OFFICIAL OPINION NO. 48

November 19, 1956

Mr. R. R. Wickersham
State Examiner
State Board of Accounts
304 State House
Indianapolis 4, Indiana

Dear Mr. Wickersham:

This is in answer to your letter which raises the following questions:

> "1. Do the provisions of statute as found in Section 53-501 *et seq.* of Burns' Indiana Statutes apply to purchases of materials, equipment, goods, and supplies paid for from funds received from use of parking meters in cities of the second, third, and fourth class?
>
> "2. Do the provisions of the statute mentioned in No. 1 apply to purchases of materials, equipment, goods, and supplies paid for from funds received from use of parking meters in cities of the fifth class and towns?
>
> "3. Do the provisions of statute as found in Sections 53-108 to 53-110, inclusive, of Burns' Indiana Statutes apply to the purchase of parking meters by any city or town if the parking meter company furnishes and installs the meters?
>
> "4. If a city or town agrees to lease parking meters to be installed by the parking meter company, which agreement provides that the city or town has the option to purchase the meters at a determinable price at any time, would such transaction come under the provisions of the statute mentioned in No. 3?"

The Acts of 1945, Ch. 99, Sec. 1, as amended, as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 53-501, is applicable only to purchases, "* * * payment for which is to be made from any appropriation of public funds made under the provisions of the budget law * * *."

In 1944 O. A. G., page 419, No. 96, it was held that a similar statute then in force (Acts of 1943, Ch. 129, Sec. 1) was

applicable to purchases made from funds received from parking meters. At that time there was no specific statute relating to the appropriation and disposition of funds derived from parking meter receipts and the above cited opinion correctly stated that under the then existing law receipts from parking meters were to be handled as were other local license fees collected under a regulation passed under the police power of the city and that the estimated receipts should be included in the city budget in the same manner as other local license fees collected under the police power.

Thereafter, the General Assembly enacted the Acts of 1945, Ch. 236, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-506 *et seq.*, which was a specific statute dealing with parking meters in second, third and fourth class cities. Section 3 of said Act, Burns' Indiana Statutes (1950 Repl.), Section 48-508, provided that said cities should provide, *by ordinance,* that all license fees collected from parking meters shall be deposited with the city treasurer to the credit of the city but in a Special Fund to be disbursed and paid out only under the orders of the board of public works of said city for certain enumerated purposes. Said Section 3 further provided that said Special Fund could be expended for said purposes "* * * without any *additional* appropriation * * *." (Our emphasis) In view of the foregoing, I believe the Legislature intended that the City Ordinance providing for the deposit and subsequent disbursement of the parking meter receipts, was itself to be considered as an appropriation of the proceeds from said parking meters for such purposes.

The various laws pertaining to municipal budgets referred to in Burns' 53-501, *supra,* are found in the Acts of 1905, Ch. 129, Sec. 84, as amended, Burns' Indiana Statutes (1950 Repl.), Section 48-1506 *et seq.*, and in the Acts of 1919, Ch. 59, as amended and found in Burns' Indiana Statutes (1951 Repl.), Section 64-1331 *et seq.* These budget laws provide for the adoption of a municipal budget after publication of estimates, review by the common council and the State Tax Board, and other specific procedure set out in said statutes, and an annual appropriation is required. As heretofore stated, the Acts of 1945, Ch. 236, *supra,* authorized one single appropriation for all the receipts from the parking meters and the expenditure of these funds was not made subject to the other

provisions of the budget law such as publication and review by the city council and the State Tax Board. I am, therefore, of the opinion that the General Assembly did not intend that Burns' 53-501, *supra,* should be applicable to the expenditure of receipts from parking meters collected under the Acts of 1945, Ch. 236, Sec. 3, *supra.*

Section 3 of said last referred to statute was amended by the Acts of 1951, Ch. 303, Sec. 1, as found in Burns' Indiana Statutes (1950 Repl., 1955 Supp.), Section 48-508, and now provides that the Special Fund derived from the receipts from the parking meters may be expended only:

> "* * * after an appropriation therefor by the common council, which said appropriation shall not be subject to review by either the county tax adjustment board or the state board of tax commissioners: Provided that the general laws with respect to appropriation of funds shall not be deemed to affect or modify the provisions of this act. * * *"

The effect of this amendment was to require an appropriation by the common council but since, under the express terms of the amendment, the appropriation is not subject to review by the tax board or affected by the general laws with respect to appropriation of funds, I am of the opinion that the Acts of 1945, Ch. 99, Sec. 1, as amended, as found in Burns' Indiana Statutes (1951 Repl., 1955 Supp.), Section 53-501, *supra,* is not applicable to such expenditures since said last cited statutes, as amended, applies only to purchases, the payment of which is to be made under the provisions of the budget laws.

With respect to your second question, the disbursement of parking meter receipts in cities of the fifth class and towns is controlled by the Acts of 1949, Ch. 23, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-511 *et seq.,* Section 3 of the Act, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-513, is identical, in all material and relevant respects, to the provisions of the Acts of 1945, Ch. 236, Sec. 3, *supra,* as originally enacted and found in Burns' Indiana Statutes (1950 Repl.), Section 48-508.

Therefore, cities of the fifth class are now in the same position with respect to the expenditure of funds from the Special

Fund derived from parking meter receipts as were cities of the second, third and fourth class under the Acts of 1945, Ch. 236, Sec. 3, *supra.*

As heretofore stated, the last referred to statute did not subject receipts from parking meters to the provisions of Burns' 53-501, *supra,* and I am, therefore, of the opinion that the Special Fund derived from parking meter receipts now collected by cities of the fifth class and towns, under and pursuant to Burns' Indiana Statutes (1950 Repl.), Section 48-513, *supra,* are not subject to the requirements of Burns' Indiana Statutes (1955 Supp.), Section 53-501, *supra.*

With reference to your third question, the Acts of 1947, Ch. 306, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 53-108 *et seq.*, is applicable, with certain exceptions specifically set out in the statute, to:

> "* * * *any public building* or *any other public work or improvement of any character whatsoever* * * * to be constructed, erected, altered or repaired at the expense of * * * any * * * city, town * * *." (Our emphasis)

In Petition of City of Detroit (1954), 339 Mich. 62, 62 N. W. (2d) 626, 630, the Court had under consideration a statute which provided, in part, as follows:

> "Any public corporation is authorized to * * * acquire * * * one or more *public improvements* and to own, operate and maintain the same, within and/or without its corporate limits, and to furnish the services, facilities and commodities of any such public improvement to users within and/or without its corporate limits * * *." (Our emphasis)

The Court held that automobile parking meters were a "public improvement" within the meaning of the above quoted statute although they were not a "public utility."

In view of the foregoing, I believe that the purchase of parking meters and the erection and installation thereof on the public ways of a city or town would amount to the erection of a public improvement at the expense of the city or town so

as to make Burns' 53-108, *supra,* applicable unless the cost of the improvement is less than $500 or unless the estimated cost is less than $2,000 and the work is to be performed by the workmen of the city or town in which case the transaction is expressly exempted from the provisions of Burns' 53-108, *supra.*

With respect to your fourth question, cities and towns of the second, third and fourth class are expressly authorized to lease parking meters under the Acts of 1945, Ch. 236, Sec. 2, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-507, as are cities of the fifth class and towns; see Acts of 1949, Ch. 23, Sec. 2, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-512. Your letter does not set out the terms of the lease; however, I am assuming that under the lease the city becomes entitled to possession and use of the parking meters. A city or town acting under a lease and erecting parking meters on the public ways of such city or town would be erecting a public improvement at the expense of the city so as to make Burns' 53-108, *supra,* applicable to the transaction unless the cost was less than $500 or unless the cost is estimated to be less than $2,000 and the city or town will erect the parking meters with its own workmen in which case the transaction is expressly exempted from the provisions of Burns' 53-108 *et seq., supra.*

An option is not a sale or an agreement of sale but merely a right of election in the party receiving the same to exercise a privilege and only when that privilege has been exercised by an acceptance, does it become a contract to sell; see Smith v. Tomlin (1935), 102 Ind. App. 103, 105, 1 N. E. (2d) 297. Therefore, the fact that an option to purchase is included in a proposed lease of parking meters might affect the question as to who was the lowest and best bidder but such fact would not affect the necessity for complying with Burns' 53-108, *supra.*

Therefore, my answers to your questions are as follows:

1. No.

2. No.

3. Yes, except as hereinabove stated.

4. Yes, except as hereinabove stated.

The foregoing opinion is applicable only to the facts stated in your letter and is not intended to imply that all leases executed by cities and towns are subject to the provisions of Burns' 53-108.

OFFICIAL OPINION NO. 49

December 5, 1956

Dr. B. W. Johnson
Executive Secretary
Indiana State Teachers' Retirement Fund
145 West Washington St.
Indianapolis, Indiana

Dear Doctor Johnson:

Your letter of November 2, 1956, requesting an Official Opinion, reads as follows:

> "The Indiana State Teachers' Retirement Fund Board desires your official opinion as to the legality of purchasing Federal Land Bank Bonds that are issued by the Federal Land Banks with farm mortgages as their basic security, and Capehart Loans which are authorized by Public Law 345 (84th Congress).
>
> "It appears to the above mentioned board that these securities may fall in the category of Government Securities which it is allowed to purchase. Attached to this letter is a letter received from Scudder, Stevens & Clark, the board's Investment Counsel, which is self-explanatory."

The classification of securities in which your Board may invest such funds is made by Acts of 1915, Ch. 182, Sec. 11, as amended, as found in Burns' Indiana Statutes (1948 Repl., 1955 Supp.), Section 28-4508. An examination of its provisions reveals that clauses (1) and (2) of said statute are applicable to your questions, and provide as follows: