Assuming this school building corporation is incorporated in pursuance to the provisions of the Acts of 1947, Ch. 273, supra, I am of the opinion that monies received by the school building corporation from the sale of its bonds are not subject to the provisions of the Public Depository Act.

OFFICIAL OPINION NO. 11

March 4, 1954

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

Dear Mr. Wickersham:

I have your letter in which you request an Official Opinion in answer to the following questions:

"1. Is it legal for the Board of County Commissioners to fill by appointment a vacancy in the office of Justice of the Peace of a township which comes within the provisions of Section 1, Clause (b), Chapter 319, Acts 1947, as amended, and in which township there is one Justice of the Peace, who was elected in 1950, now serving?

"Is it legal for Justices of the Peace in townships which come within the classifications set out in Section 1, Chapter 319, Acts of 1947, as amended, to continue to operate on a fee basis and disregard the docket fee, salary and expense provisions of this law?"

Your questions relate to the situation in Fairfield Township, Tippecanoe County. In the November elections of 1950, three Justices of the Peace were elected in Fairfield Township for terms of office beginning January 1, 1951 and ending December 31, 1954. One of these Justices of the Peace resigned on September 26, 1953, and on the same date a successor was appointed to replace such resigned Justice of the Peace. On April 1, 1950, the United States Census was taken and the
official census figures were released by the Director of the Census sometime in 1951.

The statute relative to your question is Chapter 319 of the Acts of 1947, as amended by Chapter 117 of the Acts of 1951, the same being Burns' Indiana Statutes (1946 Repl., 1953 Supp.), Section 5-1711 et seq. Said statute provides in part as follows:

“(a) In every township of this state having a population of less than thirty-five thousand (35,000) according to the last preceding United States census, and in which is wholly located a city of the third class; (b) in every township which contains a city or the greater portion thereof of the second or third class having a population of not less than thirty-three thousand (33,000) nor more than fifty-five thousand (55,000) inhabitants according to the last preceding United States census and wherein there exists a city court; (c) and in all counties having a population of not less than seventy-five thousand (75,000) nor more than eighty thousand (80,000) according to the last preceding United States census and having located therein a city of the third class and a city of the fourth class, the salary of the justice of the peace hereafter elected or appointed to serve in any such township in any such county shall be not less than twelve hundred dollars ($1,200) nor more than two thousand dollars ($2,000) per annum. The salary of any constable hereafter elected or appointed to serve in any such township or in any such county shall be not less than eight hundred dollars ($800) nor more than fifteen hundred dollars ($1,500) per annum. Such salaries shall be fixed within said limits by the advisory board for the township at any regular or special meeting called for that purpose and shall be payable monthly by the trustee of the township out of township funds in lieu of any fees of the offices of the justice of the peace and constable.” (Our emphasis)

“5-1712. * * *

“In each township as defined by section 1 (§ 5-1711), clause (b) upon the expiration of the terms of justices
of the peace and constables now serving there shall be elected or in case of vacancy appointed only one justice of the peace and one constable.” (Our emphasis)

Prior to the 1950 Census, Fairfield Township was classified within Section 1, Clause (a) of the Act above cited and quoted. Upon the basis of the 1950 Census Fairfield Township must be classified within Section 1, Clause (b) of the Act above cited and quoted. Neither Clause (a) nor Clause (b) of the Act above cited was affected by the 1951 amendment to the 1947 Act.

The questions presented by you have been substantially answered by previous opinions of the Attorney General with which I am in accord. It should be emphasized the number of Justices of the Peace for each township, the mode of their election or appointment and their compensation is a matter for legislative determination by the General Assembly. In Mosely v. Board of County Comrs. (1929), 200 Ind. 522, 526, 165 N. E. 244, the Court stated as follows:

"The constitution of Indiana requires that "a competent number of justices of the peace shall be elected by the voters in each township," but it leaves the number to legislative determination." Watson, McDonald's Treatise (5th ed.) ch. 1, Section 1. In 35 C. J. 455, Section 7, it is said: 'Where the constitution contains no limitation on the power of the legislature over the office (of justice of the peace), it may make such regulations as to the number of justices, the mode of their elections, appointment or removal, their jurisdiction and compensation, as it may see fit, although the effect of such regulations may be virtually to abolish the office in particular instances.' (Our emphasis)

* * *

"The regulation by the board of county commissioners of the county of the number of justices of the peace in each township, by proper order of record, must be in accord with the statutory provisions therefor."

In 1951 O. A. G., page 14, No. 6, the Attorney General was confronted with the same statute herein involved; the opinion is dated January 19, 1951, and reads in part as follows:
"The 1950 decennial census is not yet official. When made official, it will be effective as of April 1, 1950. Until it is made official we are obliged to act under the 1940 census. After it is made official in the absence of the enactment of corrective or remedial legislation it will be necessary to adjust actions to the 1950 census. That is if a Justice of the Peace is paid a salary beginning January 1, 1951, under the 1940 census, when he should have received fees under the 1950 census, he is technically required to pay back to the township the excess of his salary over the fees he should have received. Inasmuch as such payments made before the 1950 census becomes official are certainly made in good faith it is extremely doubtful whether such payments could be required to be returned from such Justice of the Peace or Constable receiving them during the interim."

In a 1952 O. A. G., page 4, No. 2, the Attorney General gave an opinion as follows:

"* * * This office has by numerous prior official opinions held that a census, although announced at a later date, is retroactive as to salaries as of the date the census was begun, namely, April 1, 1950. 1950 Indiana O. A. G. Official Opinion No. 38 and 1951 Indiana O. A. G. Official Opinion Nos. 6, 12 and 24. However, all of these opinions, and especially 1951 Indiana O. A. G. Official Opinion No. 6, supra, announced the principle that until the official census has been officially announced, the various municipal subdivisions of the state retain their identity given them by the 1940 United States census."

Other opinions of the Attorney General dealing with the census are:


The Department of Commerce, Bureau of Census, has provided further clarifying material in a memorandum to this office dated 18 November, 1953, which memorandum states in part as follows:
"This is in response to your letter of November 6, inquiring when the 1950 Census was officially announced or published.

"Federal laws providing for decennial census of population have never made any provision regarding the date when the results become effective or official in a given area, and we do not know of any Federal court decision concerning the same. It is believed that this is a matter for State determination through legislation, as has been done in a few States; but if no such action has taken place, or if the matter has not been decided by the State courts, the question usually requires the attention of the Attorney General of the State.

"The first release of the final 1950 population figures for political subdivisions in Indiana was on September 14, 1951 * * *"

The phrase "last preceding United States census" has been construed to mean "each succeeding United States census."

Crowe v. Board of County Comrs. (1936), 210 Ind. 404, 417, 3 N. E. (2d) 76.

Pursuant to this definition of the phrase "last preceding United States census," the limitations with regard to salaries, fees, expenses and number of justices of the peace contained in the Acts of 1947, Ch. 319, as amended, supra, must be deemed applicable to each and every Justice of the Peace in Fairfield Township. By virtue of the 1950 census, Fairfield Township changed to the new classification, effective April 1, 1950. Under said Act it is contemplated that upon its becoming applicable to a particular township that only one Justice of the Peace will hold office following the expiration of the terms of the Justices of the Peace who are then incumbent. The more difficult question relates to filling vacancies only by death or resignation of any of such incumbents. While the statute could have been more clearly worded on this point, it would seem to be the intention of the Legislature that after the Act became applicable to a township no more than one Justice of the Peace should be elected or appointed. Thus, as
terms expired, or Justices of the Peace in such township vacated office by death or resigning, the number would be reduced until there would be only one elected or appointed.

I am therefore of the opinion, that your first question should be answered in the negative.

I am informed that one vacancy has been filled by appointment. I do not believe acts performed by such Justice of the Peace would be void but that he would have color of office and therefore would be a de facto officer even if not de jure.

School Town of Milford v. Zeigler (1891), 1 Ind. App. 138, 27 N. E. 303;

Parker v. State ex rel. Powell (1892), 133 Ind. 178, 32 N. E. 836, 18 L. R. A. 567.

Your second question must also be answered in the negative with a minor qualification. Justices of the Peace in townships which fall within the classifications set out in the Acts of 1947, Ch. 319, Sec. 1, may not operate on a fee basis; that is to say, such Justices of the Peace may not retain any of their fees as compensation. The act involved specifies a salary and specifies that the same shall be in lieu of any fees of the office of the Justice of the Peace. Consequently, all fees of the office of the Justice of the Peace in such townships whether such fees be collected in civil or criminal cases belong to the township. In 1950 O. A. G., page 287, No. 74, it is said:

"3. If fees are to be collected in criminal cases, will such justices be required to pay over such fees to the township trustees for the benefit of the township fund in view of the salary limitation as provided by the act?"

"Section 1 of Chapter 319 of the Acts of 1947 specifically provides that the salary granted therein is in lieu of all fees. Therefore, fees collected in criminal cases will be collected for the benefit of the township."

The salary and expense provisions of this Act are mandatory and exclusive. With regard to docket fees, please be advised that the Act herein involved relates exclusively to docket fees in civil cases.

Acts of 1947, Ch. 319, Sec. 3.
In 1950 O. A. G., page 287, No. 74, it is further stated:

"'What fees, if any, are to be taxed, charged and collected in criminal cases on and after January 1, 1951 by justices of townships coming within the definitions of clauses (a), (b) and (c) of Sec. 1 of said Act?"

"The only provision in Chapter 319 of the Acts of 1947 concerning the collection of fees is found in Section 3, same being Burns 5-1713, which is as follows:

"'Upon the expiration of the terms of the justices of the peace and constables now serving in townships or in counties as defined by section 1 (Section 5-1711) of this act there is hereby established and fixed a docket fee which shall be taxed in each civil case filed before the justice of the peace, in the sum of six dollars ($6.00) which docket fee shall be in full for all costs, fees, service of process, as is now provided by law. Said docket fee shall be collected by the justice of the peace who shall make due accounting thereof and turn the same over to the township trustee, at least every three (3) months in each calendar year and to become a part of the township funds.'

"This section makes no provisions in regard to the collection of fees in criminal cases. Therefore, these fees would be governed by more general provisions, depending on provisions applicable under classifications contained in different acts, namely: Section 2 of Chapter 308 of the Acts of 1913, same being Burns 5-1701 as modified by any more limited acts which may be applicable." (Our emphasis)

The 1951 O. A. G., page 14, No. 6, stated as follows:

"Section 3 of Chapter 319 of the Acts of 1947 provides a docket fee of $6.00 to be taxed in all civil cases which shall be in full for all costs, fees and services of process including changes of venue as is now provided by law. As long as New Albany Township is governed by the provisions of Chapter 319 this fee and this fee alone should be charged for all services of the Justice and of the Constable in civil cases. The term 'docket
fee' as generally accepted means a fee to be paid when a case is instituted. Thus it is proper for this fee to be charged in advance. (Our emphasis)

“Chapter 319 makes no provision as to fees in criminal cases. Therefore, Burns 5-1701 and 49-3404 would be applicable in criminal cases. These fees are small amounts itemized for each service rendered and should not be charged in advance.”

For these reasons, your second question must be answered in the negative with the qualification that the chargeable fees in criminal cases by the particular class of Justice of the Peace involved are not governed by the Acts of 1947, Ch. 319. However, all fees taxed, charged and collected by such Justice of the Peace in both civil and criminal cases become the property of the township and may not be retained by any such Justice of the Peace. The docket fee in civil cases is governed by this Act. The salary and expense provision of this Act, as stated above, are mandatory and exclusive regardless of whether such Justice of the Peace hears civil cases or criminal cases or both.

It is therefore my opinion:

1. A Board of County Commissioners may not, by appointment, fill a vacancy in the office of the Justice of the Peace in a township which comes within the provisions of the Acts of 1947, Ch. 319, Sec. 1, Clause (b), as amended, when there is one Justice of the Peace in said township who was elected in 1950 and who now holds said office.

2. Justices of the Peace in townships coming within the provisions of the Acts of 1947, Ch. 319, Sec. 1, as amended, may not continue to operate on a fee basis and disregard the docket fee, salary and expense provisions of this law.