

**OPINION NO. 85-094****Syllabus:**

1. There is no statutory authority for a county to expend moneys derived from state motor vehicle license taxes for the purchase of insurance protecting the county commissioners against liability which may result from the failure to keep roads in proper repair.
2. There is no statutory authority for a county to expend moneys derived from motor vehicle fuel excise taxes for the purchase of insurance protecting the county commissioners against liability which may result from the failure to keep roads in proper repair.

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**To: J<sup>III</sup> R. Heck, Medina County Prosecuting Attorney, Medina, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1985**

You have requested an opinion on the question whether funds received by a county from state motor vehicle license taxes or motor vehicle fuel excise taxes may be used to pay for liability insurance covering the county roads. It is my understanding that the insurance with which you are concerned is purchased by the county, as part of its general liability policy, to protect the board of county commissioners against liability resulting from failure to keep roads in proper repair. R.C. 305.12 states, in part: "The board [of county commissioners] shall be liable, in its official capacity, for damages received by reason of its negligence or carelessness in not keeping any. . .road or bridge [established by such board in its county] in proper repair. . . ." See Starcher v. Logsdon, 66 Ohio St. 2d 57, 61, 419 N.E.2d 1089, 1092 (1981) ("we construe R.C. 305.12 as imposing liability for negligence whenever a board of county commissioners assumes, or is conferred by statute with, the primary responsibility for keeping in proper repair roads or bridges in its county"). See generally, e.g., R.C. 5535.01(B); R.C. 5535.08; 1980 Op. Att'y Gen. No. 80-040. There is no question but that the county commissioners have authority to purchase such insurance. See 1953 Op. Att'y Gen. No. 2406, p. 96 (syllabus, paragraph two) ("[i]nasmuch as [G.C. 2408, predecessor to R.C. 305.12] imposes liability upon county commissioners for damages resulting from negligence in not keeping a road or bridge in proper repair, the commissioners may lawfully pay the premium on a policy of public liability insurance covering the same"). See also R.C. 307.441(D) ("[t]he board of county commissioners of each county may procure a policy or policies of insurance insuring. . .each county commissioner. . .against liability arising from the performance of [his] official duties"); 1979 Op. Att'y Gen. No. 79-084 (discussing history of R.C. 307.441).

Your question is whether a county may use funds derived from state motor vehicle license taxes or motor vehicle fuel excise taxes to purchase such liability insurance. I consider, first, funds derived from state motor vehicle license taxes. R.C. 4503.02 levies an annual license tax upon the operation of motor vehicles on public roads and highways, and sets forth the purposes for which the tax is to be used, as follows:

An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways, for the purpose of enforcing and paying the expense of administering the law relative to the registration and operation of such vehicles, planning, constructing, maintaining, and repairing public roads, highways, and streets, maintaining and repairing bridges and viaducts, paying the counties' proportion of the cost and expenses of cooperating with the department of transportation in the planning, improvement, and construction of state highways, paying the counties' portion of the compensation, damages, cost, and expenses of planning, constructing, reconstructing, improving, maintaining, and repairing roads, for the purpose of enforcing and paying the expenses of administering the law to provide reimbursement for hospitals on account of the expenses for the care of indigent persons injured in motor vehicle accidents, and enabling municipal corporations to plan, construct, reconstruct, repave, widen, maintain, repair, clear, and clean public highways, roads, and streets; to maintain and repair bridges and viaducts; to purchase, erect and maintain street and traffic

signs and markers; to purchase, erect, and maintain traffic lights and signals; and to supplement revenue already available for such purposes, to pay the interest, principal, and charges on bonds and other obligations issued pursuant to Section 2g of Article VIII, Ohio Constitution and sections 5528.10 and 5528.11 of the Revised Code, and to pay the interest, principal, and charges on highway obligations issued pursuant to Section 2i of Article VIII, Ohio Constitution and sections 5528.30 and 5528.31 of the Revised Code. Such tax shall be at the rates specified in section 4503.04 of the Revised Code and shall be paid to and collected by the registrar of motor vehicles or deputy registrar at the time of making application for registration. (Emphasis added.)

R.C. 4501.03 provides that the Registrar of Motor Vehicles shall pay all moneys received by him under, inter alia, R.C. 4503.02 into the state treasury to the credit of the auto registration distribution fund, for distribution pursuant to R.C. 4501.04, R.C. 4501.041, and R.C. 4501.042. R.C. 4501.04 provides for the distribution of moneys in the auto registration distribution fund and sets forth purposes for which the moneys distributed to counties may be used. R.C. 4501.04 states, in part:

(A) Thirty-four per cent of all such moneys are for the use of the municipal corporation or county which constitutes the district of registration. . . .

The county portion of such funds shall be retained in the county treasury and shall be used for the planning, maintenance, repair, construction, and repaving of public streets, for maintaining and repairing bridges and viaducts, and for no other purpose.

(C) Forty-seven per cent of all such moneys shall be for the use of the county. . . for the planning, construction, reconstruction, improvement, maintenance, and repair of roads and highways and for maintaining and repairing bridges and viaducts. (Emphasis added.)

See R.C. 4501.04(B) and (D) (providing for the distribution of additional moneys from the auto registration distribution fund for use by the counties for the purposes specified in R.C. 4501.04(C)). R.C. 4501.041 and R.C. 4501.042 apply, respectively, to moneys received from county and municipal motor vehicle license taxes and, therefore, are not relevant to your question.

It is firmly established that, where the expenditure of public funds is limited by statute, the funds may not be spent except in accordance with the statutory provisions. See Ohio Const. art. XII, §5; State ex rel. Walton v. Edmondson, 89 Ohio St. 351, 106 N.E. 41 (1914). See generally State ex rel. Locher v. Menning, 95 Ohio St. 97, 115 N.E. 571 (1916) (the authority of a county to act in financial transactions must be clearly and distinctly granted). It is clear that the provisions of R.C. 4503.02 and R.C. 4501.04 do not expressly authorize the expenditure of funds derived from state motor vehicle license taxes for the purchase of insurance protecting the county commissioners from liability resulting from a failure to keep roads in proper repair. Rather, the purposes

authorized by R.C. 4503.02 and R.C. 4501.04 involve the planning, construction, reconstruction, improvement, maintenance, and repair of roads, and the maintenance and repair of bridges and viaducts. R.C. 4503.02 does use the words "compensation" and "damages." It appears, however, that those words are used to refer to costs which may be incurred in connection with the construction, maintenance, and repair of roads, rather than to expenses which may result from the failure to adequately repair roads. In any event, the language governing the expenditure of state motor vehicle license taxes does not seem to contemplate the expenditure of funds by a county for the purchase of liability insurance.

In 1980 Op. Att'y Gen. No. 80-016, my predecessor had occasion to consider whether R.C. 4501.04 permitted a county to expend funds derived from motor vehicle license taxes for the payment of premiums for fire and theft insurance covering county road machinery or premiums for liability insurance covering county employees who operated such machinery. My predecessor concluded that it did not, stating, at 2-73 through 2-74:

The purposes stated in R.C. 4501.04--planning, maintenance, construction, repair and repaving-- . . . pertain to the actual work performed in constructing or improving a street. . . . Nothing in the changes [in statutory provisions since the issuance of 1953 Op. Att'y Gen. No. 2819, p. 299] suggests that the purposes of the statute have been expanded to include indirectly-related or contingent uses arising from the construction, repair or maintenance of streets or roads.

Op. No. 80-016 followed 1953 Op. Att'y Gen. No. 2819, p. 299, in which it had been concluded that, although county commissioners were authorized to procure policies insuring the county against loss of its motor vehicles by fire and theft and policies insuring county employees against liability on account of damage or injury to persons or property resulting from the operation of county motor vehicles, the commissioners were not authorized to pay the premiums on such policies of insurance with auto license tax funds obtained under G.C. 6309-2, predecessor to R.C. 4501.04. 1953 Op. No. 2819 states, in part: "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." Id. at 303 (emphasis in original).

Like my predecessors, I conclude that the statutory language setting forth the purposes for which a county may expend state motor vehicle license taxes encompasses only expenditures which are directly related to the actual planning, maintenance, construction, repair, and repaving of roads and bridges, and that it does not include indirectly-related or contingent uses. In particular, I conclude that there is no statutory authority for a county to expend moneys derived from state motor vehicle license taxes for the purchase of insurance protecting the county commissioners against liability which may result from the failure to keep roads in proper repair.

I turn now to a consideration of the purposes for which motor vehicle fuel excise taxes may be expended. R.C. 5735.05

imposes a motor vehicle fuel excise tax and sets forth the purposes for which the tax is to be used, as follows:

To provide revenue for maintaining the state highway system; to widen existing surfaces on such highways; to resurface such highways; to enable the counties of the state properly to plan, maintain, and repair their roads; to enable the municipal corporations to plan, construct, reconstruct, repave, widen, maintain, repair, clear, and clean public highways, roads, and streets; to enable the Ohio turnpike commission to construct, reconstruct, maintain, and repair turnpike projects; to maintain and repair bridges and viaducts; to purchase, erect, and maintain street and traffic signs and markers; to purchase, erect, and maintain traffic lights and signals; to pay the costs apportioned to the public under section 4907.47 of the Revised Code and to supplement revenue already available for such purposes; to distribute equitably among those persons using the privilege of driving motor vehicles upon such highways and streets the cost of maintaining and repairing the same; to pay the interest, principal, and charges on bonds and other obligations issued pursuant to Section 2g of Article VIII, Ohio Constitution, and sections 5528.10 and 5528.11 of the Revised Code; to pay the interest, principal, and charges on highway obligations issued pursuant to Section 2i of Article VIII, Ohio Constitution, and sections 5528.30 and 5528.31 of the Revised Code; and to provide revenue for the purposes of sections 1547.71 to 1547.78 of the Revised Code, an excise tax is hereby imposed on all dealers in motor vehicle fuel upon the use, distribution, or sale within the state by them of motor vehicle fuel. . . . (Emphasis added.)

R.C. 5735.23 designates the various funds to which receipts from the tax levied by R.C. 5735.05 are to be paid, and specifies that a certain percentage is to be paid to the gasoline excise tax fund for distribution pursuant to R.C. 5735.27(A)(3). R.C. 5735.23(B)(2)(b), (C)(3).

R.C. 5735.25 levies an additional motor vehicle fuel tax and includes among the purposes for which it may be spent: "to enable the counties. . .to properly plan, construct, widen, reconstruct, and maintain their public highways, roads, and streets." R.C. 5735.26 designates the funds to which receipts from the tax levied by R.C. 5735.25 are to be paid, and specifies that a certain percentage is to be paid to the gasoline excise tax fund for distribution pursuant to R.C. 5735.27(A)(4). R.C. 5735.26(C). See also R.C. 5735.31 (imposing an excise tax on the use in Ohio of fuel obtained out of state and including, among the purposes for which proceeds may be expended: "to enable the counties of the state properly to plan for, maintain, and repair their roads"); R.C. 5735.32.

R.C. 5735.27 creates the gasoline excise tax fund in the state treasury and provides for the payment of certain amounts from that fund to the counties, for specified purposes. R.C. 5735.27(A) states, in part:

(3) The amount credited pursuant to divisions (B)(2)(b) and (C)(3) of section 5735.23 of the Revised Code shall be paid in equal proportions to the county treasurer of each county within the state and shall be

used only for the purpose of planning, maintaining, and repairing the county system of public roads and highways within such county, the planning, construction, and repair of walks or paths along county roads in congested areas, the planning, construction, and maintenance of suitable buildings for the housing of county road machinery, the payment of costs apportioned to the county under section 4907.47 of the Revised Code [for the installation of protective devices at railroad crossings], and the purchase, installation, and maintenance of traffic signal lights.

(4) The amount credited pursuant to division (C) of section 5735.26 of the Revised Code shall be paid in equal proportions to the county treasurer of each county for the sole purpose of planning, maintaining, constructing, widening, and reconstructing the county system of public roads and highways and paying costs apportioned to the county under section 4907.47 of the Revised Code. (Emphasis added.)

Pursuant to these provisions, it is clear that the portion of the gasoline excise tax fund paid to counties is to be expended for purposes of planning, maintaining, and repairing roads and highways. R.C. 5735.27(A)(3) expressly includes within these purposes "the planning, construction, and repair of walks or paths along county roads in congested areas, the planning, construction, and maintenance of suitable buildings for the housing of county road machinery," the payment of costs for the installation of protective devices at railroad crossings, and "the purchase, installation, and maintenance of traffic signal lights."

In Op. No. 80-016, my predecessor concluded that, like state motor vehicle license taxes, gasoline excise taxes were unavailable for the purchase of fire and theft insurance covering county road machinery or liability insurance covering county employees who operated county road machinery. On this point, Op. No. 80-016 again followed 1953 Op. No. 2819, stating, at 2-74 through 2-75:

Although the gasoline tax may be used for more purposes than the motor vehicle license tax, the purposes are set forth specifically by list as in R.C. 4501.04 and may not be further extended to purposes which are not mentioned in the statute. As was explained in Op. No. 2819 at 304:

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. (Emphasis added [in Op. No. 80-016]; emphasis of original omitted.)

Similarly, the other purposes now contained in R.C. 5735.23 bear a more immediate and direct relationship to the maintenance and repair of county roads than does the insuring of road machinery against fire and theft or the insuring of operators of the machinery against tort liability. The General Assembly has not expressly authorized the county to pay for insurance premiums out of the gasoline excise tax funds, and I can find no basis for inferring that such authority exists.

Like my predecessors, I conclude that the statutory language setting forth the purposes for which a county may expend moneys from the gasoline excise tax fund encompasses only the expenditures mentioned therein. In particular, I conclude that there is no statutory authority for a county to expend moneys derived from motor vehicle fuel excise taxes for the purchase of insurance protecting the county commissioners against liability which may result from the failure to keep roads in proper repair.

I note that the conclusions set forth herein are based upon the statutory language governing the expenditure of state motor vehicle license taxes and motor vehicle fuel excise taxes, see generally Jones v. Commissioners of Lucas County, 57 Ohio St. 189, 48 N.E. 882 (1897) (in financial affairs, the board of county commissioners has only such authority as it is granted by statute), and not upon any limitations upon expenditures which are set forth in the Ohio Constitution. Ohio Const. art. XII, §5a restricts the purposes for which moneys derived from motor vehicle license taxes or motor vehicle fuel taxes may be used, 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 refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory 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.

It appears, however, that if the General Assembly should choose to enact legislation which expressly authorizes a county to

expend moneys derived from state motor vehicle license taxes or motor vehicle fuel excise taxes for the purchase of insurance of the sort here under consideration, such legislation would be permissible under Ohio Const. art. XII, §5a. See, e.g., 1972 Op. Att'y Gen. No. 72-076 at 2-302 (clarified and amplified on other grounds in 1973 Op. Att'y Gen. No. 73-029) (making the argument that, if specific statutory authorization were granted, Ohio Const. art. XII, §5a would permit the use of funds covered by its provisions to purchase insurance protecting State Highway Patrol officers from liability for making false arrests); 1953 Op. No. 2819, at 304-05 (indicating that a statutory interpretation which permitted gasoline and auto license taxes to be used to pay insurance premiums upon all county owned vehicles, including non-road maintenance vehicles, would run counter to Ohio Const. art. XII, §5a, and suggesting that legislation which authorized the use of such funds to insure only road maintenance vehicles would be permissible). See generally State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 461, 166 N.E.2d 365, 373 (1960) ("[t]o be a statutory highway purpose, such purpose must, first, be one which is authorized by statute and, second, be one which is so related to the development of the highway system that it is within the power of the General Assembly to authorize the expenditure of public funds therefor"); Op. No. 81-016; 1964 Op. Att'y Gen. No. 1499, p. 2-388 at 2-392 (discussing the language of Ohio Const. art. XII, §5a which permits the expenditure of funds for "other statutory highway purposes" and construing restrictively instances in which such purposes may be implied from statutory provisions); 1964 Op. Att'y Gen. No. 894, p. 2-95.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. There is no statutory authority for a county to expend moneys derived from state motor vehicle license taxes for the purchase of insurance protecting the county commissioners against liability which may result from the failure to keep roads in proper repair.
2. There is no statutory authority for a county to expend moneys derived from motor vehicle fuel excise taxes for the purchase of insurance protecting the county commissioners against liability which may result from the failure to keep roads in proper repair.