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COMMISSIONERS, COUNTY — AUTHORIZED TO INSURE COUNTY AGAINST LOSS OF MOTOR VEHICLES BY FIRE AND THEFT — AUTHORIZED TO INSURE EMPLOYEES AGAINST LIABILITY ON ACCOUNT OF DAMAGE OR INJURY TO PERSONS OR PROPERTY — COMMISSIONERS NOT AUTHORIZED, SECTION 2412-3 GC TO PAY PREMIUMS ON POLICIES OUT OF COUNTY'S ALLOTMENT FROM GASOLINE TAX EXCISE FUND NOR FROM AUTO LICENSE TAX FUNDS—SECTIONS 5537, 6309-2 GC.

SYLLABUS:

While county commissioners are authorized to procure policies of insurance insuring the county against loss of its motor vehicles by fire and theft, and are authorized to procure policies of insurance insuring the employes of the county against liability on account of damage or injury to persons or property, the county commissioners are not authorized by the provisions of Section 2412-3, General Code, or any other statute, to pay the premiums on such policies of insurance out of the county's allotment from the gasoline tax excise fund provided for in Section 5537, General Code, nor out of the county's allotment from the auto license tax funds provided for in Section 6309-2, General Code.

Columbus, Ohio, July 10, 1953

Hon. Wray Bevens, Prosecuting Attorney
Pike County, Waverly, Ohio

Dear Sir:

I have before me your request for my opinion. You state that the Pike County Commissioners contemplate procuring fire, theft, personal liability and property damage insurance covering county road equipment which consists of trucks, road maintainers, caterpillar tractors, pull graders and gasoline shovel. The question advanced for my opinion is: May the county commissioners pay the premiums for such insurance out of monies derived from the gasoline tax and auto license tax instead of from the county's general fund?

The question initially presents itself as to whether or not a county has the authority to enter into a contract of insurance for the kinds of insurance mentioned in your letter. So far as insuring *the county* is concerned, a distinction should be made between fire and theft insurance on the one hand, and property damage and public liability insurance on the other. In the first case, the insurance is for the protection and preservation of the property owned by the political subdivision. In the second, the insurance is for the purpose of protecting the county against liability for injury to persons or their property.

While there is no express statutory provision authorizing a county to insure its road machinery, Section 7200, General Code, vests in the county commissioners the authority to acquire, possess and hold road machinery.

It is well settled that the express authority extended to political subdivisions to acquire, possess, and hold property includes the power to protect such property so as to secure the political subdivision in case of loss. Couch on Insurance, Vol. I, paragraph 226. See also Opinion No. 787, Opinions of the Attorney General for 1937, Vol. II, page 1454, which held that under Article VIII, Section 6 of the Ohio Constitution, political subdivisions may insure public buildings *or property* in mutual insurance associations or companies. The 1937 opinion held that "insurable property" contemplated in Article VIII, Section 6, Ohio Constitution, includes per-

sonal property such as road machinery and equipment and public-owned motor vehicles, assuming that such personal property is acquired by the political subdivision in a manner prescribed by law. Hence, there is no question but that an expenditure of county funds for the payment of fire and theft insurance premiums on county road machinery is a proper and lawful expenditure, since the power to purchase property for the county carries with it the implied power to protect the county against its loss resulting from fire or theft, by procuring insurance upon the same.

As to property damage and public liability insurance, this office has consistently held that a political subdivision cannot legally enter into a contract and expend public monies for the payment of premiums on public liability or property damage insurance covering damages to property and injury to persons *unless there is a tort liability created against the political subdivision by statute*. In this connection, see Opinion No. 787, Opinions of the Attorney General for 1937, Vol. II, page 1454, and Opinion No. 2406. Opinions of the Attorney General for 1953.

I find no statute which permits recovery of damages from a *county* for an injury to persons or property caused by the negligence of an agent or servant in the county in the operation of county-owned road machinery.

The question next presents itself as to whether the county commissioners are authorized to procure liability and property damage insurance insuring county *employes* who operate the county road machinery.

In this respect, I would call your attention to Section 2412-3, General Code, which reads as follows :

“The board of county commissioners of any county may procure a policy or policies of insurance insuring officers and employes of the county *against liability on account of damage or injury to persons and property*, including liability on account of death by wrongful act, occasioned by the operation of a motor vehicle, motor vehicles with auxiliary equipment, or all self-propelling equipment or trailers owned or operated by the county. Whenever the board of county commissioners deems it necessary to procure such insurance, it shall adopt a resolution setting forth the necessity thereof, together with a statement of the estimated premium cost thereon, and upon adoption of said resolution the board of county commissioners may purchase said insurance. *The premium* for such insurance or any other insurance covering county vehicular equipment *may be paid out of the county road fund.*”
(Emphasis added.)

This section clearly empowers the commissioners to contract for liability insurance and property damage insurance insuring *county employes* who operate county-owned vehicles and equipment. The section at the time of its enactment in 1943 provided that "the premium for such insurance shall be paid out of the general fund of the county."

In 1945 this sentence was amended to provide that such insurance, liability and property damage, "*or any other insurance* covering county vehicular equipment *may* be paid out of the county road fund." This amendment had a dual purpose. First, it authorized the commissioners to pay for "other insurance" on county vehicular equipment out of the county road fund. The words "other insurance" presumably comprehend fire and theft insurance upon the equipment, which forms of insurance, prior to the enactment, could be procured only by paying the premium from *the general fund*. Secondly, the amendment authorized the commissioners to pay for liability or property damage insurance covering county employes either out of the general fund or out of the county road fund. It was held in Opinion No. 1692, Opinions of the Attorney General for 1947, page 135, that money in the county general fund, and in the county road maintenance and repair fund provided for in Section 6956-1a, General Code, may be used by the county commissioners for the purpose of paying premiums on policies of insurance procured by them under authority of Section 2412-3, General Code.

The 1947 opinion, *supra*, does not quite dispose of the question you have advanced, for the reason that there was no specific mention of *gasoline tax* and *auto license tax* monies constituting a source from which premiums might be paid.

The question thus narrows to this: Are the gasoline and auto license tax revenues part of the county "road fund"? Putting it in still simpler terms, just what is the "road fund"?

Section 6956-1a, General Code, reads in material part as follows:

"The board of county commissioners of each county shall provide annually by taxation an adequate fund for the maintenance and repair of improved county highways. *Such fund shall be provided by levies made under sections 6926, 6927 and 6956-1 of the General Code* and the several sections amendatory thereof or supplementary thereto * * *.

"The fund produced by such levy or levies for maintenance and repair purposes shall not be subject to transfer by order of

court or otherwise and shall be used *solely for the maintenance and repair of the improved county roads within the county*. The provisions of this section shall not prevent the county commissioners from using any other available road funds for the maintenance and repair of improved county roads." (Emphasis added.)

Sections 6926, 6927 and 6956-1, General Code, referred to in the above quoted statute as the sections providing the levies for county road maintenance, are all sections dealing with annual levies *upon the taxable property* of the county and townships. The sections of the code apportioning part of the gasoline and auto license taxes to the counties, notably Sections 5537 and 6309-2, General Code, are not specifically mentioned as comprising a part of the road maintenance and repair fund.

Section 6309-2, General Code, allots 25% of all auto license funds for the use of the city or county which constitutes the district of registration. This section specifies as follows :

"* * * 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 excepting to the extent temporarily authorized by paragraph (3a) hereof. *'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 * * *.*" (Emphasis added.)

It is my opinion that this section is not sufficiently broad to allow the commissioners to use auto license tax funds for the payment of fire and theft insurance premiums upon county road machinery or the payment of liability insurance premiums protecting the county employes while operating the machinery. Neither of these contemplated uses qualifies as an expenditure "for the maintenance and repair of public roads and highways," as the words "maintenance and repair" are defined in this statute. It would appear that the words "maintenance and repair" as used in the section are to be interpreted literally since the legislature has specified that those words include all work done upon the roads in which the existing foundations thereof are used as a subsurface. In view of this provision I can only conclude that the legislature did not intend that the auto license funds be applied for uses *indirectly or remotely* related to the maintenance and repair of roads, but rather intended that the funds be used for the *actual* maintenance and repair work which is done upon the subsurface.

Section 5537, General Code allots 25% of the gasoline tax excise fund to counties, and that section earmarks this money:

“* * * for the purpose of *maintaining and repairing the county system of public roads and highways* within such counties, the construction and repair of walks or paths along county roads in congested areas, *the construction and maintenance of a suitable building or buildings for the housing of county road machinery* and the purchase, installation and maintenance of traffic signal lights, shall be within this purpose.” (Emphasis added.)

Though this statute, unlike Section 6309-2, General Code, does not attempt to define the words “maintenance and repair,” I am nevertheless brought to the conclusion that it should be construed strictly, thus narrowing the scope of possible uses for the gas tax monies. It will be noted that the legislature deemed it necessary to specifically mention that the construction and maintenance of a suitable building for the housing of road machinery shall be within this purpose (i.e. the purpose of maintenance and repair of roads).

Housing of county road machinery and *insuring* the county upon its county road machinery against loss by fire and theft, are both precautions taken to protect the county against damage or loss to the road machinery, both being designed to preserve the road machinery essential to the actual upkeep of the roads. The day to day *housing* of road machinery bears a more immediate and direct relationship to the maintenance and repair of county roads, through preservation of the road machinery, than does the insuring of the road machinery against fire and theft and the insuring of the operators of the machinery against tort liability. Since the legislature thought it necessary to *specifically* provide that the gas tax funds might be used for the construction and maintenance of a suitable building for the housing of county road machinery, even though an earlier portion of the gas tax statute allows the funds to be used for the purpose of maintaining and repairing the county system of roads, the conclusion would seem inescapable that had the legislature intended to authorize the county to pay for insurance premiums upon road machinery out of the gas tax funds it would have so provided by express language.

It would seem therefore that when the legislature in 1945 provided in Section 2412-3, General Code, that insurance premiums might be paid out of the “county road fund,” the intention was merely to permit the

county commissioners to pay the premium out of the county maintenance and repair fund provided for in Section 6956-1a, General Code, which fund is comprised of levies on taxable property of the county and township.

It will be recalled that Section 2412-3, General Code, in authorizing the county commissioners to procure policies of insurance and to pay for the same out of the "county road fund," is not limited to insurance covering county road maintenance and repair machinery alone. That section embraces *all* county-owned vehicles. If the gasoline and auto license taxes were to be considered as part of the county road fund from which the insurance premiums might be paid upon these non-road maintenance vehicles, such an interpretation would run directly counter to Article XII, Section 5a, Ohio Constitution, effective January 1, 1948, which reads as follows:

"No moneys derived from fees, *excises*, or *license taxes* relating to registration, operation or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory obligations and adjustments provided therein, payment of highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways."
(Emphasis added.)

This constitutional provision reinforces my opinion that the gasoline tax of Section 5537, General Code, and the auto license tax of Section 6309-2, General Code, do not constitute part of the "county road fund" within the meaning of Section 2412-3, General Code.

Accordingly, it is my opinion that while county commissioners are authorized to procure policies of insurance insuring the county against loss of its motor vehicles by fire and theft, and are authorized to procure policies of insurance insuring the employes of the county against liability on account of damage or injury to persons or property, the county commissioners are not authorized by the provisions of Section 2412-3, General Code, or any other statute, to pay the premiums on such policies of insurance out of the county's allotment from the gasoline tax excise fund

provided for in Section 5537, General Code, nor out of the county's allotment from the auto license tax funds provided for in Section 6309-2, General Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General