

page 1678, it was stated that the electors of a district are given no authority to fill a vacancy in a board of education.

In my Opinion No. 376 dated May 6, 1929, and addressed to the Director of Education, it was stated in the syllabus:

“When a person is elected to fill a vacancy occurring in the membership of a board of education, the person so elected is elected for the unexpired term of the person whose place had become vacant.”

In your inquiry you direct my attention to Section 5004, General Code, which provides that certificates of nomination for members of boards of education shall be filed with the election board of the proper county not less than sixty days previous to the date of election. This is the only provision under which candidates for a village board of education may get their names on the ballot, since the amendment to Section 4963, General Code, by the General Assembly, in 1923, and is not applicable here.

Section 5004, *supra*, refers to “officers to be filled by the electors of a district.” In the case of a vacancy in the membership of a board of education, however, there is no “office to be filled by the electors,” inasmuch as Section 4748, *supra*, definitely says that in case of a vacancy, it shall be filled by the surviving members of such board of education for the *balance of the unexpired term*.

Specifically answering your question, I am of the opinion that a vacancy in the membership of a village board of education is filled by a majority vote of the remaining members of such board, and the person chosen to fill such vacancy holds office for the balance of such term.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1024.

MOTOR VEHICLE LICENSE AND GASOLINE TAXES—MUNICIPALITY'S PORTION APPLICABLE FOR WIDENING STREETS BUT NOT FOR PURCHASING ADDITIONAL RIGHT OF WAY—WHEN COMPETITIVE BIDDING NECESSARY.

SYLLABUS:

1. *The municipality's share of the original two cent gasoline tax provided for in Section 5527, General Code, and the motor vehicle tax may be used by municipalities for widening streets either by way of maintenance and repair or by new construction.*
2. *The money derived from such taxes may not be used by municipalities for the purpose of purchasing additional right of way needed in connection with the widening of any street.*
3. *It is not necessary to let contracts for projects which are to be paid with said money by competitive bidding, unless such contracts are required to be so let by the provisions of Section 4221, General Code, or by the provisions of the charter in cities having a charter form of government.*

COLUMBUS, OHIO, October 14, 1929.

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

GENTLEMEN:—Acknowledgment is made of your recent communication which reads:

"House Bill No. 104, effective July 21, 1929, relating to the distribution and use of the gasoline and motor vehicle license revenues, provides that municipal corporations shall receive a percentage of such receipts to be used for the sole purpose of maintaining, repairing, constructing and repaving streets and roads, etc.

Question 1: May the cost of widening a street be paid from the motor vehicle license and gasoline tax receipts after the effective date of House Bill No. 104?

Question 2: May the cost of property needed for street widening purposes be paid from such receipts?

Question 3: Does the provision that construction and repaving shall be done by contract let at competitive bidding as provided by law, apply when such cost is less than \$500.00?"

House Bill No. 104, as enacted by the 88th General Assembly, was entitled:

"To amend Sections 5527, 5537 and 6309-2 of the General Code, and to enact supplemental Sections 5537-1 and 6309-3 of the General Code providing for the distribution of gasoline tax and motor vehicle license revenues."

Some of the sections included in said bill were construed by me in my Opinion No. 294, issued to your bureau under date of April 12th, 1929. The sections construed in that opinion were the sections as they existed previous to the amendment in House Bill No. 104. In that opinion, I discussed and cited the case of *State, ex rel. vs. Brown*, 112 O. S. 590.

In that case the Supreme Court was construing the sections as they existed at that time, enacted or amended in House Bill No. 44 of the 86th General Assembly. The court considered said act as a whole and held that the general purpose of that specific act was to provide that the money collected as gasoline tax was to be used solely for maintaining and repairing roads and streets.

The fact that the Legislature originally intended, as found by the Supreme Court, that the two cent gasoline tax originally provided for by the Legislature should only be used for maintenance and repair, does not prevent succeeding General Assemblies from amending the act for the purpose of levying such a tax for other proper purposes.

Since the passage of the original gasoline and motor vehicle license tax laws, an additional tax has been levied upon the sale of gasoline for use in constructing streets and roads.

The purpose in amending the various sections in House Bill No. 104 of the present General Assembly was evidently to extend the use of the money subsequently collected to purposes not provided for in the original act. Original Section 5527 authorized the levying of the tax to be used in repairing damage caused to highways by motor vehicles and for widening existing surfaces on such highways where said widening was rendered necessary by the motor vehicle traffic, and to be used for the same purpose on the streets of municipalities.

In the *Brown* case, *supra*, the Supreme Court held that widening, as referred to in said section, was limited to widening which could be considered a part of the maintenance and repair as distinguished from any new construction.

Said sections, as amended, in so far as the streets of municipalities are concerned, provide that the municipalities' share of the tax collected should be used "for enabling the several municipal corporations of the state properly to maintain, repair, construct and repave their streets." You will note that the amendment authorizes the construction of streets as well as the maintenance and repair thereof.

In each of the other sections amended the word "construction" has been included. The amendments, in so far as cities are concerned, say nothing about widening, but if it becomes necessary in the maintenance and repair of streets to widen them as a part of the maintenance and repair, then such work could be done under the right of the city to use the money to maintain and repair its streets.

The amended sections, however, give the municipalities greater authority to use such money than they originally had, and that is authority to use it by expending such money to construct streets. The widening of a street must, of necessity, be by means of construction or maintenance and repair. The sections as amended provide that the tax may be used for both purposes.

It is therefore my opinion that the municipality's share of the original two-cent gasoline and motor vehicle tax may be used by such municipality for widening streets either by way of maintenance and repair or by new construction.

In your second question you ask whether or not the cost of the property needed for street widening purposes may be paid from such fund. I assume you are interested in knowing whether or not these funds may be used for the purpose of purchasing property needed for the extra width of the street. The language of the section does not authorize the use of the fund for the purpose of laying out any street or a part thereof. The language used authorizes the use of the fund for the purpose of maintaining, repairing, constructing and repaving streets. The streets must, therefore, be laid out and in existence before the money can be used for the purpose designated in the statute. Buying an additional right of way for the street has to do with the laying out or establishing the street rather than with maintaining, repairing, constructing, or repaving the same street.

It is therefore my opinion that none of the fund in question can be used for the purpose of purchasing additional right of way.

In your third question you ask whether or not, in spending this fund, the contract must be let by competitive bidding even though the cost of such improvement or construction is less than \$500.00.

Both Section 5537 and Section 6309-2, as amended, provide that contracts for the expenditure of this money shall be "let after the taking of competitive bids as provided by law, or in the manner provided in the charter of any such municipal corporation."

Section 4221, General Code, provides that in municipalities, when the contract involves more than \$500.00, such contract must be let by competitive bidding. However, some municipalities have adopted charters containing different provisions relative thereto.

It will be noted that the language used in House Bill No. 104 is not that the contract shall be let by competitive bidding, but by competitive bidding as provided by law or by the charter of the municipality. This language means that the contract shall be let by competitive bidding when this type of contract is required, by the statute or by the charter of the municipality, to be let by competitive bidding. If the contract is one not required by the statute or charter to be let by competitive bidding, then it is not necessary to let the contract involving the expenditure of this fund by competitive bidding.

It is therefore my opinion that competitive bidding is not required in letting contracts for the expenditure of the moneys in question unless the contract is one which is required to be so let by virtue of Section 4221, General Code, or by the charter of the municipality.

Respectfully,
GILBERT BETTMAN,
Attorney General.