

6067.

APPROVAL—BONDS OF CITY OF TOLEDO, LUCAS COUNTY,  
OHIO, \$18,000.00.

COLUMBUS, OHIO, September 11, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

6068.

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APPROVAL—BONDS OF BELMONT VILLAGE SCHOOL DIS-  
TRICT, BELMONT COUNTY, OHIO, \$8,000.00.

COLUMBUS, OHIO, September 11, 1936.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

6069.

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APPROVAL—BONDS OF CITY OF CLEVELAND, CUYAHOGA  
COUNTY, OHIO, \$5,000.00.

COLUMBUS, OHIO, September 12, 1936.

*State Employees Retirement Board, Columbus, Ohio.*

6070.

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MUNICIPALITY—UNAUTHORIZED TO BUY AUTOMATIC  
GUARD FOR RAIROAD CROSSING FROM GASOLINE  
TAX FUND.

**SYLLABUS:**

*A municipality may not legally purchase with funds from its portion of the gasoline tax, an automatic guard at a railroad crossing which rises when a train approaches and which prevents automobiles from crossing while a train is approaching or crossing the tracks at a street intersection.*

COLUMBUS, OHIO, September 14, 1936.

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

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads in part as follows:

"The city of Columbus has enacted an ordinance authorizing the Board of Purchase to advertise for bids and to enter into a contract for a set of railroad crossing protectors to be erected upon each side of a railroad grade crossing on one of the streets of the city, and providing that payment for same shall be made from the one and one-half cent gasoline tax provided by section 5541, G. C.

We do not have any specifications or any circular describing these railroad crossing protectors, but it is our understanding that signals are erected on each side of the crossing to warn motorists and pedestrians of the approach of trains, and that simultaneously a metal slab rises from the pavement at a sufficient height so that automobiles could not cross.

In view of the provisions of section 3 of article XVIII of the Constitution of Ohio, and of section 3714, G. C., we do not question the city's right to install such protectors, but we are unable to answer the officials' question of whether payment for such protectors can be legally made from the proceeds of the gasoline tax provided by section 5541-8, G. C., or from the proceeds of the gasoline tax provided under section 5537, G. C.

Will you kindly give us your opinion on this question at your earliest convenience, as the city auditor is withholding certification on this contract pending answer from this department as to the legality of such expenditure?"

In a subsequent communication, I am informed that the automatic metal device in question has lights upon it, presumably to warn approaching autoists of its existence at the railroad crossing. These lights work automatically at the time the device rises from the street. You inquire whether or not this device may be legally paid for by a municipality from its portion of the gasoline tax funds. These funds are created by excise taxes and are provided for by legislative enactment for definite purposes. The proceeds of these taxes are limited in their uses by both constitutional and express legislative provisions, strictly to the purposes for which the taxes are levied.

The 91st General Assembly in House Bill No. 32, effective July 3, 1935, amended section 5625-13a to prohibit transfers from the motor



pairing and constructing of loading platforms in streets for the use of street car passengers; and for removing right angle and installing circular curbs.

In an opinion to be found in Opinions of the Attorney General for 1930, Vol. I, page 790, it was held that the cost of metal discs inserted in municipal streets to mark safety zones, may properly be paid from the receipts of the gasoline and motor vehicle license taxes. On the other hand it was held in an opinion to be found in Opinions of the Attorney General for 1928, Volume I, page 84, that these funds might not be used for the purpose of sweeping and cleaning streets. It should be noted that the legislature, by specific amendment, now permits the second gasoline tax to be used for this purpose. See 114 O. L., 507. An opinion somewhat close to the question presented by you is to be found in Opinions of the Attorney General for 1930, Vol. I, page 35. The syllabus of that opinion reads :

“A municipal corporation may not legally use its proportion of the motor vehicle license tax and the gasoline tax receipts for the purpose of paying the cost of installing traffic signals or the cost of rentals thereof.”

Likewise, it should be noticed that the legislature, by a specific amendment to Section 5541-8, General Code, now has permitted the second gasoline tax to be used for this purpose. See 114 O. L. 507. From the 1930 opinion I quote the following passage which appears at page 36 :

“\* \* \* While undoubtedly traffic signals contribute to the safety of the traveling public it must be said that such signals have no relation whatever to the actual preservation of the life of the pavement itself. It is a police regulation pure and simple. The convenience of the traveling public is aided by police officers who afford protection to motorists and, in view of congested traffic conditions, the need of such officers becomes more important. Prior to the adoption of traffic signals police officers performed the duties at busy intersections which traffic signals are now supposed to perform. It is believed that it would be just as logical to hold that the salary of police officers should be paid out of the gasoline tax as it would be to hold that the cost of traffic signals should be paid therefrom. While traffic signals are necessary incidents in connection with the utility of streets, it would seem that the legislature as yet has not authorized the cost of the same to be paid out of the gasoline tax. The maintenance of traffic while a necessary police function, is not the ‘maintenance’ of the street itself, and the purpose of said tax as hereinbefore

stated, is for the physical improvement of the surface of the street. \* \* \*

It would seem from a careful examination of Sections 5537 and 5541-8, General Code, supra that the purchase of these devices could not be brought within any of the uses for which these funds are authorized, unless the same could be construed within the meaning of the phrase "purchase and maintenance of traffic lights." In this connection it is necessary to determine just what is the main purpose of the device in question. Obviously it is to warn autoists not to cross the tracks when a train is about to or is passing over the tracks and in addition is to prevent any possibility of the auto crossing the tracks during that period. The lights on the device are merely to warn autoists of its existence and they are not intended as traffic lights. They do not regulate the free flow of traffic and are merely incidental to the principal part of the device which is a guard itself.

While there might be many features of this apparatus which are desirable, nevertheless it would seem that the remedy, if any, rests with the legislature. It is, therefore, my opinion, in specific answer to your inquiry, that a municipality may not legally purchase with funds from its portion of the gasoline tax, an automatic guard at a railroad crossing which rises when a train approaches and which prevents automobiles from crossing while a train is approaching or crossing the tracks at a street intersection.

Respectfully,

JOHN W. BRICKER,  
*Attorney General.*