tion or other reservations within the state which is under the authority of the United States government or any department thereof, provided that same is legally authorized by said government or department thereof having control of said reservation. In my opinion, therefore, a liquor wholesaler may sell to a military reservation or governmental area only when specifically authorized to do so by the commission and in which case the excise tax is not applicable. It is my opinion further that the excise tax is not applicable when sold directly to the military reservation or to the officers or persons thereon directly by the distiller.

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OFFICIAL OPINION NO. 67

July 26, 1949.

Mr. Otto K. Jensen,
State Examiner,
State Board of Accounts,
State House, Room 304,
Indianapolis 4, Indiana.

Dear Sir:

Your request of May 28, 1949, for an official opinion is as follows:

"Your official opinion is requested on a question about H. B. 191, (Chapter 32, Acts of 1949), as follows:

1. Do the provisions of said Chapter 32 violate the provisions of Article 1, Section 23 of the Constitution of Indiana?

"If your answer to the foregoing question is in the negative, will you please state what qualifications a cemetery must have in order that it may be maintained by a township.

"If your answer to the question is in the affirmative, would Chapter 337, Acts of 1947 now be controlling in the care and maintenance of cemeteries therein referred to."

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Chapter 32 of the Acts of 1949, Section 1 reads as follows:

“Any cemetery located in any county or within any unincorporated town or township within such county wherein any soldier, sailor or marine who was in the service of the United States during any war in which the United States was engaged, is buried and which cemetery is without funds to maintain such cemetery and has been in existence ten years prior to the effective date of this act, under the operation by a non-profit organization without sufficient funds to provide maintenance or which cemetery has no organization, shall hereafter be maintained by the township trustee of the township in which said cemetery is located. Included in the maintenance of such cemeteries shall be the re-setting and straightening of all monuments, the leveling and seeding of the ground, and the repairing of fences. A sufficient sum of money to provide for the care, repair and maintenance of such cemetery shall be appropriated in the same manner as other township appropriations.”

Article 1, Section 23 of the Constitution of Indiana provides: “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”

This Section of the Constitution may govern the matter of proper classification. That is, it is considered that a statutory classification, in order to be constitutional, must be reasonable and natural, and there must be some inherent and substantial difference, germane to the subject and purpose of the legislation, between those included and those excluded from the operation of the law.

It is noted that the Act in question, among other classifications, makes the following classification:

“Any cemetery * * * in existence ten years prior to the effective date of this act * * * shall hereafter be maintained by the township trustee * * *.”

This seems to raise a most serious question about the validity of the Act. Chapter 32 of the Acts of 1949 became effective on February 28, 1949. Therefore, the Act provides
a class of cemeteries that may benefit by public funds in the event such cemeteries were in existence ten years before February 28, 1949, And if they were not in existence ten years before said date they cannot participate in said public funds of the township. And it is noted further, that if cemeteries were not in existence ten years before such date, then such cemeteries never can come into such class or qualify for participation in such public funds.

We then are confronted with the question as to whether or not such classification is in violation of Article 1, Section 23 of the Indiana Constitution. In answering that question we must consider the following:

1. Is such classification reasonable and natural?

2. Does such classification contain some inherent and substantial difference, germane to the subject and purpose of the legislation between those included and those excluded from the operation of the law?

From the general provisions of this Act and the original Act as amended, it appears that the intent and purpose of the legislation is to maintain some respect for and to preserve the final resting places of our war dead. All else being equal, it does not seem reasonable to say that cemeteries containing the bodies of our war dead are entitled to public funds only in the event such cemeteries have been in existence ten years before the effective date of the Act, and cemeteries containing the bodies of our war dead are not entitled to the benefit of such public funds, and never can be entitled to such benefits because of the circumstance that such cemeteries did not come into being at least ten years before the effective date of the Act.

A situation appears in the case of Hayes et al v. Taxpayers Research Assn. (1947), — Ind. —, 72 N. E. (2), 658 which is somewhat analogous to the situation under consideration. This case held that Chapter 169 of the Acts of 1945 (Burns’ Section 65-510 Replacement) was in violation of Article 1, Section 23 of the Constitution of Indiana. In this case the Court stated:

"* * * The Act contains a proviso, which permits the taxing of the whole township, for the benefit of part thereof, if prior to the passage of the Act, such
township had purchased and operated fire-fighting equipment. In this proviso, this privilege is made to depend solely on the ownership and operation of fire-fighting equipment prior to the enactment of the Act. As a result we have a classification that is rather narrow and which hardly answers to the test of reasonableness. * * *".

Thus the Act amounted to special legislation, in that it provided a limited class and thereby excluded others from ever coming within such class.

The court quoted with approval the following:

"In Crawford's Statutory Construction, p. 118, § 82, it is said: 'In many instances, therefore, the validity of a general law will depend upon the basis for the classification of the subject matter to which it applies. We have already stated that the classification must be a reasonable one. Moreover, it must be founded upon substantial distinctions, inherent in the subject matter, which makes one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law.'

"In Sutherland's Statutory Construction by Horack, 3d Ed., Vol. 2, p. 20, § 2106, the author in discussing classification makes this statement:

"'* * * Thus, classification must be prospective and permit the future entrance into the class when its qualification and standards have been met. The restrictions may place either wide or narrow limits on the class, but the nearer a classification comes to total generality the more susceptible it is to attack.

"'A valid classification must include all who "naturally" belong to the class, all who possess a common disability, attribute, or classification, and there must be some natural and substantial differentiation between those included in the class and those it leaves untouched. When a class is accepted by the courts as "natural," it can not be again split and then have the dis severed factions of the original unit designated
with different rules of government established for each.'

"* * *

"(2) In the 1945 Act the Legislature stated generally what the townships could do and then added a proviso under which a class was created to be composed solely of those townships that had purchased equipment prior to the taking effect of the Act. It created a closed class, and certainly no one can say that the classification is reasonable or inheres in the subject-matter naturally. The mere incident of having already purchased equipment gave to those townships a right to tax the whole township for the use of a lesser unit. That mere incident gave to those townships a right not granted to all townships under the same or similar conditions. Certainly the mere purchase before a given date could not instill into those townships a difference in character that reasonably could be said to inhere in the subject of fire-fighting in the favored townships. It is both artificial and arbitrary and in conflict with the constitutional inhibitions of Article 1, Section 23 and Article 4, Sections 22 and 23 of our basic law. * * *."

Attention is also called to the case of Heffelfinger v. City of Fort Wayne (1925), 196 Ind. 689. In this case an Act was passed providing that in each county in which there is a city having a population of not less than 60,000 nor more than 68,000 "according to the last preceding United States census," authority was given and ways and means provided to acquire memorials for our soldiers and sailors. The Act became effective March 10, 1919, and it provided that within certain specified periods of time, certain acts by officials provided for by the Act were to perform certain duties. The opinion thus reads, "Obviously, this law was only intended to apply, and could only apply to a county which, on May 1, 1919, and for ninety days thereafter, contained a city having the prescribed population as shown by the last preceding census. (Our emphasis.) In other words, it could only apply to Allen County and the City of Fort Wayne." The Act was held unconstitutional. It was not only considered a "special" law
but it violated Article 4, Section 22 of the Constitution of Indiana, in that it attempted to regulate county and township business.

Although there seems to be grave doubt as to the validity of the classification contained in this act I feel that in the absence of a patent lack of basis for that classification all presumptions should be in favor of the legislature and of its handiwork.

For these reasons my answer to your first question is no—this act does not violate Article 1, Section 23 of the Indiana Constitution.

In answer to your second question, a cemetery must have one or more veterans buried in it, have been in existence ten years prior to the effective date of the Act and be operated by a non-profit organization without sufficient funds to provide maintenance or have no organization.