

It is therefore my opinion that, in order to secure the benefit of the tax rate of the place designated by a corporation in its articles of incorporation as the place where it is located, or its principal business transacted, an office must be maintained at said place, but is unnecessary to hold directors meetings at said place.

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

374.

MUNICIPALITY—HOW GASOLINE EXCISE TAX FUNDS MAY BE USED—  
FOR REPAIR AND NOT FOR NEW CONSTRUCTION.

SYLLABUS:

1. *The municipality's apportionment of the gasoline excise tax receipts may be used to resurface or make improvements on the streets, public roads and highways of the municipality, when in making such improvement the existing foundation of such street or highway is used as the subsurface of the improvement in whole or in substantial part.*

2. *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.*

COLUMBUS, OHIO, April 23, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your inquiry, which is as follows:

“May the municipality’s share of the gasoline tax receipts be used to pay the city’s share of the cost of paving an unimproved street; said street having been cindered and used as a public thorofare for many years?”

Section 5527 of the General Code reads in part, as follows:

“For the purpose of providing revenue for maintaining the main market roads and intercounty highways of this state in passable condition for travel, for repairing the damage caused to such highway system by motor vehicles used on the same, for widening existing surfaces on such highways where such widening is rendered necessary by the volume of motor vehicle traffic thereon, for resurfacing such highways where existing surfaces have become worn or rutted, for enabling the several counties and municipal corporations of the state to properly maintain and repair their roads and streets, and supplementing revenue already available for such purposes and arising from direct taxation and from registration fees of motor vehicles, and for distributing equitably upon those persons using the privilege of driving such motor vehicles upon such highways and streets a fair share of the cost of maintaining and repairing the same, there is hereby levied and imposed on the sale or use of each gallon of motor vehicle fuel sold or used by any dealer, as herein defined, within the state of Ohio, an excise tax of two cents; subject, however, to the following specific exemptions. \* \* \*”

Section 5537 reads 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 corporation for the sole purpose of maintaining and repairing the public streets and roads within such corporation. \* \* \*"

It will be seen from the provisions of the foregoing statutes that the use of the moneys derived from the gasoline excise tax, which is paid to municipalities, is limited to the maintenance and repair of the public streets and roads within such corporations, but nowhere in the act providing for the gasoline excise tax is it made clear just what is meant by *maintenance and repair*.

Ordinarily, we think of a repair as some action taken, or the result of some action taken to rehabilitate or reconstruct something that has fallen into decay from use, casualty, or the ravages of time, that is, to make whole, something that already exists, but has become impaired for any reason. It presupposes the existence of the thing itself before any repair can be made, and could not apply to the construction of the thing itself. In its broadest sense, when applied to a road, it might be said to include any work done on a road that had already been in existence.

On the other hand, the question arises whether or not an unimproved road is a road or is it merely a roadway.

The mere laying out of a roadway by a survey, or by fencing in a strip of land and calling it a road does not make it so, nor would the driving over such a passageway any number of times make it a road. When such a passageway is laid out it would require some work to be done on it to make it reasonably useful for travel, and such would be building a new road. Thereafter, to repair it would be to restore it as it became impaired to such reasonably passable condition as it formerly had been in, and it would still be what we now understand to be an unimproved road.

The word "maintain" is practically synonymous with repair. In the case of *Ferguson vs. Rochford*, 84 Conn. 202, the court in the course of its opinion said:

"The word 'maintain' within general statutes 1902, Section 338, requiring widows to maintain and keep in repair the property set apart to them as dower does not mean 'to provide' or construct; but means to 'keep up' not to suffer to fall or decline, 'keep in repair' and maintain as used in the statute being **synonymous**."

In the case of *Missouri K. & T. R. R. Co. of Texas vs. Bryan*, 107 S. W. 572, 576 it is said:

"The word 'maintain' is practically the same thing as repair, which means to restore to a sound or good state after decay, injury, dilapidation or partial destruction and when used in reference to railroad right-of-way includes the idea of keeping the right-of-way in such a condition that it can be used for the purpose for which it was intended."

To the same effect is *Verdin vs. St. Louis*, 37 S. W. 447.

The statutes with reference to the use of gasoline tax moneys by a municipal corporation gives no direction as to their use other than by directing that they shall be used for the sole purpose of maintaining and repairing the public streets and roads within the corporation. However, it will be observed that by the terms of Section 5527, *supra*, the legislature has, in setting forth the purpose of the passage of the act,

said that it is for raising revenues for certain purposes, to supplement revenues already available for such purposes, among which are the revenues arising from fees for the registration of motor vehicles.

The law with reference to registration fees for motor vehicles provides that revenues arising therefrom shall be used for the maintenance and repair of streets and highways, and defines what is meant by such maintenance and repair as follows:

Section 6309-2 provides:

"The revenue collected under the provisions of this chapter (relating to the registration of motor vehicles) 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 or 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 municipal corporations and counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads, highways and streets 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, or upon any street, in which the existing foundations thereof is used as the subsurface of the improvement thereof, in whole or in substantial part."

Since the gasoline excise tax law is a later enactment than the law with reference to the registration of motor vehicles, it is apparent that, when reference is made in the gasoline tax law to the motor vehicle registration law and the gasoline tax law provides that the moneys derived from the tax created thereby is for the purpose of supplementing the moneys arising under the motor vehicle registration law, and directs that these moneys shall be used for the same purpose as those arising under the former law, the definition of the expression "maintenance and repair" as contained in the former law is adopted in the later one.

The answer to your question depends on what you mean by the word *pavement*. Technically, the word "pavement" means any hard, smooth covering of a roadway, floor, yard or court, and may or may not be built or laid on an artificial or constructed base.

The Standard Dictionary defines pavement, as a hard, solid surface covering for a floor, road or footway, usually resting immediately on the ground. Webster says to pave is to lay or cover with stone or brick, so as to make a hard or finished surface for horses, carriages or foot passengers. Pavements may be of brick, asphalt, concrete, cobble stones, wood or any substance if properly packed and bound so as to make a hard but relatively smooth surface.

In the light of these definitions and our statutes it is conceivable that a top covering of some material even brick or concrete might be put on the surface of an unimproved road and it would technically be a pavement and within the law. That is it would be put on an existing foundation which foundation was being used as the subsurface of the improvement or pavement, but such construction would be of little practical use as a roadway for modern vehicles.

In the case of *State ex rel Janes vs. Brown*, Secretary of State, 112 O. S. 590, the Supreme Court had under consideration the question of whether or not the Gasoline Excise Tax Law was subject to referendum. The court in discussing the question referred to Article II, Section 1d, of the Constitution of Ohio, wherein it is provided that laws providing for tax levies and appropriations for the current expenses of the state government and state institutions shall not be subject to referendum and held

that the law was not only one providing for a tax levy, but was one making appropriations for current expenses as well.

The fourth section of the syllabus of the case of *State vs. Brown*, *supra*, reads as follows:

“The phrase ‘current expenses’, as used in Section 1d of Article II of the Constitution, in addition to including the expenses incident to the officering and maintaining of the state government, includes the expense of keeping in repair and maintaining the property of the state government, and, as applied to roads, includes the maintaining and repairing thereof as distinguished from new construction.

A pavement as the term is most frequently used, is in my opinion new construction as distinguished from current expenses for maintenance and repair.

It has come to be a matter of common knowledge that when we speak of a pavement we mean a solid, smooth covering which is laid over a substantial base constructed by removing a sufficient amount of the existing surface of an unimproved road to admit of the building of a more or less substantial base to hold a top covering, all to be sufficient and practicable for modern travel and so as not materially to change the existing grade. In other words, it contemplates the removal of some portion of the existing foundation as spoken of in the statute and it is my opinion that it was such a pavement that the legislature had in mind when they enacted the statute with reference to the gasoline excise tax and the motor vehicle registration license laws and it was meant, in defining *maintenance and repair* as the definition is found in the statute, to prevent the use of these moneys for the construction of new pavements as we understand the word in these times.

Improvements to streets such as are contemplated by the statute (Section 6309-2), *supra*, including such improvements as technically come under maintenance and repair consist of two parts, a top covering, and a base upon which such top covering rests—a surface and a subsurface as the statute speaks of it.

In view of the wording of the statute and the observations which I have hereinbefore made, I am of the opinion that when a pavement or improvement is constructed by a municipality on a street, public road or highway and the existing foundation of such street, road or highway is used as the subsurface in whole or in substantial part for the new improvement, moneys derived from the gasoline taxes may be used to pay for such improvement or so called pavement. This would really be a resurfacing of the road, street or highway. If, however, an improvement is made by such municipality such as what is generally spoken of as paving the street, road or highway, where a new foundation as distinguished from the existing foundation is constructed to be used as the subsurface of the improvement, the receipts from the operation of the gasoline excise tax law can not be used to defray the cost of such improvement.

Respectfully,

EDWARD C. TURNER,  
*Attorney General*