rate of 11/2%, and, as to any amount above 100 shares no dividends at all are to be paid. This, it seems to me, very clearly violates the rule of proportion as set out in both Acts. Your second question is answered in the negative.

STATE BOARD OF ACCOUNTS: Whether a firm or corporation of which a member of the park board of a city is a member, stockholder, or officer may sell supplies or materials to such city.

June 14, 1943.

Hon. Otto K. Jensen,
State Examiner,
Department of Inspection
and Supervision Public Offices,
State House,
Indianapolis, Indiana.

Dear Mr. Jensen:

I am in receipt of your letter dated May 24th, 1943, requesting an interpretation of Section 48-1247, Burns' Indiana Statutes 1933, which pertains to any officer or employee of any city or town being either directly or indirectly, a party to, or in any manner interested in, any contract or agreement by which any liability or indebtedness of such city or town is created.

Your specific question reads as follows:

"Is a firm or corporation of which a member of the Park Board of a city is a member, stockholder or officer, permitted to sell supplies or materials, or otherwise enter into a contract with any department of the city of which such person is an officer?"

Section 48-1247 is a criminal statute and is subject to the rule of strict construction, and acts prohibited must fall within the letter as well as within the spirit of the law.

Pontarelli v. State, 203 Ind. 146 on 171;
Colvin v. State, 203 Ind. 417 on 420.
This statute was enacted to remedy and correct the evil of a public official contracting with himself and purchasing his own supplies and materials, which he might be authorized by law to purchase.

City of Greenfield v. Black, 42 Ind. App. 645;
City of Ft. Wayne v. Rosenthal, 75 Ind. 156;
McGregor v. City of Logansport, 79 Ind. 166.

It is highly significant that this statute does not expressly say that it shall be unlawful for any person holding office in any city to do and transact business with the city, or any of its boards, officers or departments, either directly or indirectly. If such had been the purpose and intention of the Legislature, the same could have been clearly and easily expressed by appropriate language.

In this connection it is appropriate to consider the history of Section 48-1247 and its predecessor.

This section was originally enacted as Section 52 of Chapter XV, Acts of 1867, page 33, and read as follows:

“No member of the common council or other officer of such city shall, either directly or indirectly, be a party to or in any manner interested in any contract or agreement with such city for any matter, cause, or thing by which any liability or indebtedness is in any way or manner created against such city; and if any contract should be made in contravention of the foregoing provisions, the same shall be null and void.”

This statute remained in force from 1867 until 1905 and practically all of the Indiana decisions involving the validity of contracts entered into by and between an officer of a city involved the above quoted statute. See

City of Greenfield v. Black (1908), 42d Ind. App. 645 on 647.

It will be observed that the language of the above quoted statute was very broad and all inclusive and absolutely prohibited any member of the common council, or other officer of a city, from being either directly or indirectly interested in any contract or agreement with the city for any matter, cause
or thing by which any liability or indebtedness was in any way or manner created against such city.

In 1905 the above statute was repealed and superseded by Section 46 of Chapter 129, Acts of 1905, page 219. As enacted in 1905 the statute read as follows:

"Sec. 46. No member of the common council, nor any officer, clerk or deputy of such officer, or other employe of any city of this state, shall, either directly or indirectly, be a party to or in any manner interested in any contract or agreement, either with such city, or with any officer, board, clerk, deputy or employe of such city, for any matter, cause or thing by which any liability or indebtedness is in any way or manner created or passed upon, authorized or approved by such council or by any member thereof, or by any officer, board, clerk, deputy or employe of such city. No officer, employe, agent or servant of any corporation, firm, company or person holding or operating under a franchise granted by any city, or having any contract with such city, shall be eligible to any office in such city; and any officer of any city accepting any office in or employment by any such corporation, firm, company or persons holding or operating under any such franchise or having any such contract, or seeking to acquire any such franchise or contract, shall thereby vacate such city office. Any contract in contravention of the foregoing provisions shall be absolutely void; * * *"

In 1907 the statute was again amended by Section 1 of Chapter 254, Acts of 1907, page 538, which is Burns’ R. S. 1933, Section 48-1247, reading as follows:

"Section 1. Be it enacted by the general assembly of the State of Indiana, That section forty-six of the above entitled act be and the same is hereby amended to read as follows: Section 46. No member of the common council or board of trustees, nor any officer, clerk or deputy of such officer, or other employe of any city or incorporated town of this state, shall, either directly or indirectly, be a party to or in any manner
interested in any contract or agreement, either with such city or incorporated town, or with any officer, board, clerk, deputy or employe of such city or incorporated town, for any matter, cause or thing by which any liability or indebtedness is in any way or manner created or passed upon, authorized or approved by such council or board of trustees or by any member thereof, or by any officer, board, clerk, deputy or employe of such city or incorporated town. Any contract in contravention of the foregoing provisions shall be absolutely void; * * *.”

“It is a rule of statutory construction that a change of phraseology from that of the original act will raise the presumption that a change of meaning was also intended.”

Chism v. State, 203 Ind. 241 on 244; State ex rel. v. Beal, 185 Ind. 192 on 197; Hasely v. Ensley, 40 Ind. App. 598.

Applying the above rule of statutory construction to the amendment made by the Legislature in 1905, and again in 1907, it must be presumed that by enacting Section 48-1247 in its present language the Legislature intended to relax the rigid and strict provisions of Section 52 of Chapter 15 of the Acts of 1867; and to accomplish this purpose inserted the additional language contained in the amendment of 1905 and reenacted in 1907, to-wit:

“* * * is in any way or manner created or passed upon, authorized or approved by such council, or by any member thereof, or by any officer, board, clerk, deputy or employe of such city. * * *”

It is evident that by the amendment the Legislature intended the statute to apply to cases where a councilman, officer, clerk, deputy or employee of the city, in his official capacity, did an official act in creating, passing upon, authorizing or approving a contract or agreement with the city in which the councilman, officer, clerk, deputy or employee was directly or indirectly interested as a private individual. It sought to prevent an agent of the city from being on both sides of the
same transaction, which would also make the contract or agreement illegal and against public policy at common law.

Obviously, neither the park board nor any member of the park board could create, pass upon, authorize or approve a contract or agreement with the city in which a member of said board was indirectly interested by reason of being a stockholder or director of the corporation dealing with the city. Such a transaction would not only violate the statute, but it would be illegal at common law.

Let us suppose, however, that the member of the park board did not act in his official capacity in creating, passing upon, authorizing or approving any contract or agreement, made by some other official of the city in a department other than the park board. No question of a violation of a fiduciary duty owed by the agent would be involved, since no agency for the city on the part of the member of the park board would exist. Therefore, the contract or agreement would not be against public policy or illegal by the common law.

Would such a contract or agreement violate Section 48-1247, Burns’ 1933? I have been unable to find an Indiana case which decides this question. However, I call your attention to the language contained in the following cases:

Finn v. State ex rel., 66 Ind. App. 432 on 434;
State v. Green, 207 Ind. 583 on 588.

In the case of Finn v. State, supra, the relator, Lucian C. McDaniel, was a member of the common council of the city of Bloomington, Indiana, and sold and delivered materials to the appellant, Finn, as a general contractor in the improvement of a certain street in Bloomington, Indiana, under a contract with the city. As a defense to the action to recover for such materials the surety on the contractor’s bond relied upon the provisions of Section 48-1247. The court says in construing the provisions of said section:

“It appears to be limited to ‘any contract or agreement, either with such city or incorporated town’, or with any ‘officer, board, clerk, deputy or employe of such city or incorporated town, for any matter, cause or thing by which any liability or indebtedness is in any way or manner created or passed upon.’” By the
language used the legislature has eliminated city officials not parties to, connected with, or interested in the original contract made with the city by other parties, but who simply furnished materials in the regular way to such general contractor and no rule of construction would permit its being read into the statute. * * * .”

Again in State v. Green, which was a criminal prosecution against a member of the common council of the city of Gary, Indiana, for having an interest in a contract entered into between the city of Gary, Indiana, and one William Harris for painting the fire station buildings owned by said city, the Supreme Court says:

“There are many ways in which the appellee might have become interested in the contract after it was entered into, and yet not be guilty of violating any provisions of the statute in question. For an illustration—suppose that the appellee was a painter by profession, and had been employed by Harris as a painter to help paint the city buildings, he would of course, in a sense become interested in and a party to the contract of painting, but not within the meaning of the statute. Finn v. State ex rel. (1918), 66 Ind. App. 432, 114 N. E. 9.”

Therefore, in answer to your question, it is my opinion that both the common law and Section 48-1247, Burns’ 1933, prohibit a firm or corporation, of which a member of the Park Board of a city is a member, a stockholder or officer, from selling supplies or materials or otherwise entering into a contract with the park board or the city acting through the agency of the park board; but that neither the common law nor Section 48-1247, Burns’ 1933, prohibit a firm or corporation, of which a member of the park board of a city is a member, stockholder or officer, from bona fide selling supplies or materials or otherwise entering into a bona fide contract with some other independent department of the city of which such person is not a member.