

1542.

MUNICIPALITY—RIGHT TO USE MOTOR VEHICLE LICENSE AND GAS TAX RECEIPTS FOR IMPROVING STREETS BY GRADING WHEN SUCH STREETS HAVE NOT BEEN IMPROVED BY CINDERING AND GRAVELING.

SYLLABUS:

1. *A municipal corporation may use its share of the motor vehicle license tax receipts arising under the provisions of Section 6309-2, as amended by the 88th General Assembly, 113 O. L. 280, for the purpose of improving streets by grading when such streets have not been improved by cindering, graveling, etc.*

2. *A municipal corporation may use its share of the gasoline tax receipts for the same purpose and under the same conditions.*

COLUMBUS, OHIO, February 20, 1930.

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

GENTLEMEN :—Your recent communication reads :

“Section 6309-2 G. C., was amended, 113 O. L. page 280, and the provision that maintenance and repair as being all work done wherein an existing foundation is used, now seems to relate to maintenance and repair of county roads and highways, and not to municipal streets and roadways.

Question 1. May a municipal corporation use its share of the motor vehicle license tax receipts for the purpose of grading dirt streets, that is, streets which have not been improved by cindering, graveling, etc.

Question 2. May a municipal corporation use its share of the gasoline tax receipts for such purpose?

See Opinions Nos. 374 dated April 23, 1927, and 1271, dated December 9, 1929.”

“The revenue collected under the provisions of this chapter shall be distributed as follows :

“The revenue collected under the provisions of this chapter shall be distributed as follows :

(1) Fifty 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 corporations shall be paid into the treasuries of such municipal corporations on the first business day of each month, 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.

* * * "

Before the amendment of Section 6309-2, General Code, in the manner as hereinbefore set forth, the section required the proceeds from such tax to "be used for the maintenance of public roads, highways and streets and for no other purpose." The section further provided that such funds were not subject to transfer to any other funds. The original section contained the same definition for "maintenance and repair" as set forth in the section quoted above, except that following the phrase "public roads or highways" the original section contained the words "or upon any street." The history of this legislation leads to the conclusion that in the amendment of said section an entirely different use was intended in so far as municipalities are concerned. The amended section expressly authorizes the use of said funds on the part of municipalities for construction and repaving of public streets, whereas the original section was limited to maintenance and repair.

In the clause defining maintenance and repair the 88th General Assembly saw fit to exclude the words "public streets." Notwithstanding the fact that the clause which you mention still refers to "this section," it is believed when the section before amendment is considered in connection with the amendment that the conclusion is irresistible that it was the intent of the Legislature to limit the use of said funds in connection with maintenance and repair upon existing sub-surfaces to counties and that no such limitations were intended so far as municipalities are concerned. In fact it would be inconsistent to expressly state that the funds could be used for construction and then require the construction of a street to be made upon an existing sub-surface.

You refer to an opinion of my predecessor found in Opinions of the Attorney General for 1927, page 641, which held as disclosed by the second branch of the syllabus, that:

"Gasoline tax receipts which have been apportioned to a municipality cannot be used to pave or make improvements to the public streets and highways of the municipality when in making such improvement the existing foundation of the street or highway is not used as the subsurface of the improvement in whole or in substantial part but a new foundation is made to be used as the subsurface of the new improvement."

The conclusion in that opinion was arrived at because of the provision in the gasoline tax law to the effect that the levies therein made were to supplement revenues already available which, of course, relates to the motor vehicle license tax. By reason of the reference to the motor vehicle license tax, it was logically concluded that the definition of maintenance and repair would be the same under the gasoline tax as it had been construed to be under the motor vehicle license tax. However, in view of the fact that Section 6309-2 was amended in the manner hereinbefore pointed out, it would result in modifying the conclusion reached by my predecessor.

You also refer to my Opinion No. 1271 dated December 9, 1929. The third branch of the syllabus of this opinion reads:

"Inasmuch as the gasoline tax distributed under Section 5537 of the General Code expressly authorizes municipalities to use the same for main-

tenance and repair of streets as well as construction, etc., it follows that said tax may properly be used for placing slag and other materials upon said streets even though such operation constitutes "maintenance" as contradistinguished from construction."

The conclusion in the opinion last referred to is of course based upon the law as amended by the 88th General Assembly and it is in harmony with the conclusion that I have hereinbefore reached so far as this question is concerned.

Based upon the foregoing and in specific answer to your inquiry, it is my opinion that:

(1) A municipal corporation may use its share of the motor vehicle license tax receipts arising under the provisions of Section 6309-2, as amended by the 88th General Assembly, 113 O. L. 280, for the purpose of improving streets by grading when such streets have not been improved by cindering, graveling, etc.

(2) A municipal corporation may use its share of the gasoline tax receipts for the same purpose and under the same conditions.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1543.

MUNICIPALITY ADOPTING COUNCIL-MANAGER GOVERNMENT—
COUNCIL TAKING OFFICE MAY FIX ITS MEMBERS' SALARIES—
—CHAIRMAN ENTITLED TO ADDITIONAL COMPENSATION AS
CHAIRMAN AND POLICE JUSTICE.

SYLLABUS:

1. *Where a municipality adopts a council-manager plan of government, the said council, after taking office, under the provisions of Section 3515-52 of the General Code, may fix the salary of its members. Section 3515-63 would have no application in connection with the initial fixing of such compensation.*

2. *Council, under such circumstances, may fix a salary or compensation for the chairman of council as such, in addition to the compensation fixed for him as a member of council for the purpose of compensating him for the additional duties imposed upon him as such chairman and police justice.*

COLUMBUS, OHIO, February 20, 1930.

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

GENTLEMEN:—Your recent communication reads:

"The city of Ironton, in November, 1929, by a vote of the electors, adopted the council-manager plan of government provided for by statute, and parties elected as members of council took office on January 1, 1930.

Section 3515-52, G. C., reads:

'Salaries and attendance of councilmen. The council shall by ordinance fix the salary of its members which shall be paid in equal monthly installments. For each absence from regular meetings of the council, unless authorized by a two-thirds vote of all members thereof, there shall be deducted a