

**Note from the Attorney General's Office:**

1927 Op. Att'y Gen. No. 27-0104 was overruled in part by 2013 Op. Att'y Gen. No. 2013-035.

notwithstanding it will cause some inconvenience to the railway company."

This case was affirmed without opinion in 78 O. S., 427.

The highway over which this railroad crossing passes was in existence previous to the construction of said crossing by said railroad company. The railroad company occupies said highway with its tracks by virtue of the easement and its right to so occupy said highway is subservient to the right of the Department of Highways and Public Works to carry to a conclusion all matters which may directly or indirectly aid in the constructing, improving, maintaining and repairing all highways composing a part of the system of inter-county highways and main market roads.

The Director of Highways and Public Works, having the right to construct said sewer pipes across and under the tracks of the railroad company in such a manner as not to interfere with the use of said crossing by the railroad company, is not compelled to obtain a license from the company in order to lay said pipes across and under its tracks.

I am, therefore, of the opinion that the Director of Highways and Public Works may not lawfully enter into the contract in question, which provides for the payment of an annual rental to the railroad company for the privilege of occupying said crossing with sewer pipes.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

104.

COUNTIES MAY EXPEND FUNDS APPORTIONED UNDER SECTION 5537  
TO PURCHASE ROAD DRAGS.

*SYLLABUS:*

*Counties may expend funds apportioned to them under Section 5537 of the General Code, to purchase road drags, which are to be used exclusively in maintaining and repairing roads, which are a part of the county road system.*

COLUMBUS, OHIO, February 25, 1927.

HON. W. W. BADGER, *Prosecuting Attorney, Millersburg, Ohio.*

DEAR SIR:—Receipt is acknowledged of your request for my opinion as to whether the county may expend gasoline tax money to purchase road drags to be used exclusively on gravel roads that are a part of the county road system.

The pertinent part of Section 5537 of the General Code as it applies in answering your question, reads:

"Twenty-five per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the Auditor of State in equal proportions to the county treasurer of each county within the state, and shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such counties."

Your question is whether a board of county commissioners may purchase road drags to be used exclusively on gravel roads which are a part of the county road sys-

tem, out of the gasoline tax excise fund, which is allotted to county treasurers by the Auditor of State.

Your question may be answered in the affirmative in the light of the case of *State ex rel Crabbe vs. The City of Columbus*, decided by the Court of Appeals of Franklin County, Ohio, on May 28, 1926, and reported in Volume 153, North Eastern Reporter, page 174, in which the court held:

“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 General Code, Section 5537.”

There is no distinction between the right to purchase sand dryers and road drags, since both are purchased for and used in the maintenance and repair of roads.

The gasoline excise tax is collected for the purpose of maintaining and repairing certain roads, and the money derived therefrom may be used in the purchase of necessary road equipment, to be used exclusively towards the maintenance and repair thereof.

I am therefore of the opinion that the county can expend a part of the gasoline tax excise fund apportioned to it, to purchase road drags which are to be used exclusively in maintaining and repairing gravel roads which are a part of the county road system.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

105.

COUNTY AUDITOR—IF AUDITOR-ELECT FAILS TO QUALIFY ON OR BEFORE THE SECOND MONDAY IN MARCH NEXT AFTER HIS ELECTION, THERE WILL BE A VACANCY IN SUCH OFFICE—APPOINTEE TO SUCH VACANCY HOLDS OFFICE UNTIL SUCCESSOR IS ELECTED AND QUALIFIED—SUCCESSOR SHALL BE ELECTED FOR UNEXPIRED TERM AT FIRST NOVEMBER ELECTION AT WHICH STATE AND COUNTY OFFICERS ARE ELECTED.

**SYLLABUS:**

*Under Section 2561 of the General Code, if a county auditor-elect fails to qualify on or before the second Monday in March next after his election, there will be a vacancy in such office. The person appointed to fill such vacancy shall hold the office until his successor is elected and qualified. His successor shall be elected for the unexpired term at the first November election at which state and county officers are elected.*

COLUMBUS, OHIO, February 26, 1927.

HON. E. P. MCGINNIS, *Prosecuting Attorney, Caldwell, Ohio.*

DEAR MR. MCGINNIS:—This will acknowledge the receipt of your recent communication requesting my opinion as follows: