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ever, the matters covered by said outmoded section are embraced within the amendment of 1949.

I trust this answers all you had in mind in reference to the amendment of 1949.

CHJ:AA:ar

OFFICIAL OPINION NO. 53

June 16, 1949.

Mr. Otto K. Jensen, Examiner,
State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Sir:

This is in reply to your letter of 11th instant which is as follows:

“Chapter 44, Acts of 1949 is an act regulating real estate brokers and real estate salesmen. Section 14 of the Act deals with the handling of the funds received by the commission. We have doubts regarding certain provisions of this section and therefore, would appreciate your official opinion to the following questions:

“1. Is the language of Section 14 sufficient to appropriate (as provided in Article 10, Section 3 of the Constitution) the funds received by the Commission and authorize the Auditor of State to draw his warrant in payment of the expense incurred by the Commission?

“2. Does this section create two separate funds, i. e. the ‘Real Estate Commission Fund’ and another fund in the General Fund of the State? If your answer is in the affirmative please outline the type of payments that can be paid out of each of such funds.”

1. Your first inquiry calls for an opinion as to whether Chapter 44 of the Act of 1949 carries a sufficient appropriation of funds with which to pay the expenses incurred by the real estate commission under the provisions of Article 10,

Section 3 of the Constitution of Indiana. It will be seen that the correct answer to this question calls for an interpretation and determination of the language required to appropriate funds under the above mentioned constitutional provision which reads as follows:

“No money shall be drawn from the treasury, but in pursuance of appropriations made by law.”

The Act in question does not in specific terms make a formal appropriation for the purposes suggested. The language required under our constitution to constitute an appropriation has been before the Supreme Court of Indiana on several occasions. One of the leading cases by that court is the case of Carr, Auditor, *et al.* v. The State, *ex rel.* Coetlosquet, 127 Ind. 204. This case involved a payment by the State, of certificates issued by the state pursuant to an act by the legislature of 1846 and 1847 for the payment of which the irrevocable faith of the State was pledged. In that case there seems to have been no formal and specific appropriation made to pay the certificates or the interest thereon. These certificates were due according to their terms, twenty years after date. The legislature of 1865, however, adopted an act concerning the indebtedness of the State in which it said:

“* * * ‘All the money and funds properly belonging to either of said funds shall be denominated the State Debt Sinking Fund, and all such moneys are hereby set apart for the payment of such principal exclusively, and shall not, under any circumstances, be drawn or paid out of the State treasury for any other purpose whatever.’ * * *”

In passing upon the question the court on page 210 said:

“* * * ‘To an appropriation within the meaning of the Constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that the funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appro-

priation act of each year.' It is evident from these authorities that an appropriation may be implied, and the debatable question is, what provisions are sufficient to create such an implication? To determine this question, it is necessary to examine the legislative enactments subsequent to those under which the bonds were issued, and from them ascertain whether an appropriation has been made. * * *

Finally the court decided that there was an implied appropriation of the funds because of the language of the act showing the intent of the legislature that the same should be paid. This very lucid opinion was written by Judge Elliot in his usual clear and inimitable style.

The following year a case arose in respect of the Soldiers and Sailors Monument as to whether such an appropriation of funds with which to pay the incidental expenses over and above the \$200,000.00 appropriation for the construction of the monument the court cited the case of Carr, Auditor, *et al.* v. The State, *ex rel.* Coetlosquet with approval and also cites the case of Board of State-House Commissioners v. Whittaker, 81 Ind. 297. This last case involved the expenditure of incidentals in connection with the construction of the State House of Indiana and the court holds that the expenditure of incidentals in excess of the \$2,000,000.00 appropriated for that purpose was clearly intended to be paid, by the language used in the act. That this intent of the legislature was gathered from the context of the act and the court then reaffirmed the former decisions to the effect that an appropriation need not be shown by formal and specific language but may be implied from the intent of the legislature as shown by the language used in the act.

Henderson, Auditor, v. The Board of Commissioners of the State Soldiers' and Sailors' Monument. In the course of its opinion the court said:

“* * * ‘It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law, but such an appropriation may be made impliedly, as well as expressly, and in general, as well as specific terms.

* * * The use of technical words in a statute making an appropriation is not necessary. There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation. It may be said generally, that a direction to the proper officer, or officers, to pay money out of the treasury on a given claim, or class of claims, or for a given object, may, by implication, be held to be an appropriation of a sufficient amount of money to make the required payments.' Citing *Ristine v. State, ex rel.*, 20 Ind. 323."

Section 14 of Chapter 44 of the Act of 1949 contains this language:

"* * * The Commission shall, by its Chairman and Executive Secretary from time to time, certify to the Auditor of State the necessary expenses incurred by said commission, and the Auditor shall issue his warrant for the same, which shall be paid out of the funds so established for the maintenance of said Commission: Provided, that no order shall be drawn by state officials on any fund other than the above named fund for any salaries or expenses of the Commission incident to the administration of this Act.
* * *"

See also 1945 O. A. G. 499 for exhaustive opinions.

This language is amply sufficient under the decisions of the courts to show that it was the intent of the legislature that warrants should be drawn on the funds to pay the expenses incurred and is tantamount to a formal and specific appropriation. In consideration of the above and the decision of our courts, I am of the opinion that your first question must be answered in the affirmative.

2. The second question is not easy to answer because of the language used, however, Section 14 does create a "Real Estate Commission Fund" and later in the same section it provides "All funds so paid to the Treasurer of the State, in excess of five thousand (\$5000), shall be turned over to the General Fund and shall remain and be a separate and permanent fund for the maintenance of the Commission." This

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language seems a little anomalous that there should be a separate fund, to be a part of the General Fund. I am of the opinion that the law requires that only one fund be kept and that is the "Real Estate Commission Fund." All funds in excess of \$5,000.00 which by the terms of the act are to be deposited with the General Fund are to remain in a separate permanent fund for the maintenance of the commission. Judging by other similar statutes having like import the deposits to the General Fund should be made annually and the expenses of the Commission should not exceed in any year the fees collected during that year, which are deposited with the "Real Estate Commission Fund" and the accounts handled in the same manner as those under the "Beauty Culture Law," Chapter 72, Acts 1935. I conclude that the effect of the statute as to this fund is merely to earmark it and not to constitute a separate fund and may thereafter be used for the maintenance of the commission under proper additional appropriations. There seems to be no language which makes an appropriation of this latter fund. Therefore, warrants could not be drawn on this separate permanent fund which becomes a part of the General Fund without an additional appropriation.

CHJ:ar

OFFICIAL OPINION NO. 54

June 16, 1949.

Mr. Paul E. Middleton, Director,
Indiana Economic Council,
610 Board of Trade Building,
Indianapolis, Indiana.

Dear Sir:

I have your letter dated May 24, 1949 which is as follows:

"Section 11 of Chapter 174 of the Acts of 1947 states 'The County plan commission shall consist of nine members.' In Section 16, however, the Act states: 'In case there is a city plan commission a designated representative of the city plan commission shall be an