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1. WEEDS AND BRUSH—DESTRUCTION IN HIGHWAY CONSTITUTES MAINTENANCE OF HIGHWAY—TOWNSHIP TRUSTEES—AUTHORIZED TO EMPLOY LABOR AND PURCHASE NECESSARY EQUIPMENT AND MATERIALS—SECTION 5541-8 G. C.
2. TOWNSHIP TRUSTEES—AUTHORIZED TO KEEP HIGHWAY FREE FROM OBSTRUCTION BY SNOW AND ICE—PROPER MAINTENANCE—COST MAY BE PAID FROM FUNDS ALLOCATED TO TOWNSHIP—SECTIONS 1178-5, 3374-1, 5541-8 G.C.

## SYLLABUS:

1. Destruction of weeds and brush in a highway under the control of township trustees constitutes maintenance of such highway, and the township trustees are authorized to expend the funds allocated to them under Section 5541-8, General Code, for employing the labor and purchasing the equipment and materials necessary for that purpose.

2. Township trustees are authorized by Sections 3374-1 and 1178-5, General Code, to keep the highways within the township free from obstruction by snow and ice and such work is a part of the proper maintenance of such highways, and the cost thereof may be paid from the funds allocated to townships by Section 5541-8, General Code.

Columbus, Ohio, June 10, 1952

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen :

I have before me your communication requesting my opinion and reading as follows :

“In the examination of township accounts the Bureau of Inspection and Supervision of Public Offices is often confronted with the question of whether township trustees have expended gasoline tax funds, received under the provisions of Section 5541-8, General Code, for the sole purpose of constructing, maintaining, widening and reconstructing the public roads and highways within the township, within the meaning of those terms in said statute.

“Sections 3374-2 and 7146, General Code, require township trustees to destroy briars, brush and noxious weeds along public highways, and it has been common practice for the trustees to expend a portion of the funds received under Section 5541-8, General Code, for labor, equipment and chemicals in connection with brush and weed control, in the belief that such expenditures constitute a necessary part of road maintenance.

Sections 3374-1 and 1178-5, General Code, grant authority to township trustees to purchase necessary equipment and employ necessary labor for the removal of ice and snow from public roads and highways. In carrying out the provisions of these statutes, township trustees have expended a portion of the funds received under the provisions of Section 5541-8, General Code, for labor, material and equipment in connection with ice and snow removal, in the belief that such expenditures constitute a necessary part of road maintenance.

In our consideration of these matters, we have examined 1942 Opinion of the Attorney General, No. 5661, the syllabus of which reads as follows :

‘1. The term “maintenance” as used in Sections 5537, 5541-8 and 6309-2, General Code, will include the use of such materials and processes as are reasonably necessary to keep the streets and highways in good and safe condition for public travel.

‘2. A municipality may expend the proceeds of the gasoline taxes allocated to it under the provisions of Sections 5537 and 5541-8, General Code, and also the motor vehicle

license fees distributed to it under the provisions of Section 6309-2, General Code; for the purchase of salt to be used on streets to allay icy conditions and to prevent skidding of motor vehicles.'

"We further find *State, ex rel. v. Taylor, et al.*, 152 O. S. 241, holds that the removal of brush, briars, and weeds along township roads is a mandatory duty of township trustees. The syllabus of said decision reads as follows:

'1. Under the provisions of Sections 3370, 3374-2 and 3375, General Code, township trustees are charged with the duties to repair and drag township roads and to cut all brush, briars and weeds growing along such public highways.

2. These provisions are mandatory.

'3. The duties enjoined thereby may be commanded by a writ of mandamus.'

"In an effort to establish a uniform procedure to be followed by township trustees in their performance of the duties prescribed under the laws and at the same time ascertain that the distributions received under Section 5541-8, General Code, have been legally expended, we request your ruling on the following questions:

"1. May a township expend the proceeds of the gasoline tax allocated to it under the provisions of Section 5541-8, General Code, to employ labor, purchase equipment and acquire chemicals in connection with brush and weed control along public roads in the township?

"2. May a township expend the proceeds of the gasoline tax allocated to it under the provisions of Section 5541-8, General Code, to employ labor and purchase materials and equipment in connection with the removal of snow and ice from public roads in the township?"

Section 5541-1, General Code, which levies what is commonly called the "second gasoline tax," and Section 5541-8, General Code, which provides for the distribution of the proceeds of such tax, were originally enacted in 1927, and appear in 112 Ohio Laws, at page 508. Section 5541-8, with which we are mainly concerned, reads in part, as follows:

"Seventeen and one-half 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, maintaining, widening, and reconstructing the public roads and highways within such township.*

“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; provided further that such funds may be used for the purchase of road machinery or equipment; and, provided further that all such improvement of roads shall be under the supervision and direction of the county engineer 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 engineer, shall be on file in the office of the township clerk; \* \* \*” (Emphasis added.)

In their original form, the stated purpose authorized by these statutes, was to provide a fund for the use of the state and the several counties, for the general purpose of constructing, reconstructing and maintaining public highways, roads and streets. Municipalities and townships were not given any share of this source of revenue. In 113 Ohio Laws, page 70, these statutes were amended, whereby a certain percentage of the highway construction fund produced by this tax was to be given to municipalities and another portion to townships. According to that amendment, municipalities were permitted to spend such fund “for the sole purpose of constructing, *maintaining*, widening and and reconstructing the public streets and roads within such corporation.” As to townships, they were limited in their expenditure of such fund to the “sole purpose of constructing, widening and reconstructing the public roads and highways in such township.” As to townships, there was no reference to *maintenance* of highways.

The next amendment of the section appears in 114 Ohio Laws, page 507. Two significant changes were made. As to municipalities, there was added to the original purposes the phrase “cleaning and clearing,” and also, the words “and for the purchase and maintenance of traffic lights.” As to townships, the word “maintaining” was inserted among the allowable purposes.

It will thus be noted that the authority given to municipalities as to this fund, was broadened, by including "cleaning and clearing" of the public streets and roads within such corporation. No such permission as to cleaning and clearing of roads was granted to townships.

Immediately following this amendment, this statute was under consideration by one of my predecessors, in Opinion No. 3886, Opinions of the Attorney General for 1931, page 1544, where it was held:

"A municipality's portion of the gasoline excise tax arising under the provisions of Section 5541-1, General Code, and expended for the purposes authorized by Section 5541-8, General Code, may be used for the purchase of machinery for mowing grass and weeds growing in that part of a municipal street or road outside of the traveled portion."

In the course of the opinion, it was said:

"Before its amendment by the last General Assembly, Section 5541-8, General Code, provided that a municipality's share of the proceeds arising under the provisions of Section 5541-1, General Code, known as the second gasoline tax, could only be expended for 'constructing, maintaining, widening and reconstructing public streets and roads in such municipal corporation.' \* \* \*

"It would seem that the new purposes added by the recent enactment of the General Assembly (Section 5541-8 G. C.) namely: 'cleaning and clearing public streets and roads' would authorize, if conditions require, the clearing of that portion of the established street adjacent to the traveled portion of such highway.

"It would seem that the *general utility and safety* of public streets and roads *necessitates the removal of weeds and grass adjacent to the traveled portion* of a highway in order that the various obstructions, declivities and intersections obscured by such weeds and grass be apparent to those using such street or road.

"The clearing of that portion of a street adjacent to the traveled portion of weeds and grass would also tend to *facilitate drainage with resultant benefit* to the traveled portion of the road."  
( Emphasis added.)

It will be noted that this opinion related only to that portion of the section in question which governed the uses to which a municipality might put its share of the tax. It would appear as a fair inference, that if the authority to improve the portion of the highway adjacent to, but

outside of the traveled roadway, grew out of the amendment giving municipalities the additional right to use such funds for "cleaning and clearing," it was the intention of the legislature to withhold such enlarged authority from townships and confine them to such uses as involved the improvement and maintenance of the traveled portion of the highway.

That conclusion, however, would rest upon the assumption that "maintenance" of a public highway, referred only to the portion of the highway on which vehicles actually traveled, and that it required the additional authority as to "clearing," to justify the use of the fund in question on the untraveled portions of the highway. That assumption does not appear to be sound, especially when applied to *township* roads. "Maintenance" as applied to a city street, may largely consist in the repeated repair of a paved roadway. In a township where there may be dirt roads or wholly unimproved trails through the hills, "maintenance" might readily mean clearing away the encroachment of weeds and underbrush, which would make driving difficult and dangerous. Let it be noted further, that the duty of the township trustees is not confined to the maintenance of the "roadways." They are to maintain the "public roads and highways." "Highways" certainly include the entire width of the public easement.

It is true that the definitions of "maintenance," as found in the decisions and in the opinions of Attorneys General, usually relate to a permanent improvement of some sort, but in the case of a township road, which has not been paved or macadamized, maintenance may consist in dragging, or deepening a ditch, or some other minor betterment of the highway. If it be true as said in the 1931 opinion above referred to, that cutting weeds along a roadway may contribute to better visibility or drainage, then it is hard to see why that is not "maintenance" of the highway, in that it is made and kept more useful to the traveling public.

In this connection, I note a definition of "maintenance" as given by one of my predecessors in Opinion No. 1494, Opinions of the Attorney General for 1939, page 2208, as follows:

"The term 'maintenance' when used in its broad sense might well include reconstruction, enlargement, improvement, alteration, repair of highways, and all other types of duties with reference to highways other than original construction." (Emphasis added.)

The General Assembly has long recognized the propriety of keeping the highways, particularly township roads, free from weeds, brush, etc. That is evidenced by the provisions of Sections 3374-2 and 7146 of the General Code, to which you refer. They require the township trustees to destroy brush and weeds growing along the public highways, and while they direct that the cost of such work shall be paid from the township road fund, they do not provide that no other funds shall be used for that purpose. These sections certainly do recognize the propriety and necessity of keeping the highways in the townships free of brush and weeds, and it appears to me that such work, therefore, takes on the character of highway maintenance.

Opinion No. 5661, Opinions of the Attorney General for 1942, page 825, to which you refer, held:

"1. The term 'maintenance' as used in Sections 5537, 5541-8 and 6309-2, General Code, will include the use of such materials and processes as are reasonably necessary to keep the streets and highways in good and safe condition for public travel."

I approve of that statement, and consider that in applying it to the power and duty of the township trustees as to weed control, it would appear that the township trustees would be within their authority in employing such processes, including the use of chemicals, as are best adapted to accomplish the purpose; and further that this would constitute maintenance of "the public roads and highways" within their control, referred to in Section 5541-8 supra.

As to the removal of snow, the power and duty seems still plainer. Section 3374-1, General Code, provides:

"It shall be the duty of the township trustees to cause all the highways within the township, including the state, county and township roads, to be kept free from obstruction by snow. The cost and expense thereof shall be paid from the road funds of the township."

Here again, the cost is directed to be paid out of the township road fund, but there is no provision forbidding the payment for such work from other available funds. Section 1178-5, General Code, gives the township trustees specific authority to purchase the necessary equipment for the removal of "snow and ice" from township roads.

It is accordingly my opinion and you are advised :

1. Destruction of weeds and brush in a highway under the control of township trustees constitutes maintenance of such highway, and the township trustees are authorized to expend the funds allocated to them under Section 5541-8, General Code, for employing the labor and purchasing the equipment and materials necessary for that purpose.

2. Township trustees are authorized by Sections 3374-1 and 1178-5, General Code, to keep the highways within the township free from obstruction by snow and ice and such work is a part of the proper maintenance of such highways, and the cost thereof may be paid from the funds allocated to townships by Section 5541-8, General Code.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General