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MUNICIPAL CORPORATION—MAY NOT MAKE EXPENDITURES FROM FUNDS APPORTIONED UNDER SECTIONS 5537, 5541-8, 6309-2 G. C. FOR CONSTRUCTION RAILROAD SWITCH TRACK OR SIDING—USE, TRANSPORT STREET “MAINTENANCE AND REPAIR” MATERIALS IN CARLOAD LOTS TO CITY STORAGE YARD AND CITY GARAGE.

SYLLABUS:

A municipal corporation may not make expenditures for the construction of a railroad switch track or siding for its convenience in transporting

street maintenance and repair materials, etc., in carload lots to a city storage yard and city garage from funds apportioned to it under the provisions of Sections 5537, 5541-8 and 6309-2, General Code.

Columbus, Ohio, August 23, 1940.

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

Gentlemen:

This will acknowledge receipt of your inquiry, in which you request my opinion upon the following:

“May the proceeds of the motor vehicle license fees or gasoline taxes, or both, be used by a city to finance the construction of a railroad switch track or siding for its convenience in transporting street materials, etc., in carload lots to the storage yard and city garage?”

Section 5537, General Code, setting forth the apportionment of the proceeds derived from the gasoline excise tax and the purpose for which such funds must be used, provides in part, as follows:

“Thirty per cent. of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be used by such municipal corporations for the sole purpose of maintaining, repairing, constructing and repaving the public streets and roads within such corporation.”

Section 5541-8, General Code, setting forth the apportionment of the proceeds derived from the additional excise tax of $1\frac{1}{2}\phi$ per gallon on motor vehicle fuel provided for in Section 5541, General Code, provides in part, as follows:

“Seven and one-half per cent of said highway construction fund shall be paid on vouchers and warrants drawn by the auditor of state to the municipal corporations within the state in proportion to the total number of motor vehicles registered within the municipalities of Ohio during the preceding calendar year from each such municipal corporation as shown by the official records of the secretary of state, and shall be expended by each municipal

corporation for the sole purpose of constructing, maintaining, widening, reconstructing, cleaning and clearing the public streets and roads within such corporation, and for the purchase and maintenance of traffic lights.”

Section 6309-2, General Code, setting forth the apportionment of the proceeds derived from the annual license tax levied upon the operation of motor vehicles on the public roads or highways of this state, and the purpose for which such funds must be used, provides in part:

“(1) Twenty-five per centum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district of registration as provided in this chapter. The portion of such money due the municipal corporation shall be paid into the treasuries of such municipal corporations forthwith upon receipt by the county auditor, and the remainder retained in the county treasury. In the treasuries of such counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads and highways, and for no other purpose, and shall not be subject to transfer to any other fund. ‘Maintenance and repair’ as used in this section, includes all work done upon any public road or highway in which the existing foundations thereof are used as a sub-surface of the improvement thereof, in whole or in substantial part; and in the treasuries of such municipal corporations, such moneys shall constitute a fund which shall be used for the maintenance, repair, construction and repaving of public streets, and for no other purpose and shall not be subject to transfer to any other fund, provided, however, that as to such municipal corporations, not more than fifty per cent of the total funds available during any year from such source including the unexpended balance of such funds from any previous year, shall be used in such construction and repaving which shall be done by contract let after the taking of competitive bids as provided by law, or in the manner provided in the charter of any such municipal corporation.”

From the correspondence attached to your inquiry, it is apparent that the proposed switch track or siding is to be constructed for the purpose of transporting materials for street maintenance and repair in carload lots, to the city storage yard or city gaarge. This opinion will therefore be confined to the proper interpretation and construction of the words “maintenance and repair” as used in the respective statutes quoted above.

It is apparent that the above statutes grant no express authority to a municipal corporation to make such an expenditure as is proposed by the city of X. It is therefore necessary to determine whether such power exists in these statutes by implication.

It is an elementary principle of law that laws authorizing and directing the expenditure of public moneys shall be strictly construed. Inasmuch as the words "maintenance and repair", as used in the above statutes, are not specifically defined, it must be concluded that the Legislature did not intend to extend the meaning of these words beyond their common and accepted usage.

In the case of *State, ex rel. Crabbe, Attorney General v. City of Columbus, et al.*, 21 O. App., page 1, the court judicially interpreted the meaning of the terms "maintenance and repair" as used in the gasoline excise tax law. The court in that case stated in the first and second branches of the syllabus:

"1. City held empowered to expend funds allotted under gasoline excise tax law to buy sand dryer to be used in city asphalt plant, operated exclusively to prepare materials for maintaining and repairing streets, since city officials have latitude of discretion in use of such funds so long as money is spent to maintain and repair highways, in view of Section 5537, General Code.

2. Common observation teaches that more scientific, efficient, and economic method of caring for streets than having men here and there with kettles of asphalt for repair work might be adopted in large city."

At page 3, of the court's opinion it is stated:

"It is clear from the provisions of the entire gasoline excise tax act that the General Assembly intended to confine the expenditure from said fund exclusively and solely to highway maintenance and repair. In the apportionment made to the cities and municipalities the limitation in the use of the fund was again repeated. It will be observed, however, that no limitation was placed upon the officials of the city, other than that the fund be used exclusively for highway maintenance and repairs. It would necessarily follow that a reasonable discretion must be allowed the officials of the cities in determining the method or manner of making these repairs."

In 1927 Opinions of the Attorney General, Volume 1, page 256, the then Attorney General stated in the first branch of the syllabus that:

"A municipality can not purchase land to be used as a storage yard for the street repair department with its share of the registration fees for registering motor vehicles or out of its share of the gasoline excise tax receipts."

At page 260 of that opinion it is stated:

"I believe, however, that there is a distinction between purchasing machinery and supplies, which is an incident to the main-

tenance, and the purchasing of real estate, which is an incident to the purchasing of the material and machinery, * * * ”

In the case of *State, ex rel. Crabbe, supra*, it was stated that it could not be denied that the sand dryer in question was a piece of machinery or equipment that was a direct incident to the efficient maintenance and repair of the streets. However, in the 1927 opinion of the Attorney General, *supra*, the then Attorney General concluded that the purchase of real estate upon which to store materials and supplies used in the maintenance and repair of streets was at least one step removed from actual maintenance and repair. It must be concluded that the then Attorney General was correct in his conclusion for, to permit the expenditure from such tax moneys beyond that which is directly incidental to maintenance and repair, would be a dangerous interpretation of the law, and would reflect an intent that could not have reasonably been contemplated by the legislature.

In the case you present, the City of X proposes to construct a switch track or siding upon city property from which street materials and supplies are to be hauled to a storage yard and city garage. While it may be that such an expenditure is clearly expedient as effecting a savings in repair and maintenance costs, such is not the test for determining the validity of such expenditures. It can not be contended that the switch track or siding so constructed is equipment directly incidental to the maintenance and repair of streets. It is rather a facility to be used in procuring and placing in a convenient location street materials and supplies that are to be thereafter used in street maintenance and repair, and as such, it is clearly not a direct incident to the actual maintenance and repair of the streets of the City of X. That being the case, the cost of such a project can not properly be discharged from moneys apportioned to the city under the provisions of Sections 5537, 5541-8 and 6309-2, *supra*.

It is therefore my opinion, in specific answer to your inquiry that a municipal corporation may not make expenditures for the construction of a railroad switch track or siding for its convenience in transporting street maintenance and repair materials, etc., in carload lots, to a city storage yard and city garage from funds apportioned to it under the provisions of Sections 5537, 5541-8 and 6309-2, General Code.

Respectfully,

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Attorney General.