Act, as amended, which makes the tax applicable to income received by political subdivisions engaged in private or proprietary activities or business, and, therefore, it is unnecessary to consider the further question as to whether such authorities are exempted by reason of their charitable aspects.

HIGHWAY COMMISSION, STATE: Whether streets in subdivisions located entirely outside of incorporated cities or towns may be considered as highways in determining the extent of highways in any given county; whether streets and alleys in unincorporated towns are to be considered as highways in the same manner; how should county-line highways be treated in the distribution of gasoline tax; what constitutes abandonment of highways?

January 26, 1942.

Mr. Samuel C. Hadden, Chairman,
State Highway Commission of Indiana,
State House Annex,
Indianapolis, Indiana.

Dear Mr. Hadden:

This will acknowledge receipt of your request of December 17, 1941, for an opinion on the following questions concerning the determination of the total mileage of county roads in the State of Indiana pursuant to the provision of Chapter 168, Section 3, of the Acts of the Indiana General Assembly of 1941, which provides as follows:

“Fifty-two and one-half per cent of the amount allocated to the counties to be divided on the basis of the ratio of actual miles of county roads in each county to the total mileage of county roads in this state; which shall be annually determined, accurately, by the State Highway Commission of Indiana and the county highway department.”

Your questions are as follows:

“1. To what extent are streets in subdivisions, located entirely outside of any incorporated city or town, considered county highways? There appears
to be no question concerning those streets which have been improved with an all-weather surface and are now in general use by the public. The questionable streets are those which have been dedicated to public use on paper and recorded by the county recorder but which have not been constructed in the subdivision; and those streets that have been dedicated and recorded on paper and have been graded at the time the subdivision was laid out, but have not been further improved since that time.

"2. To what extent are streets and alleys within an unincorporated town considered county highways? There are many unincorporated towns in Indiana varying from only a few residents to as high as 2,660 residents. The larger unincorporated towns have developed street and alley systems the same as incorporated towns have. Should the streets and alleys in these unincorporated towns be considered county highways?

"3. Chapter 168, Section 4, of the acts of the Indiana General Assembly (1941), referring to funds allocated to counties, provides, 'The funds allocated to the respective counties of the state from the motor vehicle highway account shall annually be budgeted as provided by law, and, when distributed shall be used for construction, reconstruction and maintenance of the highways of the respective counties, including highways which traverse the streets of incorporated towns, the cost of the repair and maintenance of which, prior to the tenth day of September, 1932, was paid from the county gravel road repair fund excepting where the commission is charged by law with the maintenance or construction of any such highway so traversing such street.' Does the above section mandate the counties to maintain those routes through incorporated towns or is it left to the discretion of the counties as to whether they will maintain these routes?

"4. Many of our incorporated cities and towns have sections of the corporation limits which follow the center line of a highway. In such instances, is the city or the county responsible for the maintenance
of the highway or is the maintenance of the highway a joint responsibility? If the maintenance of such a highway is a joint responsibility of the county and city, is each responsible for one-half the maintenance? The same problem arises where a county line follows the center line of a highway. In such instances, what is the responsibility of each county in regard to the maintenance of the highway?

“5. Does complete disuse of a highway, as evidenced by (a) growth of woods, brush, or trees, (b) fencing off from the public, (c) removal of any visual evidence of its former use, or (d) impassable condition with respect to modern vehicles, affect the status of a highway and should it be included in our tabulation of the mileage of county highways which is to be certified to the State Auditor?”

In general, the county highway system is made up of all roads lying outside the corporate limits of any city or incorporated town. These may have been constructed or repaired pursuant to the provisions of any one of the many acts which have been or are now in force, authorizing the incorporation of public roads into the county highway system. Since the passage of the Highway Transfer Act of 1932, all public highways, which are situated outside of the corporate limits of any city or incorporated town, are county roads. The only remaining question is the determination as to what is a public highway. The Indiana General Assembly of 1923, in passing an act enabling counties, cities and towns to aid the State Highway Commission in the construction of highways and bridges within such counties, cities and towns (Acts 1923, Chapter 122), defined the word “highway” as follows:

“The term ‘highway’, as used in this act, shall be construed to include streets, alleys and bridges.”

(Acts 1923, Chapter 122, Sec. 7, p. 326. Burns’ Indiana Statutes Annotated 1933, Sec. 36-141.)

The purpose of the provision of the statute in question, which was quoted at the beginning of this letter (Acts 1941,
Chapter 168, Sec. 3, p. 517; Burns' Indiana Statutes Annotated (1941 Supp.), Sec. 36-2817, subsection (e) is apparent. The majority of the fund is to be distributed on the basis of need of funds to repair and maintain county roads. The county which is charged with the greater proportion of maintenance of roads is, by this provision, aided more than the county with a smaller proportion of roads.

In the determination of what highways must be included in such a tabulation, the question of abandonment undoubtedly will arise. The statutory provision is as follows:

"Every public highway already laid out or which may hereafter be laid out and which shall not be opened and used within six (6) years from the time of its being so laid out, shall cease to be a highway for any purpose whatever; but if any distinct part thereof shall have been opened and used within six (6) years, such part shall not be affected by the provisions of this section, nor shall this section be applied to streets and alleys in any city or town."

(Acts 1905, Chapter 167, Sec. 16, p. 521. Burns' Indiana Statutes Annotated 1933, Sec. 36-1808.)

Attention is called to the fact that, if the highway or any part thereof ever has been opened and used within the six (6) year period, the provision for automatic abandonment does not apply, and, to constitute vacation, it would be necessary to take formal proceedings to vacate such road or portion thereof and that an order be entered by the Board of County Commissioners. Unless such a highway is or has been automatically abandoned or the proper procedural steps have been taken, all such highways must be considered in this tabulation.

Directing your attention to the specific question raised by you in your first question, all streets in subdivisions located entirely outside of any incorporated city or town that have been incorporated into the county highway system by any of the number of procedures provided for such incorporation, which have not been abandoned as set out above, are county roads. If the roads, streets and alleys have been accepted by the Board of County Commissioners, either upon its own initiative, upon petition, or by incorporation by the county by
virtue of the transfer of the township roads to the counties in 1932, and the county is charged with the responsibility of the repair and maintenance of such roads, the question of whether or not the county is negligent in maintaining the roads as it should, is not in issue. It is possible that the county is not financially able to improve or maintain such roads until its proportionate share of the motor vehicle highway account fund is paid over to it. Even roads, which exist only on paper, remain county roads for the six (6) year period, and, if used during that period, they will remain roads unless and until formal abandonment proceedings have been completed.

Your second question may be answered by reference to the only definition of "highway" which the Legislature has made, quoted above, and the definition used by the Supreme Court of Indiana in Strange v. Board of County Commissioners, 173 Ind. 652. The definition of the court is as follows:

"Roads and highways are generic terms, embracing all kinds of public ways such as county and township roads, streets, alleys, township and plank roads, turnpike or gravel roads, tramways, ferries, canals, navigable rivers, including also railroads."

From this definition, it is apparent that the Legislature was not departing from the common law rule by including streets and alleys within the definition of the word "highway." If the streets and alleys within unincorporated towns were township roads prior to the incorporation of those roads within the county highway system, or, if they have been taken into the county highway system by any of the numerous other proceedings, maintenance thereof is the responsibility of the county, and they must be considered county highways for the purpose of this act.

Your third question is answered by the terms of the statute. It is a well settled rule of law that the word "shall" is mandatory rather than directory or permissive. Where the statute says that the funds "shall be used for construction, reconstruction and maintenance of the highways of the respective counties, including highways which traverse the streets of incorporated towns, the cost of the repair and maintenance of which, prior to the tenth day of September, 1932, was paid from the county gravel road repair fund except where the
commission is charged by law with the maintenance or construction of any such highway so traversing such street," the Board of County Commissioners is left no discretion.

Your fourth question is directed to the division of the responsibility on line highways, whether that be the line dividing a city or incorporated town or the line dividing two counties. The question has been determined by the Legislature as to county line highways. There are two statutes on the subject.

The 1905 Act made the following provision for the maintenance of county line highways where such county line divided the county from a county in another state:

"* * * That the adjoining county or counties in such other state shall pay one-half of all expenses and assessments for the construction of such improvement and shall thereafter keep one-half of such highway in repair. * * *"

Burns’ Indiana Statutes Annotated 1933, Sec. 36-1317.

A 1921 Act provided for the construction of county line highways and provided for their maintenance and repair by division of the road made by a joint meeting of the commissioners of the two counties, which provision is as follows:

"* * * And the county commissioners of such county (counties), before finally adjourning said joint session, shall apportion such county line road equally, as nearly as may be, between their respective counties for the purpose of maintenance, and the respective portions, as thus fixed, shall thereafter be maintained by such counties."

Burns’ Indiana Statutes Annotated 1933, Sec. 36-1456.

In the event that the line highway was constructed under the provisions of either of these two acts the share of responsibility, and, hence the right to share in the allocation of such funds, has been defined by statute. City or incorporated town lines running in the center of the road are not covered by any specific statute. However, since half of the road is within the city and half within the county, each would be charged
with one-half of the repair. How the problem is worked out as a practical matter should make no difference. The county should be allowed only to include one-half of such road in its calculation of its total mileage for the purposes of this act.

Your fifth question goes to the problem of abandonment. As pointed out earlier in this opinion, this subject is covered by statute. (Burns' Indiana Statutes Annotated 1933, Sec. 36-1808, supra.) If these roads never have been used as such, then growth of weeds, brush, or trees would be evidence of the six (6) year non-usage and might be grounds for denial of the right to include such roads in the calculation for the purpose of this act. Your attention is called, however, to the fact that it is not the condition of the road, but that the road has never been used within the prescribed six (6) year period, which prevents the inclusion of such road in the calculation provided for in this act. Fencing off an old road from the public, removal of any visual evidence of its former use, or an impassable condition with respect to modern vehicles, all presuppose a usage of such road. Non-usage for a considerable period of time might permit interested parties to maintain an action for vacation of such a highway, but, until such formal action is taken, the road must be included in the tabulation of the mileage of the county highways.

In summarizing, all roads which have been incorporated into the county road system, which have not been abandoned either by non-usage within the past six (6) years or by formal vacation, including all alleys and streets outside of any incorporated town or city, should be included in the tabulation by the counties. All of that portion of the county or city line highways, for the maintenance of which the county is responsible, should be included in such tabulation. Further, the provisions of Section 4, Chapter 168, of the Acts of the Indiana General Assembly of 1941 leaves no discretion to the county but charges such county with the maintenance of the highways set forth therein.