

December 17, 2015

The Honorable Dennis P. Will
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035

SYLLABUS:

2015-036

1. A board of township trustees may expend motor vehicle fuel excise tax revenues paid to the township pursuant to R.C. 5735.27(A)(5)(d) to purchase tools and supplies utilized for the repair and upkeep of a building constructed to house township road machinery and equipment.
2. A board of township trustees may expend motor vehicle fuel excise tax revenues paid to the township pursuant to R.C. 5735.27(A)(5)(d) to provide utility services such as electricity, natural gas, water, and telephone to a building housing township road machinery and equipment.



MIKE DEWINE

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OPINION NO. 2015-036

The Honorable Dennis P. Will
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035

Dear Prosecutor Will:

You have requested an opinion presenting the following questions about the expenditure of motor vehicle fuel excise tax revenues:

1. May a township expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27 to pay for tools and supplies utilized for repair and upkeep of a building constructed to house township road machinery and equipment?
2. May a township expend motor vehicle fuel excise tax revenues paid to it pursuant to R.C. 5735.27 to pay utility expenses including natural gas, electric, water, and phone services for a building constructed to house township road machinery and equipment?

Article XII, § 5 of the Ohio Constitution declares that “[n]o tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied.” Further, Article XII, § 5a of the Ohio Constitution restricts the expenditure of moneys derived from motor vehicle fuel excise tax revenues to specific road and highway purposes:

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. (Emphasis added.)

Pursuant to this constitutional directive, the General Assembly has enacted R.C. 5735.27, which creates the gasoline excise tax fund in the state treasury. “The gasoline excise tax fund is comprised of revenues derived from the motor vehicle fuel excise taxes levied pursuant to R.C. 5735.05 and R.C. 5735.25, which are credited to that fund in accordance with R.C. 5735.23 and R.C. 5735.26.” 1993 Op. Att’y Gen. No. 93-057, at 2-268 and 2-269. R.C. 5735.27(A)(1)-(5) set forth the manner in which the motor vehicle fuel excise tax revenues are distributed among the counties, municipal corporations, and townships and further carefully specifies the purposes for which they may expend those tax revenues. R.C. 5735.27(A)(5)(d) delineates the purposes for which a township may expend motor vehicle fuel excise tax revenues. *See* 1993 Op. Att’y Gen. No. 93-057, at 2-269. R.C. 5735.27(A)(5)(d) provides, in pertinent part:

The county treasurer shall pay to each township within the county its proportional share of the funds [credited pursuant to R.C. 5735.27(A)(5)(a)-(b)], which shall be expended by each township only for the purposes of planning, constructing, maintaining, widening, and reconstructing the public roads and highways within the township, paying principal, interest, and charges on bonds and other obligations issued pursuant to [R.C. Chapter 133 or R.C. Chapter 505] or incurred pursuant to [R.C. 5531.09] for the purpose of acquiring or constructing roads, highways, bridges, or viaducts or acquiring or making other highway improvements for which the board of township trustees may issue bonds under those chapters, and paying costs apportioned to the township under [R.C. 4907.47].

No part of the funds designated for road and highway purposes shall be used for any purpose except to pay in whole or part the contract price of any such work done by contract, or to pay the cost of labor in planning, constructing, widening, and reconstructing such roads and highways, and the cost of materials forming a part of the improvement; *provided that the funds may be used for the purchase of road machinery and equipment, the planning, construction, and maintenance of suitable buildings for housing road machinery and equipment, and the payment of principal, interest, and charges on bonds and other obligations issued pursuant to [R.C. Chapter 133 or R.C. Chapter 505] for the purpose of purchasing road machinery and equipment or planning, constructing, and maintaining suitable buildings for housing road machinery and equipment; and provided that all such improvement of roads shall be under supervision and direction of the county engineer as provided in [R.C. 5575.07].* (Emphasis added.)¹

¹ Am. Sub. H.B. 59, 130th Gen. A. (2013) (eff., in part, Sept. 29, 2013) amended R.C. 5735.27 to allow a township to use motor vehicle fuel excise tax revenues to pay debt service on bonds issued to finance the purchase of road machinery and equipment, the cost of planning, construction, and maintenance of buildings that house such machinery and equipment, and the costs of any highway improvement project for which the township is authorized to issue bonds.

Section 5a of Article XII of the Ohio Constitution authorizes expenditures of motor vehicle fuel excise tax revenues for “other statutory highway purposes.” R.C. 5735.27(A)(5)(d) authorizes a township to expend motor vehicle fuel excise tax revenues to maintain suitable buildings for housing road machinery and equipment. Thus, maintenance of suitable buildings for housing township road machinery and equipment is a statutory highway purpose for purposes of Ohio Const. art. XII, § 5a.

Your first question asks whether a township may expend motor vehicle fuel excise tax revenues pursuant to R.C. 5735.27 to pay for tools and supplies utilized for repair and upkeep of a building constructed to house township road machinery and equipment. You further indicate that these tools and supplies may be needed if the building becomes worn or damaged.

The terms “maintain” and “maintenance” have not been defined by statute for purposes of R.C. Chapter 5735. Absent a statutory definition, these terms are accorded their common, everyday meaning. See R.C. 1.42. *Black’s Law Dictionary* 953 (6th ed. 1990) defines “maintain” as “acts of repairs and other acts to prevent a decline, lapse or cessation from existing state or condition; ... keep in good order; keep in proper condition; keep in repair[.]” “Maintenance” is “[t]he upkeep or preservation of condition of property, including cost of ordinary repairs necessary and proper from time to time for that purpose.” *Id.* “‘Maintenance’ presupposes that a building, road, or other improvement has already been erected or constructed and is thereafter to be maintained in such condition as will continue its usefulness.” 1948 Op. Att’y Gen. No. 3191, p. 249, at 252. “Clearly, the term ‘maintenance’ cannot be more specifically defined without reference to the thing to be maintained.” 1994 Op. Att’y Gen. No. 94-025, at 2-111. R.C. 5735.27(A)(5)(d)’s directive for maintenance of *suitable* buildings recognizes that a building shall be properly used for the purpose of housing township road machinery and equipment. A building that houses road machinery and equipment is constructed to act as a shelter, enclosing and protecting the road machinery and equipment therein. The building must retain its structural integrity to protect the road machinery and equipment from outside factors such as weather, and acts of theft or vandalism. Over time, repairs to a building will be required to maintain the building’s utility or suitability for the purposes for which it was constructed. For example, if weather damages the building causing a hole in the roof, the roof will have to be repaired in order to protect the machinery and equipment within. Repairs of this nature thus maintain the building in a suitable condition for housing and protecting the township road machinery and equipment. See, e.g. 1942 Op. Atty. Gen. No. 5661, p. 825, at 830 (“all operations designed to keep a road or street in good and safe condition for the purpose for which it is constructed, may properly be included within the term ‘maintenance’”). Thus, “maintaining” suitable buildings for purposes of R.C. 5735.27(A)(5)(d) means keeping a building used for housing road machinery and equipment in a safe and usable condition for the intended and customary purpose for which it was constructed.

Performing maintenance and repair activities on the building will require supplies and tools. Acquiring tools and supplies is directly connected to the continuing maintenance or repairs of the building and ensuring the building’s functionality. For example, in order to repair a hole in the roof of the building, roofing supplies and tools to affix those supplies to remedy the damage will be needed. Without necessary tools and supplies to repair or maintain a building housing road machinery and equipment, the building cannot continue to fulfill the purpose for which it was constructed.

Attorney General opinions have concluded that a township may expend motor vehicle fuel excise tax revenues to purchase salt to keep the highways free from obstruction by snow and ice to allay icy conditions and prevent skidding as a means of maintenance in keeping the roads in fit shape and safe condition for their intended use, 1942 Op. Att’y Gen. No. 5661, p. 825, at 830 and 831, and for snow and ice removal and weed control processes including the use of chemicals, 1952 Op. Att’y Gen. No. 1485, p. 419, at 425. These opinions demonstrate that obtaining materials such as salt and chemicals to keep the roads clear and safe for their intended use is directly related to the road maintenance process. For the purpose of your inquiry, the tools and supplies are a means to provide necessary repairs to maintain a suitable building housing township road machinery and equipment. Thus, the purchase of tools and supplies is directly related to the statutory highway purpose of maintaining suitable buildings for housing township road machinery and equipment. R.C. 5735.27(A)(5)(d). Accordingly, a board of township trustees may expend motor fuel vehicle excise tax revenues to purchase tools and materials utilized for the repair and upkeep of a building constructed to house township road machinery and equipment.

Your second question asks whether the provision of utility services such as natural gas, electricity, telephone, and water to a building that houses township road machinery and equipment constitutes “maintenance,” as that term is used in R.C. 5735.27(A)(5)(d), for which a township may expend motor vehicle fuel excise tax revenues. No language in R.C. 5735.27(A)(5)(d) expressly authorizes payment of utility services from motor vehicle fuel excise tax revenues, or defines the provision of utility services as an aspect of maintaining suitable buildings for housing township road machinery and equipment.

Your letter mentions 1993 Op. Att’y Gen. No. 93-057, which advises that a township may expend motor vehicle fuel excise tax revenues for planning and constructing a driveway and parking lot that are used in connection with a building housing township road machinery and equipment. In that opinion, the Attorney General determined that “a driveway will enhance the utility of a building in which a township houses road machinery and equipment by enabling that machinery and equipment to travel to and from that building in a safe and efficient manner.” 1993 Op. Att’y Gen. No. 93-057, at 2-272. In other words, the driveway is a means to safely utilize the building for its intended purpose.

1993 Op. Att’y Gen. No. 93-057 addressed construction of a driveway to a building housing road machinery and equipment. Within R.C. 5735.27(A)(5)(d), the General Assembly has not limited the permissible expenditures of motor vehicle fuel excise tax revenues to the *planning* and *construction* of a building housing road machinery and equipment. In addition the statute makes *maintenance* associated with such a building a permissible basis for the expenditure of motor vehicle fuel excise tax revenues. *See* R.C. 5735.27(A)(5)(d); *see also Wachendorf v. Shaver*, 149 Ohio St. 231, 236-37, 78 N.E.2d 370 (1948) (“the Legislature must be assumed or presumed to know the meaning of words, to have used the words of a statute advisedly and to have expressed legislative intent by the use of the words found in the statute[.]”) The rationale in 1993 Op. Att’y Gen. No. 93-057 that construction of a driveway to a building enhances the utility of a building and thus is a permissible expenditure of motor vehicle fuel excise tax revenues can likewise be applied to the provision of utility services to a building housing road machinery and equipment. Utility services

such as natural gas, water, electricity, and telephone, enhance the utility of the building constructed to house township road machinery and equipment.

The Ohio Supreme Court in *Stockberger v. Henry*, 134 Ohio St. 3d 213, 2012-Ohio-5392, 981 N.E.2d 807, addressed whether Article XII, § 5a of the Ohio Constitution authorizes the use of motor vehicle fuel excise tax revenues to defray a county's cost of participating in a joint self-insurance pool attributable to covering the risk of liability and loss resulting from the operations of a county engineer's highway department. The essential inquiry in determining whether an expenditure of motor vehicle fuel excise tax revenues is permissible is "whether the item for which the MVGT [motor vehicle gas tax] funds are being expended is *directly connected* to a highway purpose." *Id.* at ¶29 (emphasis added); accord *Madden v. Bower*, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969); *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 166 N.E.2d 365 (1960). The court in *Stockberger v. Henry* did not require that the payment of the engineer's share of joint self-insurance pool premiums be essential to the construction, maintenance, or repair of highways, but questioned whether the expenditure was reasonably attributable or directly related to covering the inherent risk of liability resulting from a potential act or omission within the operations of a county engineer's highway department. Although the county engineer argued that the county could proceed with highway maintenance, construction, or repairs without any type of liability insurance coverage, the court determined that "the manner in which a county decides to ameliorate [the risk of liability associated with the county engineer's highway department] ... does not alter the directness of the connection." *Stockberger* at ¶25. The court found the payment of such premiums *directly connected* to the construction, maintenance, and repairs of the highways, and thus, motor vehicle fuel excise tax revenue expenditures were authorized for that purpose.

Finding the provision of electricity to power the streetlights of a limited access highway as a permissible expenditure of motor vehicle fuel excise tax revenues, the Ohio Supreme Court in *State ex rel. Walter v. Vogel* stated as follows:

The Court of Appeals considered whether "maintaining" such a lighting system includes the furnishing of electricity to activate it, and we are in wholehearted accord with its finding that it does. It is self-evident to this court that it is the *light actually dispersed by* such a lighting system which justifies its existence, rather than the mere presence of instrumentalities whereby such light *may* be dispersed. To maintain a lighting system in the furtherance of the safe movement of motor vehicle traffic at night obviously means to maintain the flow of electricity which activates the instrumentalities of dispersal; and to allow usage of fuel and license tax money therefor in situations such as that under consideration is in the furtherance of one of the statutory purposes for the fuel tax set out in [R.C. 5735.05], *i. e.*, "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."

169 Ohio St. 368, 372-373, 159 N.E.2d 892 (1952) (emphasis in the original). The Ohio Supreme Court thus ruled that furnishing electricity to a highway lighting system constitutes maintenance because the electricity is the means that activates the lighting system to do what it was intended to do.

Id. Lighting the highway is a cost directly connected to providing safe and usable highways for public travel.

Utility services such as natural gas, electricity, telephone, and water enable a building to be operated for its intended use. Without these utility services, no meaningful work can occur at the building. Electricity provides a means to operate the machinery or tools within the building. Heating or cooling a building requires natural gas or electricity to provide consistent working temperatures for employees to carry on their daily business activities. Maintaining a consistent temperature in the building ensures structural integrity and preserves the building from environmental deterioration. A consistent temperature also protects the tools, machinery, and supplies housed within the building from deterioration or decline due to environmental factors. Telephone service allows communication with third parties necessary to daily operations and business. Access to water may be necessary to clean the road equipment. The provision of utility services to the building housing road machinery and equipment is directly connected to the purpose of maintaining its suitability. In effect, without the provision of utility services, the building is unfit for its intended use.

The factual circumstances you have described to us are not materially different from those considered in *State ex rel. Walter v. Vogel*. Furnishing electricity to a township building housing road machinery and equipment makes the building operational and ensures a safe and usable working environment for employees in and around the building. Just as electricity is required to be furnished to a lighting device on a highway in order for it to operate, light systems within or on the outside of the building housing road machinery and equipment likewise are functional only when connected to electricity.

Furnishing utility services such as natural gas, electricity, telephone, and water to a building housing township road machinery and equipment maintain the building for its intended use. The provision of these utility services is *directly connected* to the statutory highway purpose delineated in R.C. 5735.27(A)(5)(d) for which motor vehicle fuel excise tax revenues may be expended, namely, for the “maintenance of suitable buildings for housing road machinery and equipment.” Thus, a board of township trustees may expend motor vehicle fuel excise tax revenues to provide utility services such as electricity, natural gas, water, and telephone to a building housing township road machinery and equipment.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised:

1. A board of township trustees may expend motor vehicle fuel excise tax revenues paid to the township pursuant to R.C. 5735.27(A)(5)(d) to purchase tools and supplies utilized for the repair and upkeep of a building constructed to house township road machinery and equipment.
2. A board of township trustees may expend motor vehicle fuel excise tax revenues paid to the township pursuant to R.C. 5735.27(A)(5)(d) to

provide utility services such as electricity, natural gas, water, and telephone to a building housing township road machinery and equipment.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial "M" and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General