different funds named above; that is, that the amount he retained was retained out of the total lump sum collected. But it does not appear that there will not still be sufficient left in the 'amount collected' to fully supply the sinking fund and funds other than the general fund and public health fund, as fixed by the proper authorities.

It is elementary that where there are two possible interpretations of a statute, one of which would render it valid and the other invalid, the court will adopt the former, so as to bring it into harmony with the constitution.

That rule should be observed in this case and it will be held that the statute does not contemplate the application of a tax levied for a certain distinct object to a different object, in disregard of Section 5, Article XII of the Constitution, but that the auditor in retaining the stated pro rata amount will do so only from such funds as are legally applicable to health purposes, in this case the general fund and public health fund.

It will be presumed that the auditor has adopted the legal and valid course until the contrary is shown. If such a final distribution should be made by the auditor as would impair the sinking fund, or any fund other than the

general and public health funds, he would be exceeding his authority and would be enjoined. From the pleadings and the agreed statement of facts in this case, it cannot be said that Section 5, Article XII of the Constitution, has been violated. And following the rule above stated we hold the statutes involved to be constitutional and valid."

Applying the reasoning of the court to the question here under consideration, it may well be said that it will be presumed that the application of a portion of the funds on hand for the purpose of maintenance of county roads will not be such as to so impair the fund that the county will be unable to cooperate with the Highway Department in the improvement of state highways. It will be presumed that the county will adopt a legal and valid course until the contrary is shown.

In an opinion of this office appearing in Opinions of the Attorney General for 1927, Vol. III, p. 2299, a question was considered of whether or not the proceeds of a two mill levy made for the purpose of construction, reconstruction, improvement, maintenance and repair of county roads, and being the proceeds of a special levy, could be used for the purposes of the general fund. The then Attorney General in reaching a negative conclusion quoted Section 5 of Article XII of the Constitution and said:

"In this instance the object of the two mill levy has certainly been distinctly stated. In my opinion this section of the Constitution would be violated in case the proceeds of the tax were applied to objects *entirely* foreign to those stated in the levy." (Italics the writer's.)

There is here an evident recognition of the fact that the application of the proceeds of a tax levy to objects substantially the same as those stated in the levy would not be violative of the constitution. I am of the opinion that the amendment of Section 1222, *supra*, has not substantially changed the object of the levy therein provided so as to compel a conclusion that the reference to Section 6906, *et seq.*, shall be prospective only. The fund is essentially, as it was prior to such amendment, a road fund. Even prior to amendment one of the purposes of the levy was county road construction. I do not think that county road maintenance is a purpose "entirely foreign" to county road construction. Perhaps, as above indicated, if the entire moneys on hand raised pursuant to the levy provided in Section 1222, prior to amendment, were sought to be used for county road maintenance, a more difficult question would be presented, but it will be presumed for the purpose of this opinion that it is proposed to apply the entire fund to effectuate the various purposes set forth in Section 1222 as now in force and effect.

It is unnecessary to consider the provisions of the Budget Law relative to transfer of funds for the reason that maintenance of county roads is now one of the purposes for which the fund provided in Section 1222 may be applied and the application of this money for such purpose would obviously, therefore, necessitate no transfer.

In specific answer to your inquiry, it is my opinion that the application of a portion of moneys on hand in the fund provided by Section 1222, General Code, to county road maintenance is not violative of Section 5, Article XII of the Constitution, although a portion of such moneys was raised by the tax provided in Section 1222, General Code, prior to amendment by the 88th General Assembly.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*