

The summary is in such respects not a fair statement of the proposed amendment. I therefore decline to certify that the summary of the proposed amendment contained in the petition is a fair and truthful statement of the proposed amendment.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

---

268.

GASOLINE TAXES — USE BY MUNICIPALITIES — OPENING  
OR EXTENDING STREETS.

*SYLLABUS:*

*Proceeds of gasoline taxes distributed to municipalities under the provisions of Sections 5537 and 5541-8, General Code, may not be used for the purpose of purchasing right-of-way in connection with the opening or extending of streets.*

COLUMBUS, OHIO, March 17, 1937.

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

GENTLEMEN: Your letter of recent date is as follows:

"We have a letter from one of our examiners in which it is shown that the gasoline tax funds were expended for acquiring property for the purpose of extending a street.

An examination of our files fails to disclose a ruling by your department on the question of opening or extending streets, the cost to be paid from gasoline tax or motor vehicle license funds.

In Opinion No. 1271, of 1929, it is shown that the purchase of additional right-of-way necessary for widening streets, constitutes a proper expenditure of the gasoline tax funds due a municipality.

In all of our accounting procedure, opening, widening and extending streets is considered as one group, and bond issues to finance such improvements are usually termed opening, widening and extending street bonds.

Accordingly, we are submitting the following question for your consideration:

Question. Can the proceeds of the gasoline tax distributed to a city, especially that portion derived from the second one and one-half cent of the tax, be used for acquiring property for the purpose of opening or extending streets?"

Your question requires a consideration of the so-called first and second gasoline taxes. The purposes for which moneys distributed to municipalities arising from the so-called first gasoline tax may be used are set forth in Section 5537, General Code, wherein it is provided, *inter alia*, that such moneys shall be used "for the sole purpose of maintaining, repairing, constructing and repaving, the public streets and roads within the corporation." This language was construed in an opinion of this office appearing in Opinions of the Attorney General for 1929, Vol. II, page 1566, the first two branches of the syllabus reading as follows:

"1. The municipality's share of the original two cent gasoline tax provided for in Section 5527, General Code, and the motor vehicle tax may be used by municipalities for widening streets either by way of maintenance and repair or by new construction.

"2. The money derived from such taxes may not be used by municipalities for the purpose of purchasing additional right of way needed in connection with the widening of any street."

It is my judgment that the foregoing opinion, particularly the second branch of the syllabus, *supra*, is dispositive of your question in so far as the so-called first gasoline tax is concerned. The language of Section 5537 of the General Code having been construed by this office as not including the acquisition of additional right-of-way needed in connection with the widening of any street, it necessarily follows that such moneys may not be used for the purchase of property for the purpose of opening or extending a street.

The controlling provisions with respect to the purposes for which a municipality's distributive share of the so-called second gasoline tax may be used are contained in Section 5541-8, General Code. It is therein provided that such moneys shall be expended "for the sole purpose of constructing, maintaining, widening, reconstructing, cleaning and clearing of public streets and roads within such corporation, and for the purchase and maintenance of traffic lights." With the exception of the additional purposes of cleaning and clearing the public streets and the purchase and maintenance of traffic lights as added by amendment in 1931, these purposes are the same as provided in 1929 when this section was under consideration in the opinion of this office to which you refer. This

opinion is reported in Opinions of the Attorney General for that year, Vol. III, page 1891. The first branch of the syllabus is as follows:

“The municipality’s share of the additional two cent gasoline tax distributed under the provisions of Section 5541-8, General Code, as amended by the 88th General Assembly, 113 O. L., page 70, may be used for the purpose of purchasing additional right of way necessary in connection with the widening of any street.”

After quoting the pertinent provisions of Section 5541-8, *supra*, the then Attorney General said at page 1892:

“From the sections above quoted, it will be observed that the amended sections expressly use the term ‘widening’, in connection with the authority granted to use said funds for the purpose of constructing, maintaining and reconstructing the public roads and streets within the municipal corporation.

In view of the conclusion that I heretofore reached, to the effect that the taxes arising under Section 5537, General Code, could be used for the purpose of widening the surface of existing streets, it would seem that it would be unnecessary to use the term ‘widening’ unless something more was to be included within the powers of the municipality by the use of said term. If I am correct in my conclusion that the surface of an existing street could be widened by the process of construction or reconstruction, then in so far as the widening of a given pavement is concerned, it would have been unnecessary for the Legislature to have used the term ‘widening’ in connection with said amendment.

It is a well known fact that in many instances it becomes necessary to purchase a right of way in order to widen a street to the extent necessary for general utility in view of traffic conditions. When such situation arises, the acquiring of additional right of way is the basic requirement in order to accomplish the purpose. It is probable that the Legislature had this in mind in using the term ‘widening’, and it is believed a fair assumption to state that in the use of the term it was intended to include the purchase of the right of way. Such a conclusion would not be in conflict with my former opinion hereinbefore considered, for the reason that said opinion held that the construction of a street included the power to extend the width of the paved portion of an established street.”

It is obvious that the foregoing opinion is no authority for the contention that Section 5541-8, General Code, authorizes the expenditure of these funds for the purpose of acquiring property in opening or extending streets, as distinguished from the widening of streets. The opening or extension of a street may not under any circumstances in my opinion be included within the terms "constructing, maintaining, widening and reconstructing". This position is fortified by a consideration of the fact that Section 5541-8, General Code, contains express provision for the expenditure of the state's portion of this gasoline tax by the Director of Highways upon extensions of state highways within municipal corporations. The sixth paragraph of the section reads as follows:

"The director of highways shall have authority to expend portions of the tax, herein imposed, upon extensions of state highways within municipal corporations or upon portions of state highways within municipal corporations, as is or may be provided by law."

It follows that had the legislature seen fit to authorize the expenditure of these funds for acquiring property for new streets to be opened up or extended as to length, as distinguished from width, it could well have so provided, but in the absence of such provision, your inquiry must be answered in the negative.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

269.

ACT OPERATIVE ON GOVERNOR'S DECLARATION AND  
INOPERATIVE ON GOVERNOR'S DECLARATION,  
AMOUNTS TO AN APPROVAL—VIOLATIVE OF SECTION  
26, ARTICLE II, CONSTITUTION OF OHIO.

*SYLLABUS:*

*An act of the General Assembly of Ohio which provides that the law shall become operative upon the declaration of the governor and remain operative until the governor declares it to be inoperative amounts to an approval of the act. Such act, having no relation to public schools, is violative of Section 26 of Article II of the Constitution of Ohio.*