Honorable A. L. F ossler, Chairman
State Board of Tax Commissioners
301 State House
Indianapolis 4, Indiana

Dear Mr. F ossler:

This is in answer to your request for an Official Opinion on the following questions:

"1. If there are no obligations (bills or contracts, oral or written) in regard to an appropriation of the proceeds of bonds issued which are payable from a levy of taxes, does the appropriation of the proceeds derived from the sale of such bonds issued by townships, pursuant to Burns' Section 28-1350 et seq., lapse on December 31st, with the result that the proceeds of said bond issue must be reappropriated in order for there to be a valid appropriation against which contracts and/or other obligations could be made?

"2. If the answer to question 1 is in the affirmative and there are obligations as explained above in regard to such an appropriation, does the amount of the appropriation in excess of the obligations lapse, as set out in question 1?"

Otherwise expressed, your questions are whether the excess of the appropriation of the proceeds of such bonds, remaining unexpended after the end of the year for which such appropriation was made, is available to bind contracts in a succeeding year without reappropriation for the year in which the expenditure is intended to be made. Simply stated: What is the life of such an appropriation? In this connection 1945 O. A. G., page 554, No. 128, holds that funds shall be considered expended if a contract is awarded during the calendar year in which there is a proper and sufficient appropriation available therefor, even though the contract price is not paid prior to the end of such calendar year because full performance of the contract is not completed. By contrast, your question relates to the authority to award a contract to bind funds
derived from the sale of such bonds in which the appropriation is made for a prior year.

The term "appropriate" is derived from the Latin terms, *ad* and *proprium*, which signify "to take as one's own by exclusive rights." In this general sense, the term "appropriate" is synonymous with the terms "allocate" and "apportion" and means to earmark a particular piece of property, or segment thereof, for a specific purpose.

The term "appropriate," as used in connection with the expenditure of *public funds*, has a more restrictive meaning because of constitutional and statutory provisions for the purpose of protecting such funds from violations of the trust reposed in public officials. The mere earmarking or allocation of *public funds* for a specific purpose is not the equivalent of an appropriation. See 1945 O. A. G., page 499, No. 116, in which it was held that public money, although earmarked for institutional use, could not be expended by the Boards of Trustees of Indiana University, Purdue University and Indiana State Teachers College for the construction of buildings to care for returning veterans without further express appropriation. With respect to public funds the term "appropriation" means, not only that the funds are allocated for a specific purpose, but also that specific *authority* has been granted to *expend* such funds for said specific purpose.

In the case of Hunt v. Callaghan (1927), 32 Ariz. 235, 257 P. 648, the Court discussed the difference between an apportionment and an appropriation, and said at page 239:

"* * * An apportionment is 'the act of dividing and assigning in just proportion.' Webster's New International Dictionary (1925 ed.). While an appropriation is 'the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.' State v. Moore, 50 Neb. 88, 61 Am. St. Rep. 538, 69 N. W. 373; Clayton v. Berry, 27 Ark. 129; Stratton v. Green, 45 Cal. 149.

"It will therefore be seen that the difference between an 'apportionment' and an 'appropriation' is that, to
make the 'appropriation,' there must be added to the dividing and assigning of funds which constitutes the 'apportionment' the specific authority to spend. This difference is of vital importance in the consideration of this case.” (Our emphasis)

An appropriation may be made in different manners. It may be made by a specific act, which by its own terms specifically authorizes some official to expend certain money for a particular purpose. In such an instance the act itself usually designates the life of such an appropriation. An example of such are the various appropriations made by the Indiana Legislature for expenditures during the succeeding biennium.

Another manner in which appropriations may be made is by statutes authorizing subordinate governmental bodies to make appropriations in the manner prescribed by other statutes of general application.

With respect to expenditures from a general fund, governed by general appropriations statutes, it is held that the appropriation operates to authorize the expenditure of such funds only in a given year. As stated in Ristine, Auditor v. State ex rel. Board of Comrs. of Sinking Fund (1863), 20 Ind. 328, 338:

“Appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be an authority from the Legislature given at the proper time, and in legal form, to the proper officers to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the State.” (Our emphasis)

The specific statute with which your question deals is Acts of 1949, Ch. 220, as found in Burns' Indiana Statutes (1948 Repl., 1953 Supp.), Sections 28-1350 to 28-1351b. This statute is one by which townships are authorized to improve, remodel or equip their existing school buildings, or to construct and equip an addition thereto, to purchase grounds therefor, or to erect, equip and purchase grounds for a new school building by means of the issuance and sale of bonds.

The pertinent section of this statute is Acts of 1949, Ch.
220, Sec. 2, as found in Burns' Indiana Statutes (1948 Repl., 1953 Supp.), Section 28-1351, which provides as follows:

"The bonds of each said school township and said civil township shall be payable in such amounts and at such times as the trustee and advisory board shall determine not exceeding twenty [20] years from date of issuance, and the provisions of all general laws relating to the filing of a petition requesting the issuance of bonds and giving notice thereof, the giving of notice of determination to issue bonds, the giving of notice of a hearing on the appropriation of the proceeds of bonds, and the right of taxpayers to appear and be heard on the proposed appropriation, the approval of the appropriation by the state board of tax commissioners, the right of taxpayers to remonstrate against the issuance of bonds, and the sale of bonds at public sale for not less than the par value thereof, shall be applicable to proceedings under this act." (Our emphasis)

There are other acts authorizing the issuance of bonds which likewise require compliance with the above general requirements. It is important to note that, although the funds to be expended for the purposes of this act are not derived from a general fund, the act itself makes no specific appropriation of the proceeds from the sale of said bonds whereby a public officer is authorized to make expenditures therefrom solely by virtue of the provisions of said act. By contrast, this section of the law explicitly requires conformance with the provisions of all general laws relating to the filing of a petition requesting the issuance of bonds, the giving of notice thereof, the giving of notice of the determination to issue bonds, the giving of the notice of the hearing on the appropriation of the proceeds of the bonds, together with the various statutory rights accorded to taxpayers to make objection thereto. Although not specifically designated, the general laws referred to are, among others, Acts of 1937, Ch. 119, Sec. 7, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Section 64-313, and Acts of 1919, Ch. 59, Secs. 200 and 201, as amended, as found in Burns' Indiana Statutes (1951 Repl.), Sections 64-1331 and 64-1332. The above sections of the statute refer to the procedure to be adopted in fiscal matters, including the issuance
of bonds, in which the State Board of Tax Commissioners has the ultimate administrative authority to approve budgets, tax levies and rates. The provisions of these sections and particularly those as found in Burns' Indiana Statutes (1951 Repl.), Section 64-1331 refer to budgets "proposed to be expended during the succeeding year." This section also provides the procedure for authorizing the expenditure "for the current year" of additional money for emergency purposes and states: "No such proposed additional amount shall be appropriated or expended unless and until such appropriation and expenditure shall have been approved by the state board of tax commissioners, as hereinafter provided."

I do not find any statutory provision relating to townships which requires, in express terms, that money be reappropriated as contemplated in your question. However, the theme runs throughout the entire section in Burns' Indiana Statutes (1951 Repl.), Section 64-1331 that the fiscal matters therein determined relate to money proposed to be expended during the succeeding year, or, as to additional emergency appropriations, that such relate to funds to be expended in the then current year.

The strictness of the requirements of the law respecting contracts paid for from the proceeds of bond issues cannot be overemphasized. In the case of Hamer v. City of Huntington (1939), 215 Ind. 594, 21 N. E. (2d) 407, a contract of that city was held invalid because the contract was executed at a time when there had been no appropriation made therefor. It was held that a subsequent appropriation could not have the effect of legalizing the contract, since such contract, being illegal, is incapable of being subsequently ratified by a subsequent appropriation so as to make it binding. As stated in City of Indianapolis v. Wann (1895), 144 Ind. 175, 187, 42 N. E. (2d) 901, 31 L. R. A. 743:

"If the contract is as appellee's learned counsel concede, ineffective, it is because it is made in violation of the statute. Such a contract is absolutely void, and is as if it had never been made. State Bank v. Coquillard, 6 Ind. 232; Cassaday v. American Ins. Co., 72 Ind. 95; Davis v. Barger, 57 Ind. 54; Reynolds v. Stevenson, 4 Ind. 619; Link v. Clemmens, 7 Blackf. 479; Pate v.
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Wright, 30 Ind. 476; Heller v. Crawford, 37 Ind. 279; Heavenridge v. Mondy, 34 Ind. 28; Case v. Johnson, 91 Ind. 477; 15 Am. and Eng. Ency. of Law, sections 1102-1103.

“If the contract had never been made, a subsequent appropriation could not have the effect of making it a contract; the contract being illegal was incapable of being subsequently ratified so as to make it binding without making it a new contract. Henry v. Heeb, 114 Ind. 275, and authorities there cited.”

When contractors deal with the government or any political subdivision thereof they have enough involved in the contract to justify a legal investigation to be made as to the validity of the contract. As stated in Dreves v. Oslo School Township of Elkhart (1940), 217 Ind. 388, 396, 28 N. E. (2d) 252, 128 A. L. R. 1405:

“If he fails to make such investigation and then finds after the work is completed that his contract is invalid his case is indeed unfortunate, but his misfortune in such a case would not affect the welfare of the public as would the misfortune of the individual investor who found that municipal securities purchased in good faith were invalid. * * *”

Although this responsibility placed upon contractors dealing with governmental units may seem harsh, it is one of universal recognition as indicated in City of Indianapolis v. Wann, supra, at page 188 as follows:


It is true, of course, that the proceeds from the sale of the bonds herein are always earmarked or allocated to the extent
that they may not be used for purposes other than those for which the bonds were sold. Acts of 1949, Ch. 82, Sec. 1, as found in Burns' Indiana Statutes (1951 Repl.), Section 61-1205, provides that whenever bonds have been issued by a municipal corporation, which by Section 2 of that Act, Burns' Indiana Statutes (1951 Repl.), Section 61-1206 includes townships, and the purpose for which the bonds were issued has been accomplished or abandoned and a surplus remains from the proceeds of such bond sale, such excess must, by order of the legislative body of such political subdivision, be transferred to the bond and interest redemption or sinking fund for the payment of interest-bearing indebtedness for which the particular governmental unit is liable. Notwithstanding this statute, in view of the principles enunciated in the above cases, contractors should be advised of the seriousness of the questions which you have raised and further that they should not enter into a contract unless there is an unexpended balance of an appropriation or reappropriation for the current year in which the contract is to be awarded. Should a situation arise in which a contract has been executed which attempts to bind the unexpended balance of an appropriation for former years which has not been reappropriated for the current year in which the contract is let, the validity of such contract is a question for determination by our courts. It is suggested that the surest way to decide this question for the protection of all parties concerned is for express legislation to be enacted on this question. That was done with respect to appropriations of cities by Acts of 1945, Ch. 128, Sec. 1, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-1506a, which provides as follows:

"When any item of appropriation made under the provisions of section 84 [§48-1506] of this act shall remain unexpended in any fund at the end of the calendar year, the amount thereof shall immediately revert to the fund against which it was appropriated, and no warrant shall be drawn on such appropriation after the end of such year, Provided, however, that the provisions of this act shall not apply to any balance of funds appropriated for the use of any board of aviation commissioners of any city remaining unexpended at the end of a calendar year. Provided, that in any and all cases
where any appropriation is not used and expended during such year because of any suit that may be instituted to restrain or enjoin the expenditure of any money so appropriated, then such appropriation shall not revert to the fund against which it was appropriated until one [1] year after the termination of such suit, if such suit shall terminate against the party or parties instituting the same.” (Our emphasis)

It is believed that the provisions of Burns' Indiana Statutes (1950 Repl.), Section 48-1506a above quoted are indicative of the legislative policy that any unexpended balance in an appropriation at the end of a calendar year shall immediately and automatically revert to the particular fund from which it was appropriated.

Your attention is further directed to another statute of similar tenor concerning the payment of funds from the County Treasury, the same being Acts of 1899, Ch. 154, Sec. 22t as amended, as found in Burns' Indiana Statutes (1948 Repl.), Section 26-522, which provides as follows:

"Funds due and payable to the state or any township, town or city of the county from the county treasury may be paid in the manner and upon the authority prescribed by law other than this act; but except as to such funds no money shall be paid from the county treasury otherwise than upon a warrant drawn by the county auditor. Except as to salaries of county councilmen this act shall not be construed as authorizing the auditor to draw any warrant that is not authorized by existing or other laws than this act. Appropriations by the county council shall not be necessary to authorize a warrant drawn and payment made out of the county treasury in the following instances, namely:

"Of any money belonging to the state and commanded by law to be paid into the state treasury; of any money belonging to any school fund, whether principal or interest; of any money belonging to any fund of any township, town or city of the county and commanded by law to be paid to such municipality; or of any money due to any person, company or corporation which has been paid into the county treasury pursuant to assess-
ment on persons or property of the county in territory less than that of the whole county for any public improvement or the purchase thereof, such as ditches and drains and repairs thereof, or establishing and constructing highways, turnpikes, straightening water-courses, making levees and repairs thereof, gravel or macadamized roads; of any money due to any person, company or corporation, which has been paid into the treasury to redeem from any tax or other sale; or of any money so due that has been paid in pursuant to authority of law as a tender or payment to the person, company or corporation; or taxes erroneously paid; or money which any statute expressly provides shall be paid for a purpose therein stated out of the county treasury without being first appropriated for such purpose by the county council. In all the above enumerated instances payment may be made out of the county treasury upon the authority and in the manner prescribed by law without appropriations by the county council.

“In all other instances, including all payments from any general or special fund to be used by any county or by the board of commissioners of any county in the construction, maintenance or repairs of any highways or bridges therein, or for any purpose other than as above stated no warrant shall be drawn upon, or money paid out of the county treasury, unless an appropriation by the county council therefor has been made, for the calendar year in which the payment is made, and which appropriation remains unexhausted: Provided, however, That nothing contained in this act shall be so construed as to apply to any funds received from the state or the federal government for poor relief, unemployment relief, old age pension or other funds which may at any time be made available under ‘The Economic Security Act’, or under any other federal act providing for civil and public works projects.” (Our emphasis)

It is to be noted that the specific instances mentioned in the above statute, in which no appropriation is necessary, would not be applicable to the instant fact pattern for, among other reasons, the provisions of Burns’ Indiana Statutes (1948 Repl.,
1958 Supp.), Section 28-1351, subsequently enacted, specifically requires "the giving of notice of a hearing on the appropriation of the proceeds of bonds" and "the approval of the appropriation by the state board of tax commissioners." In harmony with the other statutes and cases herein cited, it will further be noted that, as to funds drawn on the county treasury as provided in Burns' Indiana Statutes (1948 Repl.), Section 26-522, except as specifically authorized in said section, no warrant shall be drawn upon, or money paid out of the county treasury, unless an appropriation by the county council therefor has been made, for the calendar year in which the payment is made, and which appropriation remains unexhausted. The latter statute further supports the apparent theory of legislative policy that appropriations generally may be used only in the calendar year for which they are made, this being true whether such appropriation is from a general or special fund.

Other than the provisions of Burns' Indiana Statutes (1948 Repl., 1958 Supp.), Section 28-1351, (1951 Repl.), Sections 64-1331 and 64-1332, the only statutes which might have a direct bearing on this question are those of general application concerning the conduct of township business. Among such are Acts of 1949, Ch. 208, as found in Burns' Indiana Statutes (1951 Repl.), Section 65-301 et seq., which is an act concerning township business, prescribing certain duties and powers of township officers and concerning the keeping of records and making settlements with respect to township business. Acts of 1949, Ch. 208, Sec. 3, as found in Burns' Indiana Statutes (1951 Repl.), Section 65-311 states that at the annual meeting of the advisory board of the township for the purpose of adopting the annual budget, the trustee shall present a detailed and itemized statement in writing of his estimated expenditures for which appropriations are asked. Section 1 of that Act, as found in Burns' Indiana Statutes (1951 Repl.), Section 65-301 provides that the advisory board shall meet on the date provided by law "for the adoption of an annual budget." It may be noted that said section provides that rates finally adopted shall be deemed a levy and lien upon the property of such township "and such levy shall be deemed an appropriation for the specific purposes for which such estimates are fixed." The last above-quoted provision was present in a former law
concerning townships, but in construing that provision in the case of Miller v. Jackson Township (1912), 178 Ind. 503, 518, 99 N. E. 102, the Supreme Court of Indiana held:

"* * * We are of the opinion that the statute requires the advisory board to act on the itemized statement of the trustee, and by written record make an itemized appropriation for the payment for supplies, services, etc., proposed in the trustee's estimate, and that the function of such appropriation cannot be performed by the tax levy; and we are further of the opinion that any contract for services or supplies, not included in such appropriation, is null and void. State, ex rel., v. Howard (1910), 174 Ind. 358, 92 N. E. 115; State, ex rel., v. Anderson (1908), 170 Ind. 540, 85 N. E. 17; Waters v. State, ex rel. (1909), 172 Ind. 251, 88 N. E. 67; Peck-Williamson, etc., Co. v. Steen School Tp. (1903), 30 Ind. App. 637, 66 N. E. 909; Lund v. Board, etc. (1911), 47 Ind. App. 175, 93 N. E. 179; First Nat. Bank v. VanBuren School Tp. (1911), 47 Ind. App. 79, 93 N. E. 863."

Acts of 1949, Ch. 208, Sec. 5, as amended, as found in Burns' Indiana Statutes (1951 Repl., 1953 Supp.), Section 65-318 provides:

"The trustees shall present to the advisory board, at a meeting of said board to be held annually on the second Tuesday after the first Monday of January of each year, his annual and complete report of all the receipts and expenditures of his office for the preceding calendar year, with the balances to the credit of each fund under his charge; and if he has any money from any source in his hands or under his control which is not included in any particular fund, as shown by said report, then he must state all the facts concerning such moneys in his report. * * * The board shall consider and approve, in whole or in part, the report of the trustee so made, and any sum appropriated and remaining in the hands of the trustee unexpended, and for which no liability exists against the township, shall be deemed and credited in favor of the fund for which it was appropriated. * * *

(Our emphasis)
Reference is further made to Acts of 1899, Ch. 105, Sec. 9, as found in Burns' Indiana Statutes (1951 Repl.), Section 65-319 which requires the township trustee to procure suitable specifications to be used by bidders in the erection of a new schoolhouse; this section further requires the township trustee to make itemized estimates as to school furniture, fixtures and school supplies; it further provides that he shall in like manner make a schedule of such work as may be necessary in constructing or repairing bridges in the township; this section indicates that such estimates and specifications shall apply to contracts, whether for construction, repair or supplies, for any one year. Nothing is found in the general statutes respecting township business which indicates that the proceeds from the sale of bonds are to be disbursed in any manner different from the disbursement of any other funds of the township.

It may be argued that there is no practical necessity for reappropriating the proceeds of the bond issue as in your question for the reason that they may only be used for the purposes for which the bonds were sold.

However, as stated in Ristine, Auditor v. State ex rel. Board of Comrs. of Sinking Fund (1863), 20 Ind. 328 at 336: "It may be laid down as a maxim in constitutional government, that officers, as a general rule, should not assume to exercise doubtful powers." This would seem to be particularly true as to public funds because of their trust character. Viewing your questions in the light of protecting both affected taxpayers and contractors, and in view of the various statutes and cases herein cited, it is my opinion that your questions should be answered as follows:

1. If there are no obligations, as of December 31st of any year, binding an appropriation of the proceeds of bonds issued pursuant to Burns' Indiana Statutes (1948 Repl., 1953 Supp.), Section 28-1351, which are payable from a levy of taxes, such proceeds should be reappropriated before contracts are executed against such proceeds.

2. If there are obligations already binding the appropriation of the proceeds of bonds issued pursuant to Burns' Indiana Statutes (1948 Repl., 1951 Supp.), Section 28-1351, which are payable from a levy of taxes, but there is an excess or unexpended balance thereof on hand on December 31st of any year,
the amount of such excess should be reappropriated before contracts are executed against such excess.

Further, if the purpose for which the bonds were issued and sold has been accomplished or abandoned, then Acts of 1949, Ch. 82, Sec. 1, as found in Burns' Indiana Statutes (1951 Repl.), Section 61-1205, requires that the legislative body of the governmental unit transfer any such unexpended balance to the bond and interest redemption or sinking fund to be used for the payment of interest-bearing indebtedness.

In closing, reference is also made to the provisions of Acts of 1937, Ch. 116, Sec. 1, as found in Burns' Indiana Statutes (1951 Repl.), Section 65-324 which authorizes the advisory board, by unanimous vote, to transfer any surplus in the bond fund of the township to the special school fund or tuition fund of such township, when all bonds and other evidences of indebtedness of such township issued or incurred for the construction of a school building have been paid.

OFFICIAL OPINION NO. 2

January 4, 1955

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

Dear Mr. Wickersham:

Your letter of December 15, 1954, requesting my Official Opinion, reads as follows:

"Are clerks of the circuit courts, except those affected by Salary Limitation Law, entitled to a per diem fee of $2.00 for time occupied with business of the court for receiving, filing and entering a transcript of a cause sent to it on change of venue from another county?"

The question presented by you has been considered in three (3) opinions of prior Attorneys General. Reference is made to 1938 O. A. G., page 21, 1943 O. A. G., page 583, and 1944