July 7, 1949.

Mr. Otto K. Jensen,
State Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of May 17th, 1949 received requesting an Official Opinion which in part reads as follows:

"House Enrolled Act 313, being Ch. 255, Acts 1949, amends Sec. 1, Ch. 155, Acts 1927 (Burns' 5-104), The Act contains an emergency clause and became effective March 11, 1949.

"The population range of cities affected by this amended Act is from 55,000 to 70,000, whereas the maximum population under the original Act was 300,000.

"We respectfully request an official opinion to the following:

"(1) Does Ch. 255, Acts 1949 exclude justices of the peace in townships containing 2nd class cities having a population of more than 70,000 and less than 110,000 from participating in the provisions thereof?

(Evansville, population 97,062.)

"(2) If your answer is in the affirmative, by what authority will such justices continue to operate?

"(3) If there is an exclusion of justices by the population limitation, what compensation will such justice be entitled to receive on and after March 11, 1949?"

It is to be noted in considering your questions that there are in Indiana the following second class cities having a population of more than 55,000 as shown by the last United States
Census: Hammond, East Chicago, Gary, South Bend, Fort Wayne, Terre Haute and Evansville.

Reference is further made to the fact that under the amendment in question it would only apply to the City of Terre Haute. All of the remainder of the above named cities have been provided for by the Legislature as far as the office and salary of the Justice of the Peace is concerned, except the City of Evansville, as shown by the following: Hammond, East Chicago, and Gary by Chapter 178, Acts of 1949; South Bend and Fort Wayne by Section 5-1708 Burns' 1946 Replacement, same being Chapter 282 of the Acts of 1945.

Therefore it is to be seen that Chapter 255 of the Acts of 1949, by changing the classification of townships in which is located a city of the second class having a population of more than 55,000 and not more than 70,000, from what it originally was—a classification of 55,000 to 300,000 population—discriminates against only one township, the township in which is located the City of Evansville, and as literally interpreted Chapter 255 of the Acts of 1949 would result in the Legislature making no provision whatever as to the number of Justices of the Peace which such township should have, would result in no specific provision being made as to what salary such Justices should receive, and affects those now elected to office as well as those hereafter to be so elected to office. Under the old statute before such amendment, the township in which Evansville is located was entitled to elect two (2) Justices of the Peace and their salaries were prescribed.

Article 7, Section 14 of the Constitution of Indiana provides:

"A competent number of Justices of the Peace shall be elected, by the voters in each township in the several counties. They shall continue in office four years, and their powers and duties shall be prescribed by law."

In construing the above section of the Constitution in the case of Mosley, et al. v. Board of Commissioners of Marion County, et al. (1929), 200 Ind. 522, which action concerned the validity of the reduction of Justices of the Peace in Center Township, Marion County, Indiana from five (5) to one (1)
elective Justices, the Supreme Court on Page 526 of the Opinion said:

""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, sec. 1. In 35 C. J. 455, sec. 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 election, 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.' The legislature may determine what jurisdiction it will give to boards of commissioners. Gordon v. Corning (1910), 174 Ind. 337, 92 N. E. 59, and cases cited."

It is therefore to be observed that such office is a municipal office, the provision for the number being discretionary with the Legislature. It is also pertinent to note that from the quoted language as used by the Supreme Court in the above cited case, the Supreme Court did not go so far as to say the Legislature could abolish such office in its entirety, but only deemed the Legislature could so restrict the number and to limit their jurisdiction, power and compensation to such an extent that the effect thereof "may be virtually to abolish the office in particular instances."

If Chapter 255 of the Acts of 1949 is to be given a literal interpretation the result would be that the Legislature has now failed to provide for the number of Justices of the Peace that shall serve or be elected in the Township in which the City of Evansville is located and it would leave such Justices now elected or hereafter to be elected without any provision for compensation. At least their classification as to number and compensation would be left so uncertain that the operation of such office would be impracticable. It would also result in such township in which the City of Evansville is located being the only township in the State of Indiana having a population of more than 55,000 and containing a second
class city, in which a definite provision had not been made for such office. This would be discriminatory.

From the foregoing I seriously question the authority of the Legislature to enact legislation having the effect of abolishing the office of Justice of the Peace in such township in which the City of Evansville is located, or to fail to make any provision whatever for the compensation of the presently elected Justices of the Peace in such township, or to provide compensation for those to be hereafter elected. I further question the validity of legislation which clearly on its face discriminates against said township while at the same time providing for every other township containing a city of the second class having a population not in excess of 55,000.

In such an event one of two results would be decreed by the Court on construing the validity of said Chapter 255 of the Acts of 1949. The Court would either declare such amendatory act invalid in toto or the Court would hold the change under the legislation—from 300,000 to 70,000—in invalid and permit the remainder of the amendatory act to be operative.

It has been held that any attempt to pass a special law under the guise of a classification according to population, where the subject matter of said special law shows no reason exists for the law being applicable only to certain political sub-divisions renders such provision as to classification, unconstitutional and void.

School City of Rushville et al. v. Hayes et al. (1904), 162 Ind. 193, 200 to 203;
Bullock v. Robison et al. (1911), 176 Ind. 198, 203 to 206;
Groves v. Board of Commissioners of the Lake County (1936), 209 Ind. 371, 376;
Art. 4, Section 23 of the Constitution of Indiana.

It is a well recognized principle of law that in case of a partial invalidity of a statute, if the remainder of the statute is workable after deleting such unconstitutional provision, and the intent of the legislature can still be carried out, the valid portion of said statute will be considered and such unconstitutional provision ignored.
Under the last cited authorities, if Chapter 255 of the acts of 1949 was so construed as to delete the unconstitutional provision, to wit: 70,000, the act could then stand and be applicable alike to the township containing the City of Terre Haute and the township containing the City of Evansville. Such a construction would result in the removal of any seemingly unconstitutional classification since all other townships of a like class would have been already provided for.

An investigation of the Legislative History regarding Chapter 255 of the Acts of 1949 reveals that as originally introduced the classification applied to such townships of 55,000 or more population. Various amendments to the bill, while it was in the process of passage changed the classification from 55,000 or more to 55,000 to 70,000.

I am further of the opinion that since Section 2 of the Act attempts to amend the title of the same by changing the classification from cities of 55,000 to 70,000, that so much of said amended title as restricts its application to cities of not more than 70,000 would be so construed as to delete therefrom such limitation of 70,000.

From the foregoing I am of the opinion that Chapter 255 of the Acts of 1949 should be construed so as to make the same constitutional rather than to construe the same to be void. That in construing the same as constitutional the same should be construed so as to delete from the body of said act the limitation of 70,000 therein placed, and would render the act applicable to all townships including a second class city of more than 55,000 population. This would be applicable to those townships containing the cities of Terre Haute, and Evansville, all others having been provided for by other specific statutes. Should any contest arise of such interpretation it is pointed out that the officials involved, as well as the taxpayers of the community could have said statute clari-
Mr. Stanleigh B. McDonald, Director,  
School Lunch Division,  
Department of Public Instruction,  
State House, Room 227,  
Indianapolis, Indiana.

Dear Sir:

Your letter of June the 11th, 1949 received requesting an Opinion on the following questions:

"1. Is a school lunch program an 'athletic, social or school function' under the terms of the statute governing school extra-curricular activities funds (Acts 1937, ch. 151, and Acts 1945, ch. 312; Burns' 28-5133, 28-5141, 5145)

"2. When federal reimbursement (food assistance money) for a school lunch program, distributed by the State Superintendent of Public Instruction, School Lunch Division, is received in the local school unit, must it be treated as public funds under the terms of the Depository Act:

"(a) When received by the duly constituted officers of the school unit?

"(b) When received by the sponsors designated program supervisor, such as Parent-Teachers Association, Home Economics Club, or Fraternal Organization?

"3. When federal reimbursement for a school lunch program distributed by the School Lunch Division, State Department of Public Instruction, is received in the local unit by duly constituted officers of the unit, need such money be appropriated before being expended?